Dominion Law Reports

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A NEW ANNOTATED SERIES OF REPORTS COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT AND THE RAILWAY COMMISSION, TOGETHER WITH CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

VOL. 12

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(Alphabetically arranged)

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AND STATUTES.

[1913] A.C.	Law Reports, Appeal Cases, of the year indicated in brackets.
Allen	Allen's New Brunswick Reports (same as 6-11 N.B.R.).
A.L.R.	Alberta Law Reports.
A.R. (Ont.)	Ontario Appeal Reports.
B.C.R.	British Columbia Reports.
Bert. R.	Berton's Reports (same as 2 N.B.R.).
B.N.A.	British North America Act.
C.A.D.	Canadian Annual Digest.
Can. Com. R.	Canada Commercial Reports.
Can. Cr. Cas.	Canadian Criminal Cases.
Can. Ry. Cas.	Canadian Railway Cases.
Can. S.C.R.	Canada Supreme Court Reports.
Cart.	Cartwright's Cases on the British North America Act, 1867.
Cassels' S.C. Dig.	Cassels' Supreme Court of Canada Digest.
C.C. (Que.)	Civil Code (Quebec).
C.C.L.C.	Civil Code (Lower Canada).
C.C.P.	Code of Civil Procedure (Quebec).
Ch. Cham.	Chancery Chamber Reports (Ontario).
Chip. R.	Chipman's Reports, New Brunswick (same as 1 N.B.R.).
Clarke & Sc.	Clarke & Scully, Drainage Cases.
C.L.Ch.	Common Law Chambers Reports (Ontario).
C.L.J.	Canada Law Journal.
C.L.P. Act	Common Law Procedure Act (Ontario).
C.L.T.	Canadian Law Times.
C.L.T. Occ. N.	Canadian Law Times, Occasional Notes (Ontario).
Cochran's R.	Cochran's Reports (vol. 3 same as 4 N.S.R.).
Con. Rule (Ont.)	Consolidated Rules of Practice (Ontario).
Coutlée's S.C. Dig.	Coutlée's Supreme Court Digest.
Cr. Code	Criminal Code (Canada).
C.S.B.C.	Consolidated Statutes of British Columbia.
C.S.L.C.	Consolidated Statutes of Lower Canada.
C.S.N.B.	Consolidated Statutes of New Brunswick (1876).
D.L.R.	Dominion Law Reports, commencing with the year 1912.
Dorion	Decisions of the Court of Appeal (Quebec).
Dra.	Draper's Reports (Ontario).

Edw. VII. (Ont.)...Statutes of Ontario in the year of the Reign of Edward VII. as prefixed.
E. & A.....Upper Canada Error and Appeal Reports (Ontario).
E.C. (Ont.).....Election Cases (Ontario).
Gel. & Russ. R.....Geldert & Russell's Nova Scotia Reports (same as 31-45 N.S.R.).
G.O.....General Orders of the Court of Chancery.
3 Geo. V. (Ont.)...Ontario Statutes passed in the third year of the Reign (1913).
Gr.....Grant's Chancery Reports (Ontario).
Han. (N.B.).....Hannay's New Brunswick Reports (same as 12-13 N.B.R.).
H.E.C.....Hodgins' Election Cases (Ontario).
James R.....James' Reports (same as 2 N.S.R.).
Kerr R.....Kerr's Reports (New Brunswick, same as 3-5 N.B.R.).
L.C.G.....Local Courts Gazette (Ont.).
L.C.L.J.....Lower Canada Law Journal.
L.C.J.....Lower Canada Jurist.
L.C.R. .....Lower Canada Reports.
Man. L.R.....Manitoba Law Reports.
M.C.R.....Montreal Condensed Reports (1854), 1 vol.
M.L.R., Q.B.....Montreal Law Reports (1885-1891), Queen's Bench, 7 vols.
M.L.R., S.C.....Montreal Law Reports (1885-1891), Superior Court, 7 vols.
N.B. Eq.....New Brunswick Equity Reports.
N.B.R.....New Brunswick Reports.
N.S.R.....Nova Scotia Reports.
N.W.T. Ord.....Ordinances of the North-West Territories (Canada).
N.W.T.R.....North-West Territories Reports.
O.J. Act.....Ontario Judicature Act.
Oldr. R.....Oldright's Nova Scotia Reports (same as 5-6 N.S.R.).
O.R.....Ontario Reports.
O.S.....Old series of Upper Canada, King's and Queen's Bench Reports (Ontario).
O.W.N.....Ontario Weekly Notes.
O.W.R.....Ontario Weekly Reporter.
Ord. Alta. 1911....Territories Ordinances in force in Alberta as reprinted 1911.
P.E.I.R.....Prince Edward Island Reports.
Perrault.....Perrault's Quebec Reports, 1726-1759, 1 vol.
P.R. (Ont.).....Practice Reports (Ontario).
Pugs.....Pugsley's Reports (same as 14-16 N.B.R.).
Pyke.....Pyke's Quebec Reports, 1810, 1 vol.
Q.L.R.....Quebec Law Reports (prior to Quebec Reports).

Que. K.B.	Quebec Reports, King's Bench (continuation of Quebec Queen's Bench Reports).
Que. Q.B.	Quebec Reports, Queen's Bench.
Que. S.C.	Quebec Reports, Superior Court.
Que. P.R.	Quebec Practice Reports.
Ramsey	Ramsey's Appeal Cases, (Quebec).
R.E.D.	Russell's Equity Decisions (Nova Scotia).
Rev. de Crit.	Revue de Critique (Quebec 1871-1875, 3 vols.).
Rev. Leg.	Revue Legale (Quebec).
Rev. de Jur.	Revue de Jurisprudence (Quebec).
R.J.Q., K.B.	Reports Judicial Quebec, King's Bench.
R.J.Q., Q.B.	Reports Judicial Quebec, Queen's Bench.
R.J.R.	Mathieu's Revised Judicial Reports (Quebec).
R.S.B.C.	Revised Statutes of British Columbia.
R.S.C. 1906	Revised Statutes of Canada, 1906.
R.S.M.	Revised Statutes of Manitoba, 1902.
R.S.O. 1897	Revised Statutes of Ontario (1897).
R.S.O. 1914	Revised Statutes of Ontario (1914).
R.S.Q.	Revised Statutes of Quebec, 1909.
Russ. & Ches.	Russell & Chesley's Reports (same as 10, 11, 12 N.S.R.).
Russ. E.R.	Russell's Election Reports (Nova Scotia).
Russ. & Geld.	Russell and Geldert's Nova Scotia Reports (same as 13-27 N.S.R.).
S.C. Cas.	Supreme Court Cases (Cameron's) 1905.
S.L.R.	Saskatchewan Law Reports.
Stew. Adm. R.	Stewart's Admiralty Reports (Nova Scotia).
Stock. Adm.	Stockton's Admiralty Reports.
Stuart's Adm.	Stuart's Vice-Admiralty Reports (Quebec 1836-1874, 2 vols.).
Stuart K.B.	Stuart's King's Bench Reports (Quebec 1810-1835, 1 vol.).
Tay.	Taylor's Upper Canada K.B. Reports 1823, 1827, 1 vol.
Terr. L.R.	Territories Law Reports.
Thom. R.	Thomson's Reports (same as 1 N.S.R.).
U.C.C.P.	Upper Canada Common Pleas Reports.
U.C.L.J.	Upper Canada Law Journal (prior to Canada Law Journal).
U.C.Q.B.	Upper Canada Queen's Bench Reports.
U.C.R.	Upper Canada Queen's Bench Reports.
Vict. (Ont.)	Statutes of Ontario passed in Queen Victoria's Reign in the year of the Reign prefixed.
W.L.R.	Western Law Reporter.
W.L.T.	Western Law Times.
Wood's R.	Wood's Manitoba Reports (1875-1883, 1 vol., prior to Manitoba Law Reports).
Young's Adm.	Young's Nova Scotia Admiralty Reports 1865-1880.

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

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

CASES REPORTED, VOL. XII., PART 1.

KLING v. LYNG.

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June 11.

Ontario Supreme court. Trial before Middleton, J. June 11, 1913.

1. Reformation of instrument (§ I—1)—Contract for sale of land—Mistake.

Where, in drafting a contract for the sale of land, the purchaser and his solicitor testified that the latter omitted a stipulation to the effect that the purchaser might encumber the lands to a certain amount in priority to a mortgage given for a portion of the purchase money, and the latter instrument contained a condition to that effect, the contract will be reformed so as to include such conditions, notwithstanding the vendor denied all knowledge of such understanding, as she had nothing to do with the transaction, which was managed entirely by her husband, who had since died.

Statement

Action for reformation of an agreement for the sale of land and for specific performance.

Judgment was given for the plaintiff reforming the agreement, on terms.

W. Proudfoot, K.C., for the plaintiff.

R. R. Waddell, for the defendant.

Middleton, J.

Middleton, J.:—Mary Lyng was the owner of lot 27 on Mansfield avenue, Toronto, subject to a certain mortgage for $750, erroneously assumed, at the time of the sale to be referred to, to be for $700. Her husband made an agreement, in his own name, with Gustav Kling and his brother, for the sale of the house for $2,675. This agreement was in writing, but is not produced.

Kling, realising that the agreement with the husband was not satisfactory, asked Mrs. Lyng to execute a formal contract, and took her to his solicitor, Mr. Melville Grant, for the purpose of having this drawn. Mr. Grant prepared the document produced, dated the 12th March, 1912, by which Mrs. Lyng agreed to sell this property for $2,675, payable $100 as a deposit, $700 by the assumption of the first mortgage, $1,000 by a second mortgage, the balance in cash on the closing.

Mr. Kling and his solicitor, Mr. Grant, now both depose that this was not the bargain, but that the true bargain was, that the second mortgage should be subject, not to the $700 mortgage existing against the property, but to a mortgage for $1,500 which Kling was to place upon the property in substitution for the $700 mortgage, which would fall due in a comparatively short time. Mr. Grant says that he knew and understood this, but did not put it in the written document because he was acting for

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both parties, and he intended to provide for this in the conveyancing. A more unsatisfactory statement it would be hard to conceive.

The transaction was in due course carried out, and Mrs. Lyng received her mortgage, which contained a clause at the end: "The mortgagor to have the privilege of raising a first mortgage for any amount up to $1,500 in priority to this mortgage; said mortgagee will consent thereto and execute any necessary documents to permit of such priority, and will consent to renewal or replacement of such mortgage whenever necessary, at the cost, however, of the said mortgagor."

This mortgage was executed by the mortgagor only, and Mrs. Lyng was not asked to sign it. The evidence that she knew of the insertion of any such clause is most unsatisfactory. It is said to have been read to the mortgagor, and it is said that she was present and could have heard if she had tried. No explanation was given to her at the time the transaction was closed; it being assumed that she knew.

Mrs. Lyng states that she left the transaction entirely in the hands of her husband. He is now dead. She has no recollection of the details of the transaction, and probably never understood it at all, but merely signed, at the request of her husband, documents which he may or may not have understood.

Kling placed a first mortgage upon the property, and then brought this action to have the agreement reformed and for specific performance. He has since sold the property, so that the transaction cannot be rescinded.

There being no contradiction of the solicitor's statement, there is nothing to lead me to believe that he is not stating the facts; and I do not see how I can disregard his evidence. Accepting it, I think that the contract must be reformed; although in adopting this course I fear that I may be doing the defendant injustice. Had the husband been alive, and had he contradicted the plaintiff and his solicitor, I would not have given effect to their evidence; and it may be a serious misfortune to the defendant that her husband, manifestly a most material witness on her behalf, is not now here to give his evidence. Yet, weighing this, and realising that the husband was alive when the defence of the action was undertaken, I cannot bring myself to disregard the evidence given.

The mistake in the preparation of the agreement is the fault of the plaintiff and his solicitor, and I think I am warranted, upon the cases, in giving relief only upon the term that, as a condition precedent, the plaintiff pay, not only the costs of the action, but all the instalments of principal and interest which have fallen due under the mortgage.

Judgment for plaintiff.

WEST v. MAYLAND.

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June 9.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 9, 1913.

1. TRESASS (§ I C—17)—DEFENCE—DISPUTING AUTHORITY OF LANDLORD'S AGENT TO EXECUTE PLAINTIFF'S LEASE.

One whose lease from a company was subject to cancellation by a subsequent sale or lease of the demised premises, cannot, in an action of trespass against him by a subsequent lessee in possession question the authority of the lessor's agent to execute the last lease.

2. TRESPASS (§ I C—17) — DEFENCES — QUESTIONING EXTENT OF LESSEE'S RIGHT UNDER LEASE.

The right of one in peaceable possession to crop land, although his lease is for grazing purposes only, cannot be questioned by a trespasser.

Statement

APPEAL by defendant from the judgment of County Court Judge Ryan in favour of plaintiff in an action for trespass to land.

The appeal was dismissed.

H. A. Bergman, for defendant.

G. Barrett, for plaintiff.

The judgment of the Court was delivered by

Haggart, J.A.

HAGGART, J.A.:—This is an action for trespass to land. The plaintiff claims title under a lease, pursuant to the Short Forms Act, from the Hudson's Bay Co., dated March 30, 1912. The *habendum* is

> To have and to hold . . . for grazing purposes only for and during the term of three years.

The defendant's title is what is known as a hay permit from the same company dated September 25, 1911, permitting the defendant "to cut and take hay" from the land during the season of 1912, for a consideration of $6, and across the permit is written in red ink these words:—

> This permit becomes cancelled by the sale or lease of the lands.

On May 26, the company by letter notified the defendant of the lease and of the cancellation of the permit, and enclosed a cheque for $6.15.

The plaintiff swears that in May, before the defendant did any work on the land, he saw the defendant, took the lease over to him and read it to him, and that the defendant's reply was that the plaintiff's lease was no good, that it was a forgery, and that he, the defendant, had the land leased from the company. The defendant, however, went on and sowed the land, the broken portion, about 10 acres. This evidence is corroborated, and I assume the trial Judge believed it.

It is objected by the defendant that the authority of Thompson, who executed the lease on behalf of the company, was not proved. This same Thompson, described as Land Commissioner for the Hudson's Bay Company, signed the defendant's permit. The

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plaintiff went into possession under this document, and no ont had a right to question it but the company. The defendane further objected that the document in question was not a lease at all, and that the plaintiff had only grazing rights. In any event the plaintiff was entitled to peaceable possession, and the use to which he might put the land was a question between himself and the company.

At first I thought the Judge assessed the damages a little high; but if the plaintiff's version is correct, and the defendant committed the trespass with full knowledge of the plaintiff's title, then the Judge may have taken that feature of the case into consideration.

I would dismiss the appeal with costs.

Appeal dismissed.

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June 18.

COLLIER v. UNION TRUST CO.
Re LESLIE, an Infant.

Ontario Supreme Court, Meredith, C.J.C.P. June 18, 1913.

1. INFANTS (§ II—35)—PURCHASE OF OUTSTANDING INTEREST FOR BENEFIT OF INFANT LAND OWNER.

It is a ground for the court to exercise its discretion in refusing to authorize the purchase of an outstanding interest in land for the benefit of an invalid infant owner, a girl of tender years, where, by reason of an existing lease, the effect would be materially to reduce her income until she became thirty-five years of age, notwithstanding that at that time her fortune would be greatly increased as a result of making the purchase.

Statement

MOTION for judgment in the action in terms of consent minutes; and petition for an order, under the Act respecting Infants, enabling the infant to take steps to carry into effect the settlement agreed upon.

A. K. Goodman, for the petitioner.
D. C. Ross, for the Union Trust Company.
J. MacGregor, for the plaintiff in the action.
F. W. Harcourt, K.C., Official Guardian, for the infant.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The Court is asked to give effect to a judgment agreed upon between the parties to this action, in settlement of the matters in question in it. The settlement affects very materially the interests of an infant in the lands which are chiefly the subject of it; and so, to confer greater power upon the Court, an application is also made by the Official Guardian in the infant's behalf, under the Act respecting Infants, for leave to her to take such steps as may be needful to carry into effect the settlement.

The infant is the owner of two undivided shares of the land in question; her father, a defendant in the action, was the owner of the other undivided share; but, under a deed of settlement, by which the infant benefits largely, he conveyed that share to a trust company, who are the defendants in the action. The plaintiff is a creditor of the father, seeking payment of his demand out of the trust property.

Two questions are involved: one of law, the other of fact. Is there any power in the Court, either in the action or upon the application, to authorise or give effect to that which is sought, notwithstanding the infancy? If so, is it advisable to do so?

If the latter question cannot be answered in the affirmative, it is needless to consider the other; therefore, it may save time to deal with the last question first.

Two points are made by those who support—and no one opposes—the application. It is said, in the first place, that, unless this settlement be carried out, a sale, sooner or later, of the one-third undivided share in the land is almost unavoidable, and that ownership of it by a stranger would be detrimental to the interests of the infant. The property is situated in what is at present one of the most favoured and valuable business sections of Toronto, and is subject to a lease, which may be continued for eighteen years to come. At present valuations, the lease is unfavourable to the owner. And it is said, in the second place, that, in view of increasing values of land in the locality and of the favourable character of the terms upon which the infant can acquire the third undivided share of the land, the right to acquire it ought to be exercised; that no one sui juris would think of rejecting it.

But there are other things to be considered.

The infant is an invalid girl, still suffering from the effect of that which is said to have been an attack of infantile paralysis, when she was about two years old. It is hoped that the effects of that illness will, before long, pass away, and that normal conditions will come to her. In dealing with the case, the hoped-for and wished-for better health and strength must have due weight.

But it is yet the case of an invalid girl, not of an active, strong, ambitious boy, who could far better risk much to gain more; because, even if it were all lost in the venture, he would still have that which might prove a greater asset—the health and strength of manhood, with which to win a fortune of his own.

To carry out the present scheme would reduce the infant's income materially until she attained the age of thirty-five years, should she live; the property being hampered with the lease before mentioned. But it is said that by that time it may nearly

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double its present selling value. That may be so; and it may not. If a piece of land having only forty-five feet frontage and having no especial value beyond the tens of thousands of feet of equally valuable land in the same and in other localities, should ever be worth any such sum, out of what is the rent to come? A merchant would need extraordinary profits upon his sales to make an initial expenditure of $50,000 a year for ground rent on forty-five feet frontage, with which to begin his expense account.

And for what purpose deprive the invalid of her income for so many years, only to have a greater capital when more than half of the span of life of those who live long is past?

Should the infant gain normal health and strength, marry and have children, different considerations would be applicable; considerations which can be taken into account when the time comes, if the property be then unsold.

Under existing circumstances, even a sale now of the whole property at the sum which it is said it would bring, would, as it seems to me, be preferable, in the interest of the infant; but I see no good reason why it should be now a sale or this scheme irrevocably gone. There are other means by which a sale may be avoided, at least until, as it is said, a year or so may tell whether the hopes of better health are to be realised.

If that which seems to be deemed the worst, to those who advocate this scheme, should come, the worst, which will bring with it over a quarter of a million dollars—as I understand the witnesses' calculations—can hardly be deemed an altogether unmixed evil. At present, if there were the power to do so, I would not carry into effect the proposed scheme.

So far I have dealt with the case leaving out of consideration the right intended to be conferred upon the infant, by the deed of settlement, to purchase her father's share when she attains the age of 21 years, on the same terms as, it is said, should now be accepted by her. If that right exists, and no one has yet questioned it, why should she buy now? Why not wait and make sure as to appreciation or depreciation in value of the land? If she have this right, what excuse could there be for exercising it now, instead of leaving it till she is able to decide for herself, it being in the meantime substantially to her a case of heads I win, tails you lose?

Whether there is power or not need not be considered. Generally speaking, power to enable an infant to deal with land, as of age, exists upon statutory enactment only. I am, of course, leaving out of consideration any power over land of an infant in an adjudication in proceedings in which they are involved. Apart from legislation, law and equity seems to have considered it safer to go the whole length of preventing persons from deal-

ing with their land during minority. There must be difficulty either way. It is hard that because one may be a day, a week, a month, a year, or more, under age, favourable opportunities should be lost; whilst to allow an infant to deal with lands as if of full age, even with the approval of a Court, would have its risks and disadvantages.

This, however, is evident: that by virtue of different enactments very considerable power to deal with infants' lands has been conferred, and that that power is being from time to time increased, not curtailed; the Legislature of this Province in this year adding another word upon the subject.

Therefore, neither of the applications now before me will be granted; no order will be made in either of them; but both, or either, may be renewed at any time, if there be anything new to be shewn upon the subject in any of its features.

Both applications denied.

DICARLLO v. McLEAN.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. June 16, 1913.

1. MASTER AND SERVANT (§ II A 3—143)—WORKMEN'S COMPENSATION ACT —WHAT APPLIANCES WITHIN—STEAM SHOVEL.

A steam shovel resting on wheels on a temporary track is an "engine or machine" within the meaning of sec. 3(5) of the Workmen's Compensation Act, R.S.O. 1897, ch. 160, so as to render its owner liable for injuries inflicted on a servant through its negligent operation by the engineer in charge.

[*Murphy* v. *Wilson*, 52 L.J.Q.B. 524, distinguished.]

Statement

APPEAL by the defendant from the judgment of MIDDLETON, J., upon the findings of a jury, in favour of Carmine Dicarllo, the plaintiff, for the recovery of $1,500 in an action against his employer for damages by reason of injuries sustained in the course of his employment as a labourer in railway construction work, by reason of the negligence of the defendant or some person in his employment.

The appeal was dismissed.

J. M. Ferguson, for the defendant.

B. H. Ardagh, for the plaintiff.

Clute, J.

The judgment of the Court was delivered by CLUTE, J.:—The defendant is a sub-contractor for the Canadian Pacific Railway. The plaintiff was in the defendant's employ, and at the time of the accident was operating the jack which supported a steam-shovel when hoisting the load. The steam-shovel rested on wheels on a side track, and changed its position from time to

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time on the rails, in order to carry on its work of excavation in connection with the railway.

It became necessary, when operating, to give support by means of the jack, in order to meet and counterbalance the extra weight thus imposed upon one side of the steam-shovel.

For this purpose, it was the plaintiff's duty to operate the jack; and, while he was in the act of so doing, it is alleged, the engineer, in charge of the engine operating the shovel, started the machinery and steam-shovel without giving warning to the plaintiff, whereby a part of the hoist swung round and knocked the plaintiff on the jack and threw him against the cogs of the steam-shovel, which caught his coat and drew his left arm therein, injuring and crushing the same, and rendering it necessary to have his left arm amputated. The following are the questions submitted to the jury, with their answers:—

"Q. 1. Did the accident to the plaintiff happen by reason of any defects in the works, ways, and plant of the defendant? A. Yes. If so, what? A. By not having the cogs sufficiently guarded.

"Q. 2. Did the accident happen by reason of any negligence on the part of the defendant? A. Yes. If so, what? A. Owing to the negligence of the engineer in not giving sufficient warning.

"Q. 3. Was the accident occasioned or contributed to by any negligence on the part of the plaintiff; if so, what? A. No.

"Damages, $1,500."

Upon these findings judgment was entered for the plaintiff for $1,500 and costs; against which the defendant appeals.

Upon the argument, the plaintiff's counsel conceded that there was no evidence to support the finding in respect of the cogs not being sufficiently guarded, but submitted that the plaintiff was entitled to retain the judgment upon the other findings.

There is sufficient evidence to support the finding as to the negligence of the engineer in not giving sufficient warning. The only question that remains is as to whether or not the case falls within sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, the argument being that the engineer was not a person who had "charge or control of a locomotive, engine, machine, or train upon a railway."

In *Murphy* v. *Wilson* (1883), 52 L.J.Q.B. 524, it was held that "a steam crane fixed on a trolley and propelled by steam along a set of rails, when it is desired to move it, is not a "locomotive engine" within the Employers' Liability Act (1880), sec. 1, sub-sec. 5."

Sub-section 5 varies from the corresponding section in the English Act, as the word "machine" is not found in the Eng-

lish Act; and in the latter Act there is no comma between the words "locomotive" and "engine," as in the Ontario Act. As to the effect of the punctuation, see *Barrow* v. *Wadkin*, 24 Beav. 327. The question of punctuation may not be material here, owing to the introduction of the word "machine" in the Ontario Act.

As pointed out in *McLaughlin* v. *Ontario Iron and Steel Co.*, 20 O.L.R. 335, the introduction of the word "machine" has very much widened the scope of the Act, and quite distinguishes *Murphy* v. *Wilson* from the present case. See also *Dunlop* v. *Canada Foundry Co.*, 4 O.W.N. 791, at p. 796, where it was held that a hoist was a machine or engine and the rails upon which it ran a tramway, within the meaning of the Act.

Sub-section 5 applies to a temporary railway laid down by a contractor for the purposes of construction work: *Doughty* v. *Firbank*, 10 Q.B.D. 358; and applies to railways operated under the Railway Act of the Dominion: *Canada Southern R. Co.* v. *Jackson*, 17 Can. S.C.R. 316.

I am of opinion that the plaintiff is entitled to retain his judgment upon the findings of the jury.

Appeal dismissed with costs.

REX v. ALLINGHAM; Ex parte KEEFE.

New Brunswick Supreme Court. Trial before Landry, McLeod, White, and Barry, JJ. February 21, 1913.

1. CERTIORARI (§ I A—1)—RIGHT TO—HOW TAKEN AWAY.

The right to review a conviction for a criminal offence on *certiorari* can be taken away only by an express statutory declaration to that effect.

[*Ex parte Hebert* (1898), 4 Can. Cr. Cas. 153, 34 N.B.R. 455, explained.]

2. CERTIORARI (§ I A—1)—RIGHT TO—TAKING AWAY BY STATUTORY IMPLICATION.

The jurisdiction to review on certiorari a summary conviction for an offence under the Liquor License Act, N.B. Con. Stat. 1903, ch. 22, is not in effect taken away by the declaration of sec. 104 (1) of the Act that a conviction thereunder shall be "final and conclusive."

3. CERTIORARI (§ II—24)—NATURE AND EXTENT OF REVIEW—CONVICTION UNDER LIQUOR LICENSE ACT—REVIEWING EVIDENCE.

On *certiorari* the court will not examine the evidence in a summary proceeding for a violation of the Liquor License Act, N.B. Con. Stat. 1903, ch. 22, pertaining to the very issue which the inferior court had to enquire into, notwithstanding an erroneous conclusion may have been reached, except in so far as to ascertain whether the depositions shew any evidence warranting a conviction.

[*Ex parte Coulson*, 1 Can. Cr. Cas. 31, 33 N.B.R. 341; *Re Melina Trepanier* (1885), 12 Can. S.C.R. 111; *The King* v. *McArthur* (1906), 14 Can. Cr. Cas. 343, referred to.]

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4. CERTIORARI (§ II—24)—REVIEW ON—EXTENT—INTOXICATING LIQUORS—UNLAWFUL SALES—CONVICTION.

On *certiorari* a summary conviction for violating the Liquor License Act, N.B. Con. Stat. 1903, ch. 22, will be sustained, notwithstanding the contradictory nature of the evidence, where there is testimony from which the magistrate might have found the accused guilty; since the former saw and heard the witnesses and, as a judge of the evidence, was in a position to accept such portion as he might think credible.

[*The King* v. *Conrod* (1902), 5 Can. Cr. Cas. 414, 35 N.S.R. 79, referred to.]

Statement

APPLICATION upon *certiorari* upon the return of an order *nisi* to quash a summary conviction of the applicant Keefe by W. H. Allingham, esquire, stipendiary magistrate, for an offence under the Liquor License Act, C.S.N.B. 1903, ch. 22.

The application was refused and the order *nisi* discharged.

A. A. Wilson, K.C., shewed cause.

W. H. Harrison, supported the order *nisi*.

The judgment of the Court was delivered by

Barry, J.

BARRY, J.:—The applicant was convicted on December 3 last before W. H. Allingham, esquire, stipendiary magistrate in and for the city and county of St. John, for having, between the 16th and 26th days of November last, at the parish of Lancaster, unlawfully kept liquor for sale, contrary to the provisions of the Liquor License Act (C.S.N.B. 1903, ch. 22).

The conviction is attacked upon a variety of grounds which are set out at great length in the order *nisi* granted by Landry, J., on December 20 last. The following is, I think, a fair summary of them:—

1. It was not proved that there had been found in the place where the liquor is alleged to have been kept for sale, any of the appliances usually found in taverns and shops where liquor is sold.

2. No proof of liquor having been sold or kept for sale.

3. The defendant was not the owner, occupier or lessee, or in possession of the premises in question.

4. No proof of the consumption of liquor.

5. Mrs. O'Regan was the owner and occupier of the barn where it is alleged the liquor was kept for sale, and the defendant should not have been convicted unless a sale was proved to have been made by him.

6. There was no society, association or club as contemplated by sec. 47 of the Act.

Now all these objections were matters of evidence and questions for the determination of the magistrate upon the trial. There was a proper information, the defendant appeared, and the magistrate had jurisdiction over both the offence and the offender. Mr. Wilson, who shewed cause, argued that in these circumstances, *certiorari* was taken away and cited *Ex parte Hebert* (1898), 4 Can. Cr. Cas. 153, 34 N.B.R. 455, in support

of his contention. In that case Tuck, C.J., who delivered the judgment of the Court, held that as by sec. 104 of the Liquor License Act, 1896 (now sec. 104, sub-sec. (1), of ch. 22, Con. Stat. 1903), a conviction against a person selling liquor without a license is made final and conclusive, *certiorari* is, in effect, taken away; but this dictum must, I think, be considered as *obiter*, because a perusal of the report of the case shews that the conviction was affirmed not because the Court regarded the judgment of the magistrate who decided it as final and conclusive, and that therefore the Court could not interfere with it, but because, upon a reading of the evidence given before the magistrate, the Court was satisfied that the charge against Hebert had been fully proved.

If I may be permitted to say so at this distance of time, and with every deference for the opinion of the able Judge who presided here at the time the case under discussion was decided, I am disposed to think that the words in the section of the Act referred to, *i.e.*, that a conviction of the justice or magistrate, except as afterwards in the section mentioned, shall be final and conclusive, do not take away the *certiorari*.

The right to issue this writ is inherent in the Court, and they will grant the writ to an inferior Court, though the statute giving the jurisdiction say that the sentence shall be final and without appeal, for that nothing but the express words of an Act of Parliament taking away their jurisdiction, can deprive the Court of its power to issue or the party to apply for the writ: Grady and Scotland's Crown Practice, 129; *Reg* v. *Bivvon* (1837), 7 A. & E. 417.

Certiorari can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be "finally determined" in the inferior Court: *Rex* v. *Jukes* (1800), 8 Term. Rep. 542; *Rex* v. *Plowright* (1686), 3 Mod. Rep. 94; nor by a proviso that "no other Court shall intermeddle" with regard to certain matters as to which jurisdiction is conferred on the inferior Court: *Rex* v. *Morcley* (1760), 2 Burr. 1040. That the Court has not followed the dictum laid down in the *Hebert* case is shewn by several cases that have since arisen and been determined, in which they have examined into the evidence returned with the *certiorari* to ascertain whether there was any evidence upon which the convictions could be justified: *Ex parte Giberson* (1898), 4 Can. Cr. Cas. 537, 34 N.B.R. 538; *Rex* v. *McQuarrie, Ex parte Rogers* (1903), 7 Can. Cr. Cas. 314, 36 N.B.R. 39; *Rex* v. *McQuarrie, Ex parte Rogers* (1906), 37 N.B.R. 374, *sub nom. Rex* v. *Rogers*, 11 Can. Cr. Cas. 257.

But even in cases where the superior Court has jurisdiction to review by *certiorari*, if the fact in question be not a collateral one, but a part of the very issue which the lower Court has to

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inquire into, *certiorari* will not be granted, although the lower Court may have come to an erroneous conclusion with regard to it. We should not re-hear the case as on an appeal, or nicely balance the evidence, but simply look into the depositions to see if there is any evidence whatever to warrant the conviction: *Ex parte Coulson*, 1 Can. Cr. Cas. 31, 33 N.B.R. 341 at 346; *Re Melina Trepanier* (1885), 12 Can. S.C.R. 111; *The King* v. *McArthur* (1906), 14 Can. Cr. Cas. 343.

I have read all the depositions returned with the *certiorari*. Sub-inspector Stevens swears that Keefe has been occupying the barn, the place where it is alleged the liquor was kept for sale, for a number of years, was the reputed owner of it, and always kept his horses there when he had any; and further, that the accused himself told the inspector that the barn was his; that he kept liquor there, and would always have it. The barn was watched by the sub-inspector on Sunday, November 17; the accused went into it about nine o'clock in the morning of that day, and between that hour and 12.15 p.m. of the same day, seventeen different men went into the barn. The place was searched by the sub-inspector and another officer, who found upon the premises five gallons of ale, some gin, thirty empty gin bottles, a score or more of empty whiskey bottles, a five-gallon keg containing a small quantity of porter, a few chairs, a table and on it several glasses which had been used for liquor. The officer says the place certainly looked to him like a bar-room.

James Dowling, a witness for the prosecution, swore that he was in the barn on Sunday, November 17, having gone there purposely to get a drink; he generally got liquor when he went there and could not name a time when he did not get it there; he helped to pay, but does not say whom he paid, for the liquor he obtained upon the premises.

I think there was evidence from which the magistrate may have concluded that the accused was the occupant of the premises and kept liquor there for sale. That this evidence was contradicted by witnesses for the defence, or that we as a Court of first instance might not, upon the same evidence, have come to the same conclusion, is not the question: *The King* v. *Conrod* (1902), 5 Can. Cr. Cas. 414, 35 N.S.R. 79. The magistrate, as the judge of the evidence, could accept what he thought credible, and reject what he thought disentitled to credit. The order *nisi*, in my opinion, should be discharged.

Order nisi discharged.

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REX v. CURRY.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, and Drysdale, JJ. March 15, 1913.

1. EVIDENCE (§ XII A—920)—WEIGHT, EFFECT AND SUFFICIENCY—CORROBORATION—CONNECTED ACTS, HOW ESTABLISHED—PERJURY.

There need not be two witnesses to prove every fact necessary to make out an assignment of perjury, the corroboration being required merely for the perjured fact as a whole and not to every detail or constituent part of it; and where the accused had in his testimony connected two persons at different points with the one act, *e.g.* a joint attempt to bribe him for his vote at an election, evidence on the perjury charge by one of the alleged bribers negativing the bribery charge as to himself and evidence by the other to the like effect as regards himself, may establish the perjury, the one statement sufficiently corroborating the other.

[*The King* v. *Houle*, 12 Can. Cr. Cas. 56; *Reg.* v. *Roberts*, 2 C. & K. 607, 614, applied.]

2. PERJURY (§ II E—80)—FORM AND MAKING OF OATH—UPLIFTED HAND—FORMULA—ASSENT—ESTOPPEL.

Where a man presents himself as a witness before a duly constituted judicial tribunal, holds up his hand by way of assenting to the terms of an oath administered to him in the usual solemn formula concluding with the actual test words "so help me God" as binding on his conscience, and then proceeds with deliberate knowledge and for the purpose of deceiving the court to make a series of false statements by which the tribunal is materially misled and a serious miscarriage of justice is caused; this man is estopped, on a subsequent assignment of perjury against him (under sec. 170 of the Criminal Code 1906), based upon such false statements, from denying that he assented to the oath so administered, and a conviction of perjury on the evidence so given will not be disturbed. (*Per* Russell and Drysdale, JJ.)

[The judgment below stood on an equal division of opinion upon the appeal; *Omychund* v. *Barker*, 1 Atk. 21, specially referred to; see as to testimony without legal sanction, *The King* v. *Deakin*, 19 Can. Cr. Cas. 62; *The King* v. *Lee Tuck*, 19 Can. Cr. Cas. 471, 5 D.L.R. 629; *The King* v. *Deakin* (No. 2), 2 D.L.R. 282, 19 Can. Cr. Cas. 274.]

Statement

CASE reserved by His Honour Judge Finlayson, Judge of the County Court for District No. 7, to determine the validity of a conviction for perjury.

The judgment below stood on an equal division of opinion upon the appeal.

The following was the case reserved:—

The accused was tried before me on the 23rd day of December, A.D. 1912, under the provisions of part 18 of the Criminal Code, "The speedy trial of Indictable Offences," on a charge of perjury, alleged to have been committed on the 4th day of September, 1912, in the Court of Inquiry held by H. P. Duchemin, Esq., at North Sydney, N.S., a Commissioner under ch. 104, R.S.C. 1906, the Inquiry Act. Mr. Duchemin was investigating a charge against John J. McDonald, an officer of the customs of Canada, at North Sydney. The accused was a witness at this investigation and testified in substance as follows:—

That the said John J. McDonald met him at the Belmont Hotel the day before the election in 1911, and asked him to support D. D. McKenzie's

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party. He asked if there was anything doing. McDonald told him to go and see Joseph McPherson at the customs house. He went and saw McPherson, who gave him four bottles of liquor, and two dollars, to take him home to vote. He then went back to the Belmont and saw McDonald, who told him if he did not vote for D. D. McKenzie, not to go to the poll at all.

John J. McDonald swears that he did not see the prisoner on the day mentioned or any other time; that to the best of his knowledge the first time he saw him was on the 4th of September, 1912, at the Court of Inquiry, and consequently denies ever having any conversation with the accused at any time.

Joseph McPherson swears that he did not see the accused the day before the election of 1911, nor did he ever see him in the customs house. That he did not give him two dollars, nor did he give him four bottles of liquor, nor any liquor. Denies the whole story in full.

The accused did not testify before me. It was contended for the defence, that there was no corroboration of the evidence of John J. McDonald, the prosecutor, contradicting the statements of facts, testified to by the accused, at the Court of Inquiry.

I held that the whole evidence given by the accused at the inquiry must be considered that the fact proved by his evidence was that John J. McDonald, and Joseph McPherson, canvassed and paid him for voting a certain day or abstaining from voting.

I found him guilty of perjury, and sentenced him. I have been asked to reserve the following questions:—

"Was I right in holding that there was sufficient corroborative evidence to warrant a conviction?"

The defendant was sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way.

It was objected that the accused was never sworn, and that he could not be convicted of perjury on evidence so given.

"Was I right in holding that he could be convicted on the evidence so given?"

The whole evidence being short, I herewith attach the said evidence.

J. W. Maddin, for the prisoner.
S. Jenks, K.C., Deputy Attorney-General, for the Crown.

Townshend, C.J.

TOWNSHEND, C.J.:—The defendant was convicted of perjury by the learned County Court Judge for District No. 7. Two questions have been reserved for our consideration.

First: "Was I right in holding that there was sufficient corroborative evidence to warrant a conviction?"

It appears from the case, and also the evidence which was returned to the Court, that the defendant in the course of an investigation before H. P. Duchemin, a commissioner appointed for that purpose under ch. 104, R.S.C., swore that one John J. McDonald, an officer of the customs, met him at the Belmont Hotel, North Sydney, the day before the election, 1911, and asked him to support D. D. McKenzie's party. He asked if there was anything doing. McDonald told him to go and see

Joseph McPherson at the customs house. He went and saw McPherson, who gave him four bottles of liquor, and two dollars to take him home to vote. He then went back to the Belmont and saw McDonald, who told him if he did not vote for D. D. McKenzie not to go to the poll at all. John McDonald denies the whole story, swearing that he did not see him on the day mentioned, nor had conversation with him at any time, and that he had never seen him before. Joseph McPherson also denies the whole story, so far as he is concerned, that he did not see him at the customs house, did not give him two dollars, nor four bottles of liquor, nor any liquor.

The contention of the accused is, that there is no corroborative evidence as to any one of the essential facts necessary to justify his conviction. The learned County Court Judge held, I think rightly, that the whole evidence given by the accused at the inquiry must be looked at, and that, considering the whole, there was sufficient corroboration. It will be noted that the accused himself is responsible for the whole statement made before the commissioner, in which he connected McDonald and McPherson with one act, the attempt to bribe him for his vote at the election. The Crown, by two witnesses, proved that no part of his testimony before the commissioner was true. It is true the Crown witnesses could not testify to each part of the alleged false testimony, but the effect of their evidence was to shew that a transaction which, as sworn to, was necessarily connected with each, was not true as to either of them.

In Wigmore on Evidence, sec. 2042 (3), he says: "Moreover the corroboration is required for the perjured fact as a whole, and not to every detail or constituent part of it," and he cites as authority *Regina* v. *Roberts*, 2 C. & K. 607 at 614, where Patten, J., says:—

> There need not be two witnesses to prove every fact necessary to make out an assignment of perjury. If the false swearing be that two persons were together at a certain time, and the assignment of perjury that they were not together at that time, evidence of one witness that at the time named the one was in London, and by another witness, that the other was in York, would be sufficient proof.

Other cases cited at the argument are to the same effect. The cases on corroboration in cases of forgery cited in *The King* v. *Houle*, 12 Can. Crim. Cas. 56, sustain the same view.

The second reserved question is as follows: "The defendant was sworn by holding up his right hand, without being asked whether he had any objection to being sworn in the regular way. Was I right in holding that he could be convicted on the evidence so given?"

It further appears that [illegible] Bible was used in administering the oath.

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I do not understand that any objection was made by the accused to the form and manner in which the oath was administered to him by the commissioner on any ground.

"It is laid down," says Hardwicke, L.C., in *Omichund* v. *Barker*, 1 Atk. 21 at 45, "by all writers that the outward act is not essential to the oath. It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the persons taking." And Lord Mansfield says in *Atcheson* v. *Everett*, Cowp. 382 at 389, "that upon the principles of the common law there is no particular form essential to an oath to be taken by a witness."

See also *Regina* v. *Pah-Mah-Gay*, 20 U.C.Q.B. 195.

The oath then, to be valid, must be taken in that form which is binding on his conscience. This brings us to the question whether an oath administered to a witness, without touching or kissing the Holy Bible, is binding on a Christian, and whether he can be indicted for perjury when he has given false evidence. There can be no question that at common law a good and valid oath could only be taken by the witness touching or kissing the Book.

Coke (3 Inst. 165) says: "It is called a corporal oath, because the person lays his hand upon some part of the Scriptures when he takes it." In *Omichund* v. *Barker*, Willes Rep. 538, Willes, C.J., speaking of oaths says: "But I take it, that although the regular oath as it is allowed by the laws of England is '*tactis sacrosanctis Dei evangeliis*,' which supposeth a man to be a Christian, yet in cases of necessity, etc., etc., oaths of Jews and other nations not being Christian, may be received when administered in that form binding on their consciences." All the authorities agree in this, and so far as I am aware it has never been changed in this province. To change the common law form and mode of administering an oath, a statute would be necessary. While we have a statute allowing persons to affirm, who have conscientious objections to taking an oath, no change has been made in respect to those who have no such scruples.

In England, the using of the Book, or Scriptures, has been dispensed with in cases where the witness objects to swearing in that way; *vide* 172 Vict. ch. 105, also 51 and 52 Vict. ch. 46. So in many of the States of the Union, the use of the Book in taking an oath has been dispensed with by statutes. Consequently we find the American writers and Courts declaring that such practice is unnecessary. The very fact that a statute was deemed necessary to validate such an oath seems pretty clear evidence that it was theretofore considered essential at common law that a Christian should be sworn on the Scriptures. So far as we can follow the practise and procedure in the British

Courts from the reports of trials witnesses were always so sworn, being Christians.

I have had the opportunity of reading the opinion of my brother Graham, dealing very fully with all the cases and statutes on the subject, and I fully concur in the views he has expressed.

Graham, E.J.

GRAHAM, E.J.:—The defendant was charged with perjury and was under the speedy trials provisions of the Criminal Code, sec. 170, convicted by the Judge of the County Court for District No. 7 and there is a reserved case. By sec. 170, perjury is "an assertion . . . made by a witness in a judicial proceeding as part of his evidence upon oath or affirmation . . . such assertion being known to such witness to be false . . . and being intended by him to mislead the Court," etc. There is no definition in the Code for "oath" and we resort to the common law to get its meaning.

The perjury is alleged to have been committed by the defendant in giving evidence before a commissioner appointed under ch. 104, R.S.C. 1906, the Inquiries Act. Provision is made, sec. 4, to enable him to "require witnesses to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters." And one of the questions reserved here is a very narrow one, namely, whether the witness was properly sworn, there having been no copy of the Scriptures used and the witness without any objection on his part to its use or any question from the commissioner eliciting from him that the uplifting of his hand was as binding on him as the usual form would be, was, altogether at the instance of the commissioner, sworn with uplifted hand and not as far as the case shews even according to the Scotch form in other respects, as by repeating the oath after the administrator in lieu of kissing the book and using a different form of invocation of the Deity.

The case states: The defendant was sworn by holding up his right hand without being asked whether he had any objection to be sworn in the regular way. This is the evidence given about it by the commissioner himself on the perjury trial, or rather the portion of it in the case:—

Q. Was the evidence given under oath? A. I think under oath, although some little question with regard to that has been raised. There was no copy of the Bible used. In a few cases where copy of the Scripture was not readily available, I called the witness to hold up his right hand and went through the formula with the man. It was done in this case.

Q. Tell what was done? A. I called the witness to raise his right hand and I put this formula to him: "The evidence you will give in this inquiry will be the truth, the whole truth, and nothing but the truth, so help you God?"

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Q. And did he raise his right hand? A. He raised his right hand.

THE COURT:—Q. I suppose, Mr. Duchemin, you determined yourself the manner in which you would swear him? A. Yes, I did not ask any questions.

Q. You determined yourself the manner in which he would be sworn? A. Yes, as a matter of fact at that time.

Cross-examined by *Mr. Maddin*:—Q. You did not ask him whether he would prefer to be sworn on the Bible, whether it was a matter of conscience? A. No, I put no questions to him. No opinion given to him. No choice. No questions put to him.

It is quite clear, I think, from the leading case of *Omichund* v. *Barker*, Willes, 538 (1744), also reported 1 Atk. 21 and 2 Eq. Cas. abr. 397, that by the common law of England a witness was sworn upon the Gospels. Willes, L.C.J., p. 544, quoting from 2 Hale, P.C. 279: "But I take it that although the regular oath as it is allowed by the laws of England is *tactis sacrosanctis Dei evangeliis*, which supposes a man to be a Christian yet in cases of necessity as in foreign contracts between merchant and merchant which are many times transacted by Jewish brokers, the testimony of a Jew *tacto libro legis Mosaicae* is not to be rejected and is used (as I have been informed) among all nations."

That was the rule—but for Hebrews, Mohammedans, non-Christians and witnesses from Scotland, who although Christians, had conscientious objections to the English ceremonies on the administration of an oath, for example, Covenanters, exceptions from time to time had to be made—and they were made.

In *Robley* v. *Langston*, 2 Keble 314, 19 & 20 Car. II.

Nota. Wild, Sergeant, on evidence to a jury in Guildhall yesterday, where, because the witnesses produced were Jews, Keeling, C.J., swore them upon the Old Testament only, desired the opinion of the Court if this were any oath by the statute 5 Eliz. ch. 9 (provision for perjury), that might be assigned for perjury and per Curiam it is so and within the general words of *Sacrosancta Evangelia*, so of the Common Prayer Book that hath the Epistles and Gospels; *contra* by Windham of a Psalm Book only.

There were earlier cases not reported according to the precedents of indictments. In *Colt* v. *Dutton*, 2 Sid. 6 (1657), Dr. Owen, Vice-Chancellor of Oxford, refused to be sworn in the usual manner by laying his right hand upon the Book and kissing it afterwards but he caused the Book to be held open before him and he lifted up his right hand. Blyn, C.J., on inquiry from them told the jury that "in his judgment he had taken as strong an oath as any other witness, but said if he was to be sworn himself he would lay his right hand upon the Book." Apparently he was a Presbyterian, at least not of the Church of England: 18 Encyclopædia Brittanica 85.

There was, in 1738, a case of a Moor being sworn on the

Koran, *Fachina* v. *Sabine*, 2 Strange 1104, at the council. But the leading case to which I shall refer again was *Omychund* v. *Barker*, 1 Atk. 21, already mentioned, a case of depositions of Hindoo witnesses taken at Calcutta which settled the rule for later cases.

After *Omychund* v. *Barker*, *supra*, there was a case of *King* v. *Morgan*, 1 Leach C.C. 54 (1764), of a Mohammedan being sworn on the Koran and the opinion of the twelve Judges was taken. There are cases of Scotch witnesses being allowed to swear without touching or kissing the Book, but with uplifted hand, but only after objection on the part of the witness and inquiry by the Judge. *Walker's Case*, Leach C.C. 498 (1788); *Mildrone's Case*, Leach C.C. 412 (1786); *Mee* v. *Reid*, Peake (3rd ed.) 33 (1820). And this manner had been permitted in 1745 and the opinion of the twelve Judges taken, who determined that the witness so sworn had been legally sworn: *Mildrone's Case*, Leach C.C. 412.

For the exceptional cases this rule was established by *Omychund* v. *Barker*, *supra*, not that you may use any form whatever but you must do the next best thing, namely, administer the oath in such form and with such ceremony as the person may disclose to be binding on his conscience. As Lord Mansfield says in *Atchison* v. *Everett*, 1 Cowper 382, referring to *Omychund* v. *Barker*, *supra*, which he, as Solicitor-General, had argued

> as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his conscience most. Therefore though the Christian oath was settled in very early times, yet Jews before 18 Edward I., when they were expelled the kingdoms, were permitted to give evidence at common law and were sworn, not on the Evangelists, but on the Old Testament.

And in *Miller* v. *Solomans*, 7 Ex. 475 at 535, Alderson, B., says:—

> Where an oath is to be taken in order to establish affirmatively or negatively any proposition by a witness, I agree that *Omichund* v. *Barker*, reported in Willes, 538, has settled that it ought to be taken in that form and upon that sanction which most effectually binds the conscience of the party swearing. Thus a Jew is to be sworn on the Book of the Law and with his head covered; a Brahmin by the mode prescribed by his peculiar faith; a Chinese by his special ceremonies, and the like.

And Pollock, C.B., p. 557:—

> With respect to the case of *Omichund* v. *Barker*, it appears to me to have decided merely this, that the common law of England agrees with the law of nations that the form of an oath is to be accommodated to the religious persuasions which the swearer entertains.

In the Exchequer Chambers, *Solomans* v. *Miller*, 8 Exch. 778, Lord Campbell said:—

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We have no doubt about the law as laid down in *Omichund* v. *Barker*, that where an oath is to be taken, the only question being how it is to be taken, it shall be taken in the form most binding on the conscience of the taker, and if this were merely a question as to the form in which the oath was to be taken, that case would lead us to the conclusion that it might be taken by a Jew according to the form most binding on his conscience.

In the case itself, Willes, C.J., says:—

It would be absurd for him, a Hindoo, to swear according to the Christian oath which he does not believe and therefore out of necessity he must be allowed to swear according to his own notions of an oath.

And Lord Hardwicke, L.C., says:—

It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking.

Lord Campbell in his Lives of the Lord Chancellors, vol. 2, p. 118, says:—

Lord Hardwicke established the rule that persons, though not Christians, if they believe in a Divinity, may be sworn according to the ceremony of their religion and that the evidence given by them so sworn is admissible in Courts of justice as if, being Christians, they had been sworn upon the Evangelists.

In *Regina* v. *Pah-Mah-Gay*, 20 U.C.R. 195, a case of a non-Christian Indian witness, who believed in a Supreme Being and a state of rewards or punishments, being sworn in the ordinary way upon the Gospels, Robinson, C.J., after referring to *Omychund* v. *Barker, supra*, said, p. 198:—

If the witness had belonged to a nation or tribe that had in use among them any particular ceremony, which was understood to bind them to speak the truth, however strange and fantastic the ceremony might seem to us, it would have been indispensable that the witness should have been sworn, if we may use the term, according to such ceremony, because all should be done that can be done to touch the conscience of the witness according to his notions, however superstitious they may seem.

I have cited all these authorities to shew what was really decided in *Omychund* v. *Barker, supra*, because it seems to be contended now, and a deduction has been made by an American Court in an Illinois case I shall cite presently—I think erroneously—that the common law permitted of the usual ceremony of administering the oath being dispensed with, that the only thing necessary, was the use of the form for the invocation of the Deity. Lord Hardwicke, it was claimed, in his judgment in *Omychund* v. *Barker, supra*, is authority for that view. This is the passage I think relied upon, at p. 49 of Atkyn's Reports. Lord Hardwicke said:—

It is laid down by all writers that the outward act is not essential to the oath. Saunderson is of that opinion, and so is Tillotson in the same sermon, p. 144: "As for the ceremonies in use among us in the taking of

oaths, it is no just exception against them, that they are not found in Scripture, for there was always matter of liberty and several nations have used several rites and ceremonies in their oath." All that is necessary appears in the present case, an external act was done to make it a corporal oath.

In the same way Willes, L.C.J., had argued that there was no moral efficacy about kissing the Gospels, but he said this, Willes, p. 553:—

> For touching the hand or the foot of the priest after the words, "so help me God," it being their usual form, is as much signifying their assent as kissing the Book is here, where the party swearing likewise says nothing.

In that case, it must be remembered that the witnesses had taken the oath in the English form of words "so help me God," etc., but not with the English ceremony of touching, or kissing, the Gospels. So that the Deity had been invoked. In respect to the external form of administration alone was there a substitution, and that was what the Judges on this branch of the case were discussing. Reverting to the quotation from Willes, L.C.J., that it would be absurd for the Hindoo witness "to swear according to the Christian oath which he does not believe," I ask the question why absurd if, as is now contended, any book, or no book, will suffice? Excepting the very rare atheist who believes in no God, all witnesses are willing to, and do, invoke the Deity for their oath, the difficulty always is about the external act, the external act appropriate to the witnesses' religion or race, what will be substituted for the Gospels under English law.

In English law, according to the cases, there have been mentioned very different books for use: the Gospels for Christians, the Old Testament for the Hebrews, the Koran for the Mohammedan, Grantham for a Sikh and the Zend Avesta, a book the Parsee uses. Then there must be a saucer or a lighted taper or the killing of a chicken for different kinds of Chinese witnesses; and a Judge in India actually had a cow brought into Court for a witness to touch in order to bind his conscience. Courts will get rid of all this trouble obtaining appropriate books and other articles, if invoking the Deity without any external act or if any kind of an external act used indifferently, as raising the hand, will do. I think you must have that external act, that ceremony, which the proposed witness states will be binding upon his conscience. Follow that, and he is bound.

In *The Queen's Case*, 2 B. & B. 284, the Judges advising the House of Lords indicated the proper time

> for asking a witness whether the form in which the oath is about to be administered to him is one that will be binding on his conscience.

That shews that the practice existed before the statute 1 & 2 Vict. ch. 105 was passed.

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I might content myself with relying upon the quotation already made as to what *Omychund* v. *Barker*, *supra*, really did decide, particularly those from Lord Mansfield and Pollock, C.B., but it is necessary to understand how this passage from Lord Hardwicke came about. Lord Coke had held, or written in effect, that in England, none but a Christian ought to be admitted as a witness, the use of the Gospels shewed that, moreover, Lord Coke had held, further, that the oath could not be altered, nor a new one imposed but by Act of Parliament.

Of course that view of Lord Coke's had to be overruled for several reasons, and it was very properly overruled. The necessities of trade with the Hebrews and non-Christians abroad, which involved lawsuits, was a very practical argument in favour of overruling it. Then how much could be changed to suit their circumstances? This led to the consideration of oaths in general and the Scriptures and other writings on that subject were very exhaustively considered. They said that "Oaths were instituted before Christianity," also "Other nations have other rites and ceremonies."

One thing was of the essence: the person proposed as a witness must believe in God, and that there will be Divine punishment in this world, or the next, if he swears falsely, otherwise there is no obligation in it, no moral efficacy, and that has to be considered always as one aspect in connection with oaths. That does not admit of alteration or change; there must be, whatever words are used, the invocation of the Deity. Lord Hardwicke cited from two theologians, Bishop Saunderson and Archbishop Tillotson, and he quotes from a sermon of the latter a passage in the extract already given, also another passage: "The form of the oath is voluntarily taken up and instituted by men." These theologians were not, I am inclined to think, consulted by Lord Hardwicke to find out what the common law of England was, but to ascertain the moral efficacy and requirements of oaths in general. But the outward act of administration, the manner, that is human, and for oaths in general it has varied, varied in the Scriptures, varied with other nations, even with the Hebrews and some other exceptional cases in England. As to that, the Judges decided not to abolish all outward form, all manner of administration, there must be an external act, but they would substitute for the exceptional cases according to the religion or race of the witness, the form which he declared was binding on his conscience, as the use of the Gospels would be inappropriate. But the common law of England according to which the Gospels had been used in administering oaths for hundreds of years before that (Encyclopædia Brittanica, title "Oath") and are to this day used in the case of ordinary Christians, since 1909 by statute, was never impeached by Lord

Hardwicke, or any of the other Judges, indeed they conceded that much. If an authority was cited shewing that the use of the Gospels was necessary in administering an oath, the Judges answered, in effect, "certainly," but that is in the case of Christians. For instance, Lord Chief Justice Fortescue had been cited "De laudibus leg. Angliae." ch. 26, p. 58, *Omnes et singulos testes qui super sancta Dei evangelia onerate testificabantur.* See I Atk. 23. Willes, L.C.J. (Willes, p. 543) answers back,

> As to what is said by that great man, the Lord Chief Justice Fortescue, in his book "De Laudibus," p. 26, that witnesses are to be sworn on the Holy Evangelists, he is speaking only of the oath of a Christian.

Then Parker, L.C.B., 1 Atk. 40, says:—

> The books cited by the defendant's counsel to shew jurors or witnesses must be sworn on the Gospels, were Bracton, Britton, Fleta, etc. These authors prove no more than that the oaths are adapted to the natives of the kingdom.

And Willes, L.C.J., 1 Atk. 53, after something rather narrower that Lord Coke had said, says:—

> It is very plain, too, these ancient authors speak only of Christian oaths.

Then cases had been cited to them, three cases in which witnesses had been rejected by the presiding Judge. Willes, L.C.J., 548, as to these said:—

> Very little can be inferred from either of these instances, since it does not appear that the fact to which the witness was going to be sworn arose in a foreign country, or that it was a mercantile cause or that it was ever insisted on by counsel that the witness should be examined in any other manner than in the common form upon the Holy Evangelists.

I emphasize the last alternative. And Lord Hardwicke, 2 Eq. Cas. abridgment 412, refers to one of these cases, namely, *East India Co.* v. *Admiral Matthews,* before Eyre, L.C.B., in which, in fact, he had been counsel, says:—

> The evidence then was rejected because the heathen was offered to be sworn on the Bible and therefore there being no proper way of swearing him, he was rejected.

It was a Parsee, and they had not the right book. Now this was the point which Lord Hardwicke was making in *Omychund* v. *Barker,* 2 Eq. Cas. ab. 408.

> As to the first, whether the oath these persons have taken, respect being had to their religion, be a proper obligatory oath according to the *general notion of an oath.*

(I emphasize those words.) Then follow the theological quotations. He never professed to disturb the manner of administering an oath for an ordinary Christian witness or the

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common law to that effect, he was much too wise to change anything further than was absolutely necessary. While some of the other Judges affected not to follow the civil law in dealing with what I have called exceptional cases, he did so. He says, 2 Eq. Cas. ab. 412, after quoting from a Spanish book shewing provision in the law of Spain for the Moors in that country:—

> This falls in directly with what is mentioned by Puffandorf (4th Book, 4th section, p. 122 and 1 Atk. p. 33), Stair (Lord Stair's Institutes of the Law of Scotland, p. 692, quotation Willes, p. 553) "and other writers, that it has been the wisdom of all countries to accommodate the oath to the particular religion of the parties, *referring to the conscience* (I emphasize those words) of the person who is to take the oath.

In Taylor on Evidence, sec. 1388, it is said:—

> This doctrine of the civil law was, in the great case of *Omychund* v. *Barker*, *supra*, settled to be also the common law rule.

But take the last sentence of the passage quoted from Lord Hardwicke's judgment:—

> All that is necessary appears in the present case an external act was done to make it a corporal oath.

"Necessary," I repeat that word. There must be an external act therefore in addition to the invocation of the Deity. What was the external act? Why in that case touching the priest's foot, etc.? It is not any external act, any gesture, the reasoning is not to that effect. It was an external act, which in the mode of taking an oath by Hindoo witnesses, corresponds to the external act of the ordinary Christian in taking an oath, namely, touching the Gospels. Raising the hand, and repeating the oath after the official, but in another form, is the form for a Covenanter or a member of the Kirk of Scotland if he objects to the use of the Scriptures, but not for this witness.

Judge Parry in his interesting article in the Contemporary Review of April, 1909, did not question that that part of the ceremony was required by the common law in the English Courts; he conceded it, as his citations shew, but he laboured to shew that kissing the book was not necessary. In reply, a writer in the Solicitor's Journal, vol. 54, p. 78, says:—

> In the Egerton manuscripts (vol. 656) preserved in the British museum, there is still to be read an ancient manual of the procedure observed, "*devaunt Justices en Baunk ou en eyre et in Comitee et en Court de Baroun.*" This treatise may be assigned with some confidence to the beginning of the fourteenth century. Among the matters with which its author deals are the various ways in which a man may fail to make his law—*ore on est a saver qe meyntemans put hum fayler se fere sa ley*—and one of the ways in which a man may fail is, if he do not kiss the book after having taken the oath—"*si apres ceo quil eyt fet le sement le livere ne beyse ov les moz* (fo. 191)."

That this is not an original and unwarranted statement of the writer, but is what one may call a commonplace of the time, is proved by the fact that we find the identical expression either in French form or literally translated into the English of the day in several of the ancient Castumals. He quotes from Borough Customs:—

It is from the Castumal of Romney (14th century) Item it is used that in many manere may a man defayle in his law . . . if after that ye have done your lawe, ye kys not the Book.

I also refer to *Anon.*, 2 Salk. 682, for the form.

To meet the Illinois case, I take Greenleaf 364*b*, 371 (one can depend on Greenleaf). The author's own text:—

Witnesses how sworn. It may be added in this place that all witnesses are to be sworn according to the peculiar ceremonies of their own religion, or in such manner as they may deem binding on their own consciences. If the witness is not of the Christian religion, the Court will inquire as to the form in which an oath is administered in his own country, or among those of his own faith, and will impose it in that form. And if being a Christian, he has conscientious scruples against taking an oath in the usual form, he will be allowed to make a solemn religious asseveration involving a like appeal to God for the truth of his testimony in any mode in which he shall declare to be binding on his conscience.

And he cites *Omychund* v. *Barker*, 1 Atk. 21, with other authorities. Now I think that this is the common law. But the following declaratory act concludes, I think, the matter as to what the common law was. 1 & 2 Vict. ch. 105, U.K., entitled an "Act to remove doubts as to certain oaths." Be it declared and enacted, etc.

In all cases in which an oath may lawfully be and shall have been administered to any person either as a juryman or a witness or a deponent in any proceeding, civil or criminal, in any Court or on any occasion whatever, such person is bound by the oath administered in such form and with such ceremony as such person may declare to be binding, and every person in case of wilful false swearing may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.

In Craies on Statute Law 66, it is said:—

For modern purposes a declaratory Act may be defined as an Act passed to remove doubts existing as to the common law.

Lord Coke, however, says:—

By reason of this word (declared) which it appeareth what the law was before the making of this Act like cases in semblable mischief shall be taken within the remedy of such an Act: Coke Littleton, 290.

The British Parliament can generally be depended upon for correctness in reciting the condition of the common law, and although we have not this Act it is a guide to us as to what the

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common law was. One can only conjecture why it was passed, at least I have not access to the debates of the period, but I suggest that the case of *Omychund* v. *Barker, supra,* was not clear as to whether those persons swearing with the exceptional forms and ceremonies could be prosecuted for perjury. Now this statute recognizes in connection with the oath ceremonies as well as forms. Parliament used for a standard the forms and ceremonies most commonly adopted (of course at that time) in administering an oath as one of the constituents of the oath and essential thereto in order that the oath should form the subject for a conviction of perjury. The forms and ceremonies most commonly adopted were those in use for the ordinary Christian. And in effect it provides that an oath in those forms and with those ceremonies which the exceptional witness declares to be binding on him shall be deemed in all cases civil and criminal and specifically in a prosecution for perjury as binding an oath as that taken by the ordinary Christian, the oath commonly adopted, an oath with forms and ceremonies. How can it be said that an external act was not necessary after that?

Later Parliament passed another Act, not the common law, but to ameliorate it. Section 5 of the Oaths Act, 1888, 51 & 52 Vict. ch. 46:—

> If any person to whom an oath is administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do and the oath shall be administered to him in such form and manner without further question.

Why the words "without further question"? Simply to relieve the tribunal of making a minute inquiry as to the religion of the Scotch witness? In passing I notice that in Taylor on Evidence, 994, it is said in connection with this last statutory provision:—

> It should be noted (a fact which country administrators of the law occasionally forget) that a witness must desire this form of oath before its use becomes lawful, and that he cannot have the form thrust upon him.

These provisions have not been incorporated into the Canada Evidence Act, R.S.C. ch. 145, or into the Nova Scotia Evidence Act in civil cases. We must enquire what the common law was. Section 14 of the former Act makes a very usual statutory provision for affirmation on the witness objecting on grounds of conscientious scruples to take an oath at all, but that is not this case. Neither have we the English Act, 1909, ch. 39, still requiring the New Testament for Christians and the Old Testament for Hebrews and for others the oath shall be administered in any manner which is now lawful. That Act was passed to enable witnesses to be sworn, who, through dread of disease, do not wish to kiss the book; but touching the book, mediæval though it be, was continued.

Now there is no ground for contending that the swearing of the now defendant as a witness without the use of any book whatever and only with the uplifted hand, and without a repetition of the oath comes within any of the exceptions I have mentioned or the rule established for such exceptions. The witness made no objection to the production of a book or any claim to have it dispensed with, nor was there any inquiry of him made by the commissioner, no declaration that would qualify him to be sworn without a book. He was not qualified for that form of taking the oath. He was just the ordinary Christian, presumably so, and entitled to be sworn in the ordinary way for Christians.

There were cases mentioned in *Omychund* v. *Barker* (1744), Willes 538, of Hebrews having been indicted for, and I suppose some were convicted of, perjury, who were sworn on the Hebrew Scriptures and there may be cases of the other exceptional witnesses being indicted for and convicted of perjury before the passage of these English statutes, but such a conviction could only be supported, I think, on the ground of estoppel. The witness objecting to the ordinary mode of touching the Gospels, or counsel objecting to that form for that witness, he would be asked, as under the decisions it is prescribed should be done, as to what mode of taking an oath is binding on his conscience. What is his oath? And he declares that it is binding if made on the Hebrew Scriptures, or the Koran, or touching the Brahmin's foot and the Brahmin touching his hand, or with uplifted hand as the case may be, then if he swears falsely he may be estopped from saying that the oath was not a binding oath. I think that would probably be held, but there is no estoppel, no election when a witness silently takes an oath in an unusual and irregular way, altogether at the instance of the administrator and when he has not had the opportunity of being sworn in the usual and proper way. There is no duty cast on him to speak, he may not know that the unusual way is irregular, the tribunal must see to that, it is the tribunal's act, he is not misleading the tribunal. That comment applies to the two cases in Illinois relied upon by the Crown, namely, *Gill* v. *Caldwell*, 1 Ill. 53, and *McKinney* v. *The People*, 7 Ill. 540. The statute in that case was as follows:—

Whenever any person shall be required to take an oath on any lawful occasion and such person shall declare that he has conscientious scruples about the present mode of administering the oath by laying his hand on and kissing the Gospels, it shall be lawful for any person empowered to administer the oath to administer it in the following form, to wit: The person swearing shall with his hand uplifted, swear by the ever living God, and shall not be compelled to lay the hand on, or kiss the Gospels. And, oaths so administered, shall be equally effectual, and shall subject such person to the like pains and penalties for wilful and corrupt perjury as oaths administered in the usual form.

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They were not perjury cases, but arose, one out of an action of slander imputing perjury, the other upon the objections to the validity of the testimony. It was in effect held, although there was no inquiry by the Judge, that it would be presumed where the oath was administered in that form, namely the uplifted hand, etc., that the person taking it elected that it should be so administered and it was not necessary that an opportunity to be sworn in the usual manner should have been offered to him.

But there are cases from the British Courts bearing on this matter. If estoppel would prevail in such a case where there is no declaration, but mere silence, there would be an estoppel when a witness gives his testimony by affirming instead of taking an oath without the qualifications or formalities necessary for that substitution, and we know that such testimony would not be evidence at all, and I think that perjury could not be maintained if it was false. The words in both statutes are in effect the same. For that I cite *The Queen* v. *Moore*, 8 Times L.R. 287, 61 L.J.M.C. 80. It is a decision in the Court of Crown cases reserved of four English Judges and I think it is at variance with the Illinois cases. It was a case of two Indian witnesses giving evidence on a trial in England for larceny, one was a Sikh, neither was a Mohammedan; the officer tendered a Bible, which was declined, then a Koran, which was also declined; in each case he then permitted them to affirm. It appeared in cross-examination that the witnesses had no objection to be sworn, that they had a religious belief and had no religious objection to an oath. No objection was taken until after the verdict was given. It was held by the Judge at the trial, that as the witnesses had been offered the Bible and the Koran for the purpose of being sworn they had elected to take the benefit of the first section of the Oaths Act, 1888, and that it was unnecessary to put any specific questions to them as to whether they had an objection to be sworn or that they had no religious belief or that the taking of an oath was contrary to their belief. He reserved a case and the four Judges held that the Judge was wrong in receiving the evidence, as

> Before he allowed the witness to make an affirmation it was his duty to ascertain the grounds of objection which the witnesses had to taking an oath and the grounds upon which they elected and were prepared to take a solemn affirmation instead of an oath.

The conviction was therefore quashed. This case was followed in *Rex* v. *Deakin*, 19 Can. Cr. Cas. 62 (B.C.). The witness on being offered the Bible to take the oath in the usual form said "I affirm" and he did affirm. On cross-examination he was asked for his objection to taking an oath on the Bible, he answered, "I believe it is optional with the Court" and "I

consider that that is a private matter of my own discretion." He was not asked whether he had conscientious scruples against the taking of an oath on the Scriptures.

Macdonald, C.J., said during the argument, "It was the duty of the trial Judge to ascertain." and in giving judgment he said, "A proper foundation was not laid to permit the witness Ellison to affirm," and he thought there was no real distinction between the Criminal Evidence Act of Canada (sec. 14) and the English Oaths Act. There was a new trial ordered.

I think it was just as necessary for the Judge in the Illinois cases under the Illinois statute to elicit from the witness his qualifications to take an oath in the mode permitted in the statute in order that the witnesses might be properly qualified to testify, as it was to ascertain the qualifications in these two cases to permit the witness to affirm. I also think that if it was necessary for the Judge to see to the qualifications under these statutory provisions, it was also necessary under the common law decisions that the tribunal should see to the qualification and take a declaration thereto before dispensing with the use of the Gospels. A person in Court is not in a position to question everything that affects him. If submitting in silence is going to estop him, there will be estoppel whatever form of oath is tendered and taken or if there is no oath at all. I also cite the case of *Nash* v. *Ali Khan*, 8 T.L.R. 444, where it appears Denman, J., followed *Rex* v. *Moore*, 8 T.L.R. 287. In *The King* v. *Lee Tuck*, 19 Can. Cr. Cas. 471 (Alberta), it was held that a Chinaman cannot be convicted of perjury when presented as a witness in the case in which false testimony was alleged to have been given, in response to a question from the clerk of the Court the accused stated that he was a Christian and that he desired to be sworn on the Bible, but under the direction of the trial Judge, without further inquiry or any assent on the part of the Chinaman, the clerk administered the Chinese oath by burning paper, as under such circumstances no binding oath was administered. This appears from the evidence on the perjury trial of the officer of the Court below:—

Q. Were they asked by anyone what form of oath was most binding on their conscience? A. No.

Q. Did you get any opportunity to do that? A. No, I said, "Are you a Christian, and do you swear by the Bible?" and they say "Yes." (It appears that each witness was directed to write his name on a piece of paper and burn it.) The exact words I used were, "You swear, that as this paper burns, so may your soul burn in hell if you do not tell the truth at the hearing of these appeals or this appeal, at each appeal."

Beck, J., cited in part from *Atcheson* v. *Everitt*, 1 Cowp. 382, and *Miller* v. *Salomans*, 7 Ex. 535, the passages which I have cited, and he said, p. 473:—

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The Judge of the District Court before whom the proceedings occurred, at which it is alleged perjury was committed, was, therefore, not only competent, but it was his duty, the question having been raised, to inquire and determine what was the form of oath most binding upon the conscience of the prisoner, then witness in the proceedings before him.

And Stuart, J., p. 476:—

It is clear also from the evidence before us, that the accused, being in strange surroundings in what is to them a foreign country, simply did as they were told by the Judge, who was in control. In my opinion they should not, in such circumstances, be taken to have assented to the administration to them of the oath in the Chinese form. But there is no suggestion in the material before us, that the District Court Judge made any inquiry at all. The result is that I think the Chief Justice should have told the jury that the accused were not upon oath when they gave the testimony complained of and so directed the jury to acquit.

An additional ground here for holding that there would be no estoppel by silence is that it is optional under this Act (we have not the commission of this commissioner in evidence) whether the evidence is to be on oath or not, and surely a witness is not obliged to find out a fact like that before he gives his evidence and put the tribunal right.

No English case decides that swearing on the Gospel may be dispensed with in the case of an ordinary Christian who makes no objection to that ceremony, or that there may be a conviction for perjury in such a case when the Gospels have not been used. The inferences and dicta are the other way. Take a case I have already cited of *Robley* v. *Langton*, 2 Keble 314. Why did Windham, a member of the Court, deal with the use of a Psalm book, why say no book at all is required? And why, in the cases of the Hebrews, did they not put the cases on the short ground that no book at all was required instead of the one which was used, viz., that the Old Testament was the Hebrews' Evangelists? And why take the trouble to hold that the Book of Common Prayer would suffice because it contained the Gospels and the Roman Catholic prayer book would not suffice because it did not contain the Gospels, for there is a case on this?

In *Doherty* v. *Doherty*, 8 Irish Equity Reports 379, when depositions had been taken in Chancery, some of the witnesses it was claimed had not given their testimony under the sanction of a legal oath, they having been sworn upon a Roman Catholic Prayer Book which did not contain the Holy Evangelists. The Master of the Rolls, after argument, set aside the depositions as being a nullity.

In *Rabey* v. *Birch*, 72 J.P. 106, before the Act of 1909 was passed, a doctor, called as a witness in a County Court in England, declined to be sworn on the copy of the New Testament

in Court, or to take the oath in the Scotch form, but produced a copy of a New Testament of his own. The County Court Judge refused to allow this, and his evidence was not taken. On the appeal before Phillimore and Walton, JJ., from the nonsuit, Phillimore, J., said:—

In this case it may be that the County Court Judge would have been wiser to look at the book produced to see that it was a testament. I am, however, of opinion that the County Court Judge could have compelled the witness to be sworn by exercising his powers as to contempt of Court. For the purpose of this appeal we shall bear in mind what it is alleged in the plaintiff's affidavit the doctor was prepared to state in his evidence.

I refer also to the case of *Rex* v. *McCarther*, 1 Peake, 3rd ed., 211, 33 Geo. III. This was an indictment for perjury, etc. The indictment stated that the defendant was sworn upon the Holy Gospels of God. It was proved that the defendant was first sworn on the Testament in the usual form but the Solicitor-General, understanding that the defendant was a member of the Kirk of Scotland, desired he might be sworn by holding up his hand, and the oath was so administered. Garrow, the counsel, objected that this was a fatal variance. The indictment should have stated that he was sworn by holding up his hand, for though he was first sworn in the usual way, it was not under the sanction of that oath he gave his evidence and therefore he could not be indicted for perjury on that oath. Lord Kenyon observed that the indictment would have been sufficiently certain if it had only stated the defendant to have been in due manner sworn.

If the defendant had only been sworn according to the form of Scotland, this would have been a good objection, but as in the present case the defendant had suffered himself to be sworn in the usual way (that is, on the Gospels), without objection on his part, he would not suffer him, by acting the hypocrite, to escape punishment.

The defendant was convicted. Here we have Lord Kenyon to the effect that the prisoner would have had a good objection if there had been no oath administered except the one in which the swearing was with uplifted hand, which shews that he considered it a variance in a material matter, and it would not have been a material matter if the use of the Gospels was not necessary.

It has been held in *Sells* v. *Hoare*, 3 B & B. 232, a Hebrew witness, having been sworn in the way a Christian is usually sworn (he gave a false name to escape detection as a Hebrew) that its efficacy cannot be called in question afterwards; the presumption was that he was a Christian. The reason is, that that form (the other qualifications existing) is the usual form and is always sufficient if the witness takes it and the counsel and Judge are satisfied with it and it is always sufficient if he

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comes to be tried for perjury in giving the evidence. But the fallacy in this case consists in assuming that because in exceptional cases already mentioned, the common law from necessity established that the use of the Gospels might be dispensed with and another form substituted for each exception, and for which a rule was established covering all cases, therefore it may be dispensed with altogether.

It is suggested now, I suppose to displace the application of cases cited, that there may be a distinction, that although the testimony of a witness may be invalid and a verdict of conviction set aside for want of a proper oath (of course the common law as *Omychund* v. *Barker*, Willes Rep. 538, shews, requires testimony in Court to be on oath), and yet the witness may be punishable for perjury notwithstanding, that is saying an oath in one case and not in the other. One would like, at least, a concrete instance of such a situation before discussing it. Generally, when the invalidity of testimony has been discussed for irregularity in the administration of the oath, reference has been made by the Judges to the test whether an indictment for perjury could be sustained if it was false. If the witness has spoken under that sanction and exposed himself to the imposition of the penalties for perjury, the testimony is valid against everyone, and is so, even in a case where the oath, though irregular, the witness is nevertheless estopped from saying otherwise.

But the Illinois cases were not perjury cases. Surely they can be answered by cases in British Courts which were not perjury cases. If there are exceptional cases in which there may be an oath for perjury without an oath sufficient to make testimony valid the inquiry still remains, is this case within that category?

I am dealing with a case where an unusual form of administration was adopted by the tribunal. Suppose, as has happened in England, that a witness has gone into the box without being sworn. It is very likely to happen there or here unless the officer is attentive, where a number of witnesses are called in reply, some of whom have been already sworn and are not of course sworn again, and some are called for the first time, and he is examined and makes false statements in the box. I say with some confidence that he cannot be convicted of perjury. He is indicted, and the Judge calls attention to the fact that no oath has been proved and the counsel for the Crown answers, "Oh, he is estopped from saying he was not sworn." "Why?" asks the Judge. "Because he went into the box and told something false." I need not pursue the reasoning. I think that the law is, no oath, no perjury (I am not dealing with a case of affirmation); it does not constitute something else an oath or estop a witness ever after from saying it was

not an oath because the testimony given in the case was false. The connection is remote. If the statement was as to what form of oath was binding on his conscience and thus misleading the Court, that would likely constitute an estoppel. In the other case, while a reprehensible thing to do, and perhaps some kind of a crime, he is misleading the Court by a statement not an oath, but it is not perjury. The following is a much stronger case and not nearly so remote.

In *Rex* v. *Clegg*, 19 L.T.N.S. 47, a defendant charged with keeping a gambling house and incompetent to be sworn as a witness, represented himself as a son of the defendant and had therefore been sworn and given evidence. That evidence was the subject of an indictment for perjury. At the trial Hannen, J., said:—

> The prisoner comes forward, and by a trick induces the magistrate to believe that he is not the John Clegg summoned. Much as I may regret that the prisoner should escape the consequence of this trick, still I think it was not competent for him to give evidence and that the indictment cannot be sustained.

There is now a statutory provision which prevents that happening again, but it shews that misleading the Court and playing a trick even in Court would not constitute the crime of perjury by itself. Courts must take care to administer an oath if they wish the present world's penalties to follow on false statements in the witness box, not to say afterward to the defendant, "You should have put the tribunal right." Complaints about the technicalities of the common law are not new and not serviceable. How many affidavits have been rejected because perjury could not be sustained if they turned out to be false?

Also, take the law of Scotland from which the Scotch oath comes. This is said, 1 Alison Crim. Law 474:—

> Certain formalities are required in the administration of oaths, and it is indispensable that such as are fixed by law or custom should have been observed in the oath which is the subject of an indictment for perjury. Thus, if the oath is not reduced to writing in situations where by law or custom it should have been done, or if the oath of a witness or party has not been read over to him before signing, or if after being read over it has not been signed either by the deponent or the presiding commissioner or Judge, or if the Judge has refused to take down any explanation which the deponent requested to have added after having it read over, or if the oath has been emitted verbally, the panel has modified or explained away his story, in all these situations the law considers the perjury as not having been committed. In some of them there is not the finished and deliberate intention to assist a falsehood on oath which the law decrees indispensable to the offence.

I think that the case of *Omychund* v. *Barker*, Willes 538

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(1744), establishing what the common law was, and brought over with the founders of this province, should be followed.

In my opinion the oath was not properly administered, not having been upon the Gospels nor within the rule for exceptional cases and the witness, now the defendant, is not precluded by the doctrine of estoppel from saying that it was not properly administered.

I think that for this reason the conviction should be quashed and the second question answered in the negative.

Russell, J.

RUSSELL, J.:—It is with great diffidence that I venture to differ from the closely reasoned opinion delivered by my brother Graham, who has exhausted the learning available on the subject of our inquiry, and by whose argumentative treatment of the question I have been almost persuaded to concur in the conclusion at which he has arrived. I must frankly confess the intellectual difficulty that I have in resisting his argument, but the conclusion is one that is so repugnant to my notions of essential justice that I have felt bound to escape it if there is any course of reasoning by which I can justify my dissent.

The question for decision is whether, without subjecting himself to any risk of punishment for his act, a man can present himself as a witness before a duly constituted judicial tribunal, hold up his hand by way of assenting to the terms of an oath administered to him in the usual solemn formula, concluding with the words "So help me God," and then proceed to make a series of false statements by which the tribunal is materially misled, and a serious miscarriage of justice is caused.

The law that governs the question has been embodied in a code, one section of which, 170, enacts that

> perjury is an assertion as to a matter of fact, opinion, etc., made by a witness in a judicial proceeding as part of his evidence upon oath or affirmation, such assertion being known to such witness to be false and being intended by him to mislead the Court or jury, or person holding the proceeding.

The only thing that can be said for the defendant as to this part of his defence is that he did not give evidence upon oath because he was not sworn "upon the Holy Evangelists," no book having been furnished to him by any officer of the Court which he could touch with his hand or his lips or which he could at least gaze upon while the solemn words of the oath were being pronounced. The statement of such a proposition has to the modern ear such a far-away, mediæval sound that I am reluctant to assent to it except under the compulsion of irresistible authority.

But for sec. 16 of the Criminal Code (1906) I should have no hesitation in applying to the definition of the crime of per-

jury as contained in the Code the obvious and natural meaning of the words therein used.

The inquiry would not be whether the oath had been administered in the usual manner, or even in a regular and lawful manner, but whether an oath had in fact been taken and false evidence had been given under its sanction.

It may be, however, that sec. 16 of the code obliges us to apply "the principles of the common law," and not the dictionary meaning or the common sense meaning of the words to the language used in the definition, because that section enacts in substance that all rules and principles of the common law which render any circumstances a defence to any charge shall be applicable to a charge under the code except in so far as they are inconsistent with its provisions.

I seriously doubt whether this provision was intended to affect in any way the construction of the terms used in the definition of the crime. I think it was rather intended to give a defendant the benefit of some common law excuse or defence when all the conditions constituting the crime as defined in the statute were present. And if that is the correct view of the provision the only question would be, what did the legislature intend when it used the words in which it has defined the crime of perjury?

Addressing one's self to that question, and observing, by the way, how many of the old technical rules applicable to the constitution of the crime had been swept away, one would have little difficulty in coming to the conclusion that the *gravamen* of the crime was to be found in the fact that the Court had been misled by the false statement knowingly made by a person under oath, and in the present case he would say that whether regularly sworn or not the defendant was under an oath of some kind when he misled the Court by his evidence.

It may be, however, that in construing a statute relating to the criminal law we should be obliged to reject this view and to read the provision of sec. 16 in such a way as to give the defendant the benefit of the common law definition of perjury.

And it may be a principle of the common law that a witness can in a Court of justice falsely swear away the property, or even the life of his fellow-man, and escape punishment for doing so by proof that he was a Christian, just an ordinary Christian, and not a Scotch Covenanter, and that an opportunity had not been afforded of binding his Christian conscience by kissing a copy of the Holy Evangelists. The contention for the defendant goes even further, for he need not prove that he is a Christian. He must be shewn not to have been a Christian, or, if a Christian, to have been one whose conscience, although it would permit him to falsely swear away the living of

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his neighbour, would be offended by the idolatry of the usual ceremony, before he can be convicted of perjury for having misled the Court by his evidence.

Far be it from me to undervalue the importance of any ceremony which can add to the solemnity and impressiveness of the oath administered to the witness. I of course agree that it is the duty of the Judge to adhere to the time-honoured formulas and ritual and not allow them to be departed from except under the conditions well recognized and understood even before they were embodied in modern English and American legislation. But I think there is room for a clear and sound distinction which is so obvious to my mind that I find it difficult to understand how it happens that I am unable to discover any authority to support it, even if it has never yet been applied.

If the question were to arise between the Crown and a prisoner convicted on the evidence of a witness sworn in the manner in which the defendant in this case was sworn, there might be good reason for quashing the conviction, or if a verdict were found on the evidence of a witness thus irregularly sworn there might be good reason for ordering a new trial. It could be reasonably argued that the prisoner found guilty or the unsuccessful party in the civil suit had a right to the protection which would be afforded to him by having the witness sworn in the manner most binding upon his conscience and that this protection was not secured to him if the accustomed and regular form was departed from without the proper preliminary question being asked or answered. But it surely ought to be a different question altogether when the witness whose statements have misled the Court is himself on trial for having borne false witness against his neighbour. It seems to me the extreme of drollery that the witness who has consented to be sworn in a particular manner without objection and whose false statements have inflicted injury upon his fellow-man should be allowed to come before a Court of justice and claim immunity from punishment because he was not sworn in such a way as to bind his conscience, for that is exactly what his contention really amounts to. It is no adequate answer to all this to say that no harm has been done by the action of the witness in the case supposed, because the conviction will be quashed or the verdict set aside. The mischief has been done, the Court has been misled, the prisoner has suffered an unjust imprisonment even though it may have been afterwards adjudged illegal, and in the case before us I assume that the commissioner has reported in accordance with the testimony which the decision of the County Court has pronounced to be perjury.

Suppose, for example, that a case should occur in this coun-

try such as *The Queen* v. *Moore*, 8 T.L.R. 287, in which the witness was allowed to affirm without proof of the conditions precedent to that concession being granted, the conviction would of course and with propriety be quashed, but would that be any good reason why the witness who had thus affirmed should go unpunished if his evidence was false and had misled the Court? Surely the fact that he ought not to have been allowed to affirm, should not afford any defence whatever to the charge of having misled the Court by his false testimony after he has solemnly affirmed. Such a decision would seem to me opposed to the spirit in which Lord Kenyon administered the law in one of the early cases cited in support of his conclusion by my learned brother Graham. In *Rex* v. *McArthur*, Peake, 3rd ed., 211, the objection taken on the trial of the prisoner for perjury was a variance between the charge and the proof, the indictment being that the prisoner had been sworn upon the Holy Gospel while the proof was that although he had been so sworn he had afterwards been sworn with the uplifted hand and that it was under this latter oath that he had given his testimony. Lord Kenyon said that

> if the witness had only been sworn by the uplifted hand, the objection of variance would have been good, but in the present case, as the witness had suffered himself to be sworn in the usual way without objection on his part, he would not suffer him by acting the hypocrite to escape punishment.

I do not read this as a decision one way or other on the question whether the common law requires a witness to be sworn on the Evangelists. The question was merely whether there was a variance between the evidence and the proof. But the spirit of this ruling certainly is that a witness should not be suffered to escape the punishment of perjury where he has allowed himself without objection to be sworn in a particular way and being so sworn has misled the tribunal by false testimony.

In *Mildrone's Case*, Leach Cr. Cas. 412, the witness did not make any objections to being sworn in the usual way, or allege any conscientious scruple, but merely said that he was a North Briton and that the usual way of swearing in his country was not to kiss the book. It was in this case that Mr. Justice Gould referred to the trial of the rebels at Carlisle in 1745, in which, on reference to the twelve Judges, it was decided that the witnesses could properly be sworn according to the ceremony of their sect without kissing or touching any book. I do not see how this decision or advice of the twelve Judges could have been given if the presence of a book was necessary to the validity of the oath at common law. There was no statute to warrant the departure from the usual and regular form which was undoubtedly that of kissing the copy of the New Testament.

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Of course it cannot be denied that authority may be found in the decisions of single Judges and in the *dicta* of others that the kissing of the book, or at least some manner of appeal to the authority of the book by kissing it or touching it or as in the case of Dr. Owens, of looking upon its open page while pronouncing the words of the oath, is essential to the validity of the administration. But the whole subject was so fully considered in the great case of *Omychund* v. *Barker*, and the true *rationale* of the matter so clearly presented in the judgment of Willes, J., that I do not feel bound by the opinions expressed or even by decisions of single Judges which may be opposed to the spirit in which this great case was decided and to the reasoning on which the great Judge who delivered the principal opinion rested his decision. It was not necessary in that case to decide whether the touching of the book was or was not an essential part of the valid administration of the oath to a Christian. The question was whether the depositions of witnesses professing the Gentro religion and who had been sworn according to the ceremonies of their religion could be read in evidence. In the opinion of Willes, L.C.J., there is a definition of the Latin word for "oath" by Lord Coke which would be sufficient if it stood alone to warrant the conclusion that the defendant in this case was in fact under oath when he gave his testimony before the commissioner. Chief Justice Willes points out that oaths were instituted long before Christianity and he quotes Lord Coke to the effect that *juramentum nihil aliquid est quam Deum in testem vocare*. Selden also is quoted to the same effect:—

> Whatever the forms are (it) is meant only to call God to witness to the truth of what is sworn.

The Lord Chief Justice proceeds as follows:—

> It is very plain from what I have said that the substance of an oath has nothing to do with Christianity; only that by the Christian religion we are put still under greater obligations not to be guilty of perjury; the forms indeed of an oath have been since varied and have always been different in all countries under the different laws, religion and constitution of those countries. But still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say. . . . There are several very different forms of oath mentioned in Selden, vol. 2, p. 470, but whatever the forms are, he says that it is meant only to call God to witness to the truth of what is sworn; *sit Deus testis, sit Deus vindex*, or *ita te Deus adjuvet*, are expressions variously made use of in Christian countries; and in ours that oath hath frequently been varied, as *ita te Deus adjuvet tactis sacrosanctis Dei evangeliis, ita, etc., sacrosanta Dei Evangelia, ita, etc., et omnes sancti*. And now we keep only these words in the oath, "so help you God," and which indeed are the only material words and which any heathen who believes in God may take as well as a Christian. The kissing the book here and the touching the Brahmin's hand and foot in Calcutta, and many other different forms which are made use

of in different countries, are no part of the oath, but are only ceremonies invented to add the greater solemnity to the taking of it and to express the assent of the party to the oath when he does not repeat the oath itself; but the swearing in all of them, be the external form what it will, is calling God Almighty to be a witness.

If the essential part of the oath is the calling of God to witness the truth of the affirmation about to be made I can see no reason why the assent of the witness to the formula and his objection to it may not be as well expressed by holding up his hand as by kissing or otherwise touching a copy of the Bible. I am unable to understand this language of Willes, L.C.J., in any other sense than that of making a clear distinction between what is essential to the validity of an oath and the variable ceremonies which are no necessary part of the oath and which have differed in different countries and in the same country at different times. If the essential feature of the oath is the calling of God to witness the truth of the statement or, as the formula would rather seem to indicate, the imprecation of Divine wrath and judgment upon the witness in the event of his statement being false, then I see no reason why the presence of the book is necessary to the validity of the oath now any more than the touching of the relics which seems to have been a usual ceremony in the time of Canute.

The declaratory Act passed after the decision in *Omychund* v. *Barker* does not seem to me to throw any clear light on the question. It was of course to make it certain that a person sworn in the manner determined in that case to make the deposition admissible would be punishable for perjury and it would be natural and perhaps necessary to use words which would leave no doubt whatever as to the liability to punishment for perjury upon an oath so taken. I do not see that the declaratory Act passed under such circumstances can settle the doubtful question whether he would not be equally punishable if he had been sworn in the manner in which the witness was sworn in this case.

The decisions of American Courts are not authority in our Courts, but it is worthy of remark that the conclusion I have arrived at is in accordance with those of the Supreme Court of Illinois as indicated in the cases cited at the argument of *Gill* v. *Caldwell*, 1 Ill. 53, and *McKinney* v. *The People*, 7 Ill. 540 (2 Gillman). In the latter case the prisoner who had been convicted on the evidence of a witness who had been sworn by the uplifted hand without kissing the book and without its having been shewn that the witness had any conscientious objections to the kissing of the book was not allowed to avail himself of this defence because he did not make any objection to the witness being so sworn. If a person condemned in consequence of a failure to object to the irregularity is estopped, I should think

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that, *a fortiori*, the witness by whose evidence he has been convicted should be estopped from saying that he was not under oath because he was sworn in a manner to which he made no objection.

I would conclude this branch of the argument as I began it with the sincere expression of the diffidence with which I differ from the conclusion which Mr. Justice Graham has fortified with such a wealth of learning and such close and cogent reasoning. But that conclusion savours so strongly to my mind of mediæval superstition and formalism that it is with a sense of relief that I find myself able to resist it.

As to the other point in the case reserved, I think there was corroboration. The statement of the prisoner under oath was that he met McDonald at one place who canvassed him for his vote and sent him to McPherson to get his pay, that he accordingly went to McPherson, who gave him liquor and money, and that he then returned to McDonald, who told him if he would not vote for McKenzie to stay home.

I think the learned trial Judge was right in connecting the statements together as the narrative of a continuous transaction. The prisoner himself made the connection. It seems to me that when both of the persons so involved in the transaction deny ever having seen or spoken to the prisoner each of them corroborates the other. The fact that the prisoner was a strong Conservative and, if he is to be believed, had always theretofore voted but did not vote at this election, would of course tend to support his statement of the reasons why he did not vote. But all that was for the trial Judge, who has accepted the evidence of the witnesses McDonald and McPherson, as he could not very well help doing when the prisoner did not contradict either of them at the perjury trial.

Drysdale, J.

DRYSDALE, J.:—The only question here is whether a proper and binding oath was taken by the witness. The oath administered was in the ordinary form whereby the defendant called God to witness that he was about to speak the truth. It is said that because the Holy Book was not given the witness or was not produced before him no legal oath was taken. It comes rather as a shock to me that a witness can present himself in Court to testify and after calling God to witness with uplifted hand that he is about to speak the truth and nothing else, that he should, after testifying, be permitted to say that he had not taken a binding oath, and was not responsible in law for his utterances on the witness stand.

Although there are cases that follow such a doctrine, I prefer to follow that learned Judge Willes, Lord Chief Justice, in *Omychund* v. *Barker*, 1 Atk. 21, wherein it is expressly stated and laid down as English law, that although the forms of oaths

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are, and have always been, different in all countries, according to the different laws, religion and constitution of those countries, still the substance is the same, which is, that God in all of them is called upon as a witness to the truth of what we say, that we keep only the words "so help you God" and which are the only material words. In that learned judgment it is expressly stated that the kissing of the Book, or the touching of the Brahmin's hand and foot and other different forms are no part of the oath, but only ceremonies invented to add solemnity to the taking, but the swearing in all of them, be the external form what it will, is calling God Almighty to be a witness. If this is taken as the true test of an oath in the case before us, we have it fulfilled, the ceremony attendant upon the administration being the uplifted hand, and for myself, I must decline to assent to the doctrine, that a witness who comes forward at an enquiry where oaths are not only permitted, but required, can go through a solemn ceremony using the essential elements of a good oath, and then, after he has been charged with perjury, be permitted to say he was never sworn.

Although there are cases that lead to this conclusion, I am not aware of any that are binding upon us, and I am not aware that the leading case on the subject, viz., *Omychund* v. *Barker*, *supra*, is not good law to-day. In my opinion, it is not only good sense, but good law, and I prefer to follow it. On the other point I agree that there was corroboration. I would affirm the conviction.

The Court being equally divided, the conviction stood.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Sutherland, Middleton, and Leitch, JJ. February 4, 1913.

1. BRIDGES (§ I—8)—DUTY TO ERECT—ASSUMPTION OF STREET BY TOWN FOR PUBLIC USE, WHAT AMOUNTS TO.

A dedication, as well as an acceptance and assumption by a town of a street for public use sufficient to render it liable under sec. 606 of ch. 19 of the Ontario Consolidated Municipal Act of 1903, for not replacing a bridge, is sufficiently shewn notwithstanding that the bridge was built by and the connecting street which was not on an original road allowance, was laid out to the stream by a private individual, and the street was afterwards, by a duly registered plan continued from the opposite bank, if statute labour was performed on the street for a number of years, and the town council on several occasions ordered and paid for repairs to the bridge, and the general public had free and uninterrupted user of same for over thirty years.

2. BRIDGES (§ II—13)—INJURY TO PROPERTY OWNER BY FAILURE OF TOWN TO REPLACE BRIDGE—NECESSITY OF NOTICE OF INJURY.

Sub-sec. 3 of sec. 606 of Consolidated Municipal Act of Ontario, 1903, ch. 10, providing that the failure to give notice to a town of an accident due to negligence in keeping a street or highway in

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repair, does not extend to an action for an injury occasioned an adjacent property owner by the failure of the town to replace a bridge after it was swept away.

3. LIMITATION OF ACTIONS (§ II F—130)—TORTS—RECURRENT INJURIES—FAILURE TO REBUILD BRIDGE.

On the failure of a town to restore a bridge that had been swept away, a new cause of action arises daily in favour of those injured by such default for which damages may be recovered for three months, less one day, prior to the time of bringing action, since the period of limitation prescribed by sec. 606 of the Consolidated Municipal Act (Ont.), 1903, ch. 19, does not apply to such a case.

4. DAMAGES (§ III K—229)—FAILURE OF TOWN TO REBUILD BRIDGE—INTERRUPTION OF MILL BUSINESS—EFFECT OF NONREPAIR OF MILL.

The owner of a mill cannot recover damages for the interruption of his business by reason of the neglect of a town to replace a bridge leading to his mill, where, at the time the bridge was swept away, the mill was out of repair, and it was not shewn when it was ready to resume operations.

Statement

APPEAL by the plaintiffs from the judgment of the Senior Judge of the County Court of the County of Bruce dismissing an action brought in that Court by residents of the unincorporated village of Allenford, in the Township of Arran, against the Corporation of the Township of Arran, for damages because of the nonrepair of a highway known as Mill street and failure to replace a bridge which formerly stood upon Mill street where it crossed the Sauble river, in the village of Allenford, but which had been carried away by a freshet.

The plaintiffs alleged that Mill street, with the bridge formerly thereon, was the only practical highway to and from their lands situate on the south side of the river; and that, because of the nonrepair of the highway and bridge, they had been damnified.

The defences were, that Mill street, with the bridge thereon, was laid out by private persons, and never became a public highway; and that, even if it did so become, the defendant corporation was not liable.

The appeal was allowed.

Argument

C. A. Moss, for the plaintiffs, argued that the case of *Cummings* v. *Town of Dundas* (1907), 13 O.L.R. 384, which was not referred to by the learned trial Judge, affirmed the principle of law on which the plaintiffs rely in the present case. [MULOCK, C.J.Ex., referred to *Re Township of Pembroke and County of Renfrew* (1910), 21 O.L.R. 366.] The case of *Noble* v. *Municipality of Turtle Mountain* (1905), 15 Man. L.R. 514, was decided under a section of the Manitoba Municipal Act, similar to that now in question, and is an authority in the plaintiffs' favour. Reference was also made to *Hislop* v. *Township of McGillivray* (1890), 17 S.C.R. 479, *per* Gwynne, J., at p. 489; Halsbury's Laws of England, vol. 16, pp. 151, 159, 160.

D. Robertson, K.C., for the defendant corporation, argued

that all money granted by the corporation was by way of bonus merely, and did not involve the corporation in any such responsibility as was contended for by the plaintiffs. He referred to *Regina* v. *Hall* (1866), 17 C.P. 282, *per* J. Wilson, J., at p. 286; *Corporation of St. Vincent* v. *Greenfield* (1886), 12 O.R. 297, affirmed (1887), 15 A.R. 567; *In re Morton and City of St. Thomas* (1881), 6 A.R. 323; *Waldie* v. *Burlington* (1884), 7 O.R. 192, 193, affirmed, *sub nom. In re Waldie and Village of Burlington* (1886), 13 A.R. 104, *per* Osler, J.A., at p. 111. The registration of a plan does not constitute a dedication. It is submitted that the judgment of the learned trial Judge is right, and that no cause of action under sec. 606 of the Municipal Act is made out. No special damage has been shewn by any of the plaintiffs.

Moss, in reply, referred to *Rushton* v. *Galley* (1910), 21 O.L.R. 135; *Madill* v. *Township of Caledon* (1901), 3 O.L.R. 66; Denton on Municipal Negligence (Highways), p. 46.

Mulock, C.J.

February 4. The judgment of the Court was delivered by MULOCK, C.J. (after a brief statement as above):—The history of the matter is as follows:—

The unincorporated village of Allenford is situate on the south side of the public highway known as the Saugeen and Owen Sound road, which runs in an easterly and westerly direction.

On the 27th November, 1868, the then owner of certain lands on the southerly side of that road caused to be registered in the registry office a plan shewing a subdivision of his land into several village lots, with a street called Mill street running through the same in a southerly direction from the Saugeen and Owen Sound road to the northerly bank of the Sauble river. Subsequently, viz., on the 27th January, 1881, the owners of other property on the southerly side of the river caused to be registered a further plan shewing a subdivision into village lots of the land on the southerly side of the river, and shewing Mill street as extended across the river, and continued southerly until it intersects a lane running westerly, and the owners of the land included in this extension of Mill street, by a written memorandum on the plan, give the land for the continuation of Mill street as far as the lane. Mill street, as shewn on this second plan, from the lane northerly across the river, and until it reaches within a few feet of the Saugeen and Owen Sound road, is wholly within the township of Arran. "Somewhere in the sixties" a grist-mill and saw-mill were erected on the east side of Mill street, south of the river; also a bridge over the river on the allowance for Mill street where it crosses it.

It may be assumed that the bridge was erected by private persons—probably the owners of the mill.

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On the lots laid out by the second plan, and situate on the south side of the river, have been erected certain residences, some of which are now occupied, the plaintiffs Hewitson and Arnott being two of such residents.

The precise date when the bridge was erected does not appear; but, as the mills were built to serve the public, who were in the habit of coming to them from time to time, it may be assumed that the mills and bridge were erected at about the same time. The evidence shews that for at least thirty years the mill was patronised by residents of the townships of Arran, Amabel, Derby, and Keppel, for such purposes, proceeding by Mill street and the bridge in question. Throughout the whole of this period, and down to the present time, the general public have enjoyed free and uninterrupted user of this way, *viâ* Mill street, to and from the south side of the river.

Shortly after its erection, the Township of Arran was urged to assume the bridge; but, by resolution dated the 26th May, 1871, the council refused to do so. From that time onwards, until the 7th July, 1883, numerous applications were made to the township to repair or replace the bridge; but the township, having been advised by counsel that it was under no legal obligation to do so, always refused.

On the 7th July, 1883, the council, in response to a numerously signed petition, asking assistance to Mr. McDougall to build a new bridge in the place of the one referred to, passed the following resolution: "That, in consideration of the large petition of the ratepayers of the township, asking this council to assist John McDougall to erect a bridge in the village of Allenford, to his mill, this council grant the sum of $200 to assist said enterprise; provided the Township of Amabel give a like sum, and without any intention on the part of this council of assuming any responsibility in connection with said bridge, or any liability as to its maintenance hereafter."

It was admitted during the argument that the council contributed the $200, in the terms of this resolution.

On the 22nd October, 1894, the council passed a resolution that the bridge be put in proper repair, and authorising the Reeve to have it put in proper repaid. Accordingly, the Reeve employed persons to do the work, which was carried on under his instructions, and, when completed, he so reported to the council, which paid the bills for the work.

On the 10th June, 1899, the council passed the following resolution: "That the Reeve be appointed to assist in the repairing of the Allenford bridge to the amount of $75." On the same day, the council instructed the clerk to procure a registered plan of the Arran portion of the village of Allenford; and, should the plan shew that the road or street upon

which the present bridge crosses the Sauble river is in said registered plan, the Reeve is to let a contract for repairing the same.

On the 15th August, 1899, the Reeve and Councillor Corbitt were appointed to let a contract "on 15th side road, concession 12, and opposite lot 10, concession 12, and repairing Allenford bridge." Thus authorised, the Reeve posted up notices, signed by himself as Reeve, inviting tenders for the work, consisting of lengthening the bridge and doing filling at one end, and let the contract to one William Craig, who performed the work. When finished, the Reeve inspected it, reported it to council as duly completed, and on the 10th November, 1899, by order of council, Craig was paid $145, the contract-price for the work; and also a further sum for repairing the northerly approach to the bridge.

On the 9th June, 1906, the council instructed the Reeve and clerk to solicit from the county council a grant for the building of a new bridge; but the Reeve subsequently informed the council that he had not done so, as he considered the bridge a private bridge; and the council approved this view and passed a resolution disclaiming liability.

On the 11th August, 1906, certain persons waited on the council with reference to the bridge, but the council then assumed the attitude that the township was not interested in it.

On the 14th September, 1907, the council granted $25 to Mr. Murphy to help him to repair the bridge, but without any intention of assuming responsibility.

On the 14th November, 1908, in response to the request of Messrs. Murphy and Strang for assistance towards repairing the bridge, the council, whilst disclaiming any legal responsibility for it, voted a sum of $25 to assist them in the work.

For the past twenty-three years, work supposed to be statute labour has been performed continuously on Mill street, on both sides of the river. Except as to the years 1907, 1908, and 1909, no instructions appear to have been given by the council to pathmasters where to perform statute labour in the township, the matter being apparently left in the discretion of those officials, and the locality where such statute labour has each year been done. But it appears from the evidence that some pathmasters caused statute labour to be performed on Mill street, on both sides of the bridge. Hewitson says that he was pathmaster for two years (1904-1905 and 1907), and that he caused statute labour during those years to be performed on Mill street. Frank Arnott says that six years ago last March he purchased his property, situate on the south side of the river, at Allenford; and that during each of those years, except one, statute labour was

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performed on Mill street. That six years ago (that would be in 1906) he was pathmaster and did statute labour on both sides of the road, beginning on Mill street, on each side of the bridge. R. H. Murray swore that at least four pathmasters had caused statute labour to be performed on Mill street, on both sides of the river, including work around the bridge. According to the evidence of R. T. Potts, clerk of the township until 1907, no instructions were given pathmasters where to perform statute labour; but it appeared that the pathmaster for 1907 was instructed to have the work done on the gravel road, and that the same instructions were given for the years 1908 and 1909.

On the facts disclosed in this evidence, one question to be determined is, whether Mill street, including the bridge, is a highway under the jurisdiction of the defendant corporation, and which it is bound to keep in repair. It was not an original road allowance, but was laid out by private individuals; and, before the corporation can be liable under sec. 606 of the Consolidated Municipal Act, 1903, it must appear that Mill street was "established by by-law of the corporation, or otherwise assumed for public user," as provided by sec. 607 of the Act. The question of dedication is one of fact. The registration of the plans shewing Mill street; the specific reference on the plan of the 27th June, 1881, providing for its continuance southerly to the lane; the sale of lands according to these plans; the uninterrupted user of Mill street by the general public as a highway since the year 1868; and the performance of statute labour on it over a considerable number of years: constitute unmistakably an offer of dedication. And the action of the council in the years 1894 and 1899, in voting money for the repair of the bridge, in causing those repairs to be done, and in paying therefor, are, I think, referable to one thing only, viz., acceptance of the offer of dedication, and constitute an assumption of the bridge and street for public user by the defendant corporation within the meaning of sec. 607: *Hubert* v. *Township of Yarmouth* (1889), 18 O.R. 458; *Holland* v. *Township of York* (1904), 7 O.L.R. 533.

Accordingly, the township is bound to keep that portion of Mill street within its limits, and the bridge, in reasonable repair. For the purposes of this case, it may be assumed to be the law that, except for sec. 606, a municipality is not liable in damages because of the nonrepair of a public road; but the learned trial Judge held that, because the plaintiffs had not complied with the requirements of sub-sec. 3 of sec. 606, they were not entitled to maintain this action.

With all respect, I do not find myself able to accept his interpretation of the section. Sub-section 1 of sec. 606 comes down to us from the Consolidated Statutes of Upper Canada. At

that time the various sub-sections of sec. 606 formed no part of the statute-law; and, as the section thus originally stood, a municipality was "civilly responsible for all damages sustained by any person by reason of such default" (failure to keep in repair), "but the action must be brought within three months after the damages have been sustained."

The scope of the section was not limited to damages to the person, or to damages arising from some accident, but included any cause of action resulting from the municipality's default. The same language is found in sub-sec. 1 of sec. 606; but it is contended that the addition of sub-sec. 3 limits sub-sec. 1 to an "accident case;" and this contention is based on the words of sub-sec. 3: "No action shall be brought to enforce a claim for damages under this section unless notice in writing of the accident," etc., has been given.

In passing sub-sec. 3, the Legislature was not dealing with sub-sec. 1, but was considering accident cases only, and was endeavouring to provide for a municipality being given prompt notice of the accident; evidently with a view to its having the opportunity of investigating the attendant circumstances before they had become dimmed by the lapse of time. In order to secure the giving of such notice, the Legislature enacted that failure to give it might, in that class of case, bar the claim for damages. But sub-sec. 1 includes damages to property not the result of accident: *Cummings* v. *Town of Dundas*, 13 O.L.R. 384; and the Legislature has not pretended to amend that section. It is not to be inferred that the Legislature intended in a very important respect to alter a state of the law by depriving persons of a cause of action growing out of (say, by way of illustration) damage to property or business, by the indirect method of apparently dealing with the subject of causes of action arising out of accident merely; and, where the cause of action, as in the present case, is of that nature, the requirements of sub-sec. 3, as to notice, do not apply.

I, therefore, am of opinion that the scope of sub-sec. 1 has not been limited by sub-sec. 3; and, the present cause of action not being an "accident" case, notice is not necessary. In other words, sub-sec. 3 does not apply.

The facts of this case shew continuing damage. The plaintiffs' grievance is not that they were injured by the accident of the bridge being swept away, but because of its non-restoration. Each day, so long as the condition of nonrepair continues, the plaintiffs have a new cause of action, and they are entitled to recover three months', less one day's, damages prior to action begun. As to the amount of damages: the plaintiff Strang's mill was out of repair when the bridge was carried away, and it is not shewn when it was repaired; and, therefore, he is not

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entitled to damages for interruption to his milling business; but, as access to his property was cut off, he is entitled to damages for the inconvenience thus occasioned. Further, it is probable that he was somewhat inconvenienced in the work of repairing the mill, by reason of the absence of the bridge, and I would allow him the sum of $75 damages.

Hewitson, who resides at the south side of the river, is entitled to reasonable damages, and I would fix the same at $25, which appears to me a proper sum.

Arnott shews no special damage, but is entitled to nominal damages, say $5.

As to the costs of this action, the defendant corporation denied liability, and the plaintiffs were, therefore, justified in bringing suit at the earliest moment, without giving, as they otherwise should have done, a reasonable time within which to allow the defendant an opportunity to restore the bridge.

Under the circumstances, the plaintiffs are entitled to the costs of the action, on the County Court scale; and to the costs of this appeal.

Appeal allowed.

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CANADIAN FREIGHT ASSOCIATION v. CADWELL SAND & GRAVEL CO.

(File No. 19391.)

Board of Railway Commissioners, March 25, 1913.

1. CARRIERS (§ IV C—535)—REASONABLENESS OF TOLLS — PRESUMPTION—INCREASE—ONUS ON CARRIERS—VOLUME OF TRAFFIC—CHANGED CONDITIONS—COST OF OPERATION.

A toll established in the first instance by a carrier of its own volition, having remained some time in force, is presumptively reasonable, and the onus is on the carrier to shew, with reasonable conclusiveness, that changed conditions or increased cost of operation justified an increase.

[*Laidlaw Lumber Co.* v. *Grand Trunk R. Co.*, 8 Can. Ry. Cas. 192, at 194; *Montreal Produce Merchants' Association* v. *Grand Trunk and Canadian Pacific R. Cos.*, 9 Can. R. Cas. 232, at 238; *Canadian Manufacturers' Association* v. *Canadian Freight Association (Interswitching Rates Case)*, 7 Can. Ry. Cas. 302, at 308, followed; *Cadwell Sand & Gravel Co.* v. *Canadian Freight Association*, 14 Can. Ry. Cas. 172, re-heard and reversed.]

Statement

THE facts are fully set out in the judgment of Mr. Commissioner Mills.

H. D. Drake, for the applicant.
C. A. Hayes, for the respondent.

Commissioner Mills.

March 25, 1913. MR. COMMISSIONER MILLS:—On the original hearing of this complaint, the only matter at issue was the increased rate on pressed brick from Bradford, Pennsylvania, to Windsor, Ontario.

The decision as given in the original hearing was based on the procedure which had been adopted by the Board in respect of the onus in the matter of reasonableness. In effect, the decision as rendered was a nonsuit so far as the railway was concerned. The Board had laid down in various decisions that where a rate which had been for some time in force was increased, the burden of proving that such increase was reasonable was on the railway; it being held that a rate established in the first instance by a railway of its own volition was presumptively reasonable; and that it was incumbent on the railway, if such initial rate was reasonable, to shew with reasonable conclusiveness what changed conditions or increase in cost of operation justified the advance of the rate. The Board, it is true, had on various occasions expressed opinions somewhat at variance with this. In dealing with the question of joint switching rates in Toronto, Chief Commissioner Killam used the following words:—

> It does not appear to me that the railway companies are bound to make an exception in the case of Toronto, or that because of their having thus mutually absorbed these charges for a considerable length of time they must necessarily continue to do so forever. The whole question is one of reasonableness, and while the continuance of the practice affords evidence of its reasonableness, it is not conclusive.

Canadian Manufacturers' Association v. *Canadian Freight Association*, 7 Can. Ry. Cas. pp. 307, 308.

The same position was followed by the Board in *Laidlaw Lumber Co.* v. *Grand Trunk Ry.*, 8 Can. Ry. Cas. 194, and in *Montreal Produce Merchants Association* v. *Grand Trunk R. and Canadian Pacific R. Companies*, 9 Can. Ry. Cas. 238.

The railways have continuously urged before the Board that while there have been increases in general cost of operation, it is not possible to so analyze these increases so as to shew in detail how they affect each particular commodity moved, and whether each commodity moved participates in the increased cost of movement in greater or lesser degree. Undoubtedly the railways, in common with other portions of the public, have felt the effect of the steadily upward movement of the price curve, a movement which has been so practically continuous in one direction that the curve is now virtually a tangent. In effect, the decision in the *Pulpwood* case is that while the continuance of the particular rate may raise a presumption of fact as to the unreasonableness of the increased rate, there is no presumption of law which must be rebutted. In dealing with an analogous situation, the Supreme Court of the United States has said:—

> Undoubtedly where rates are changed the carrier making the change must be able to give a good reason therefor; but the mere fact that a

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rate has been raised carries with it no presumption that it was not rightfully done.

Interstate Commerce Commission v. *Chicago Great Western R. Co.*, 209 U.S.R. 118.

The Board had dealt with the onus as to reasonableness in the *Pender* group of cases and in the *Davy* case.

Complaint of *James Pender & Co.*, St. John, N.B., respecting rates on iron goods from St. John, N.B., to points on the Quebec Central Railway. File 10720; complaint of the *Portland Rolling Mills, Ltd.*, of St. John, N.B., against the rates charged on bar iron and nails from St. John, N.B., to Quebec Central Railway points. File 10720.1; complaint of the *Maritime Nail Company, Ltd.*, against the rates charged on bar iron and nails from St. John, N.B., to Quebec Central Railway points. File 10720.2; *Davy* v. *Niagara, St. Catharines & Toronto Ry. Co.*, 9 Can. Ry. Cas. 493.

In these cases, the onus being placed on the railway, it was required that the information as to changed conditions and cost should be as to the particular commodity on which the rate increase had been made.

Now while the onus still remains, the effect of the Board's judgment in *International Paper Co.* v. *Grand Trunk, Canadian Pacific and Canadian Northern R. Cos.*, is that the Board has a wider discretion. This judgment in effect sets out that not particular cost alone or conditions peculiar to that particular commodity, but all material conditions and costs, including therewith comparison of rates, may be given such weight as seems reasonable to the Board. It follows that for this purpose all tariffs on file with the Board, whether referred to in the record or not, are part of the record.

The present re-hearing must be dealt with in the line of the principles which the above mentioned case has developed.

In the application for a re-hearing, the railways stated that while the original application had dealt simply with the question of increase of a particular rate, the change in rate was the outcome of the adoption of a new rate scheme in regard to bricks, in which while there were some upward movements there were other downward movements. They plead in effect that the rate situation in respect of the brick movements should be looked at from the standpoint of the rate scheme, not from the standpoint of a particular rate.

In the original hearing, much had been made of the decision in the United States, in which the Interstate Commerce Commission had directed that identical rates should be given on fire brick, paving brick, and building brick. This decision is spoken of in railway circles as meaning that "a brick is a brick." It was shewn in the re-hearing that whatever the pertinency of this phrase may be as a determining factor in the

reasonableness of rates on brick in the United States, it has no necessary connection whatever with what has been done in Canada by the railways, and that the railways have acted entirely of their own volition.

The railways having urged that the general effect, not the effect of a particular rate, should be considered, they were permitted to file statements shewing the nature of the brick movement to various representative points, the earnings on these movements at the new rates, and the earnings on the old rates. These statements are now before the Board. They cover movements to Toronto, Oshawa, Hamilton, Midland, London, Brantford, Windsor, and Guelph, Ont., from points of origin in the United States. Of these points of origin, eight are located in Ohio, viz., Nelsonville, Canton, Cleveland, Delaware, Portsmouth, Wadsworth, Marietta, and Strasburgh. Six are located in Pennsylvania, viz., Emery, Lewis Run, Rochester, Bradford, St. Marys, and Karthaus. Two are located in Kentucky, viz., Ashland and Haldeman; and one in Michigan, viz., Detroit. These returns cover the movements of fire brick, paving brick, and building brick for a period from June 1st to November 30th, 1912, over the Grand Trunk Railway System, the Michigan Central, the Toronto, Hamilton and Buffalo, and the Canadian Pacific Railways. These cover a total movement of 761 cars, sub-divided as follows: Fire brick, 578; building brick, 120; paving brick, 63. The statements presented do not cover the Wabash and Pere Marquette movements. The Wabash did not move any cars of brick from the United States to any of the points mentioned during the period in question, while the Pere Marquette moved forty-six cars to Chatham and Walkerville. Six of these were from Detroit, six from Ohio and Kentucky points, and the remainder from New York and Pennsylvania. The Pere Marquette figures do not appear to be very material.

An analysis of the summary of earnings for the six months' period shews a net decrease of revenue, as a result of the arrangement, of $1,988.88. The figures as submitted shewed a decrease of $2,122.87. But some portion of the decrease as thus given is due to the fact that in particular cases there is now a through rate, where formerly the only rate combination available was the sum of the locals. This of necessity adds to the percentage decrease. Where the old rate was the sum of the locals this would not be characteristic, as where there was a choice by another route at a through rate there would not be any considerable movement on the sum of the locals. An attempt has been made in checking the summary to make allowance for this.

The following summary gives the summary detail as to increases and decreases, both in gross amount and per ton:—

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FIRE BRICK.

	Lbs.	Decrease	Increase	Per Cent. of Total movement
G.T.R.	19,540,907	$1,854.18	.....	.....
M.C.R. & T.H. & B.	11,814,965	259.94	.....	.....
C.P.R.	2,435,100	159.83	.....	.....
	33,790,972	$2,273.95	.....	73.8

Decrease per ton, 13.4c.

BUILDING BRICK.

	Lbs.	Decrease	Increase	Per Cent. of Total movement
G.T.R.	4,130,550	.....	$205.90	.....
M.C.R. & T.H. & B.	178,500	.....	14.60	.....
C.P.R.	3,152,060	$ 9.64	.....	.....
	7,461,110	Net...	$210.86	16.2

Increase per ton, 5.6c.

PAVING BRICK.

	Lbs.	Decrease	Increase	Per Cent. of Total movement
G.T.R.	2,351,700	$ 34.98	.....	.....
M.C.R. & T.H. & B.	270,000	.....	$43.50	.....
C.P.R.	1,904,600	.....	65.79	.....
	4,526,300	Net...	$74.31	9.8

Increase per ton, 3.2c.

The figures of the importations of brick into Canada during the year 1912 via Detroit, Port Huron, Black Rock, and Suspension Bridge, amounted to 83,281,085 bricks, valued at $1,006,091.00. The returns as given for the six months' period deal with 45,778,382 pounds weight of brick. As the United States customs returns are for quantity, not for weight, no percentage comparison can be made.

The total movement of brick to Windsor during the six months' period was 79 cars, made up as follows: Paving brick, 2; building brick, 67; fire brick, 10. A further analysis shews that the building brick, which is the gravamen of the Cadwell Company's complaint, is sub-divided as to car movement and sources of supply as follows: Detroit, 21; Ohio, 25; Pennsylvania, 21.

There are two points in the application of the Cadwell Sand & Gravel Company: (1) the increase of rate to Windsor is

unjustified; (2) Windsor should have the same rate as Detroit, viz., $1.60. The $1.60 rate is fixed by the commercial competition of the Ohio brick plants, which are a shorter distance from Detroit than are the Pennsylvania plants. Under these conditions of trade competition, the rate from the Ohio fields fixes the maximum which brick from the Pennsylvania field can pay. It holds down the Pennsylvania-Detroit rate below the point which it might fairly be expected to pay on mileage. The $1.60 rate being concerned with the condition of market competition at Detroit, which does not exist at Windsor, therefore does not afford a measure of the Windsor rate.

The rate to Windsor remains to be considered.

A summary of the six months' statistics already referred to may be put in condensed form in the following table:—

Railway	Kind of Brick	Average Weight per Car Lbs.	Average Earnings per Car
C.P.R.	Paving	63,153	$ 83.85
"	Building	63,043	50.82
"	Fire	62,438	75.20
M.C.R. & T.H. & B.	Paving	67,500	83.37
" " "	Building	44,625	46.50
" " "	Fire	59,366	60.84
G.T.R.	Paving	81,693	112.12
"	Building	62,659	57.87
"	Fire	57,473	67.87

It will be noted that in general the building brick, included in which is pressed brick, loads to a lighter weight per car than the other kinds of brick, and returns smaller earnings per car. The weights and earnings on the building brick movements to Windsor shew variations in point of weight and point of earnings as between the different lines:—

Railway	Average Weight per Car Lbs.	Average Earnings per Car
C.P.R.	73,250	$67.96
M.C.R. & T.H. & B.	42,833	41.83
G.T.R.	61,983	55.39

There is no movement of building brick by the C.P.R. to Windsor during the six months' period from Pennsylvania points taking the Bradford rate, viz., $2.00. For the G.T.R. and the M.C.R. and T.H. & B., the following detail may be extracted:—

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Railway	Ex	Cars	Loaded Weight Lbs.
G.T.R.	Rochester, Pa.	1	55,000
"	Lewis Run, Pa.	15	858,300
"	Bradford, Pa.	2	143,000
		18	1,056,300
M.C.R. & T.H. & B.,	Emery, Pa.	2	86,000
M.C.R. & T.H. & B.,	Lewis Run, Pa.	1	42,500
		3	128,500

This gives an average loaded weight from these points via the G.T.R. of 58,683 lbs. and via the M.C.R. & T.H. & B. of 42,833 lbs. The weight via the G.T.R., which equals 29.3 tons per car, may be taken in order to measure the earnings. The average receipts at $2.00 per ton work out $58.68 per car. Out of the $2.00 rate from Bradford to Windsor, the Grand Trunk receives $1.20 per ton, or $35.34 per car. The distance from Buffalo to Windsor, on which the Grand Trunk earns $1.20 is 230 miles that is to say, on this haul its earnings per car mile are 15 3-10 cents. Under the old proportional of 88 cents per ton, the Grand Trunk earned .386 cents per ton mile. Under the new proportional of $1.20, it would earn .521 cents per ton mile.

Comparison with other rates is of interest. The rate from Bridgeburg to Windsor, a distance some 5 miles shorter than from Buffalo to Windsor, is on the standard 10th class, 10 cents per 100 lbs. weight, which works out 1.03 cents per ton mile. The special town tariff 10th class is 11 cents per 100 lbs., which works out .982 cents per ton mile. The special mileage brick tariff is 9½ cents per 100 lbs., which works out .848 cents per ton mile. Under the brick tariffs which are being considered, the rate from Black Rock to Montreal, via Grand Trunk, is $2.05, or a ton mile rate of .473. To Ottawa, via M.C.R. & T.H. & B., and C.P.R., there is the same rate, the ton mile rate working out .5923. To St. John, N.B., via M.C.R. and T.H. & B., and the C.P.R., the rate is $4.80 per ton. The distance is 905 miles and the ton mile rate is .5303 cents. Comparison may also be made with the rate on pressed brick from Toronto to Ottawa and Montreal. The rate is blanketed to both points at $1.80. Ottawa is a distance of 256 miles and Montreal 384. The ton mile rate works out .703 and .54 cents.

It has been submitted in evidence before the Board in the matter of rates on quarried stone that one-half cent per ton mile is the lowest rate on that commodity.

Doolittle & Wilcox v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 8 Can. Ry. Cas. 10, at p. 12 (*Stone Quarry Rates* Case).

Stone is a tenth-class commodity. It was at the same time submitted by the applicants that the rate should be made up of this one-half cent per ton mile for movement expenses plus a terminal charge of 25 cents per ton on the shorter hauls and a lesser terminal charge on the longer hauls. It was held in this case that this procedure was defective in that it did not recognize that terminal cost entered both into the loading on the cars and the unloading therefrom. Computations which have been made in the United States place average terminal costs for loading and unloading at 25 cents per ton at each end of the line. This was the figure of transhipment cost on large movements of grain at Depot Harbour on the Parry Sound Railway. If brick were given a ton mile rate of one-half cent, plus a terminal charge of 25 cents per ton at each end of the route, the Bradford-Windsor rate would be $1.55 plus 50 cents, or $2.05 per ton.

Reference has been made to the special mileage brick tariff from Bridgeburg to Windsor. In the absence of evidence as to there being an actual movement over the whole of this distance on this tariff, a comparison may be made with a low grade commodity which does move. Brick and coal are both tenth-class in the Canadian Classification, and usually move on commodity rates. Pressed brick from Bradford averages 6 lbs. per brick. This brick, which sells at from $22 to $26 per 1000, is, therefore, worth from $7.33 to $8.66 per ton. Bituminous coal is of lower value than the pressed brick in question.

From Buffalo to Windsor, the rate on bituminous coal per net ton is $1.00 and on the anthracite 90 cents, which figures out ton mile rates of .434 cents and .391 per ton mile. The following table puts the ton mile earnings in summary form:—

Brick, old proportional of 88c.	.386c. per ton mile
Coal, bituminous	.434c. " " "
Coal, anthracite	.391c. " " "
Brick, new proportional of $1.20	.521c. " " "

The earnings per car mile on brick have been given. Coal moves in 50-ton cars giving earnings per car from Buffalo to Windsor as follows: Bituminous coal, $50.00; anthracite, $45.00. Put in summary form, the car mile earnings are as follows:—

Coal, bituminous	20.15c. per car mile
Coal, anthracite	17.4c. " " "
Brick (new proportional)	15.3c. " " "

It is to be recognized that the volume moving is a factor in the determination of the rate. The statistical returns published by the Department of Railways and Canals bulk cement, brick, and lime; and so it is impossible to make any exact comparison of the total brick movement with the total coal movement. Subject to this modification, the tonnage movement over the Grand Trunk for the year ending June 30th, 1912, was as follows:—

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Coal, anthracite	2,047,314 tons
Coal, bituminous	2,440,302 "
Cement, brick, and lime	898,242 "

After due consideration of the new rate system on brick, as tested by the figures which have been analyzed, and also after consideration of the different sources from which the brick moves into Canada, and the earnings thereon per car mile and per ton mile, I am of opinion that rates as charged are not unreasonable.

Chief Commissioner. Com. McLean. Com. Goodeve.

THE CHIEF COMMISSIONER and COMMISSIONERS MCLEAN and GOODEVE concurred.

Order accordingly.

MAN.

C. A.

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April 14.

SCHWARTZ v. WINNIPEG ELECTRIC R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, and Haggart, JJ.A. April 14, 1913.

1. NEGLIGENCE (§ II B 1—88)—CONTRIBUTORY NEGLIGENCE OF CHILDREN—STREET CAR—PRESUMED JUVENILE DISCRETION.

A boy of eight and one-half years, possessing the ordinary intelligence of a child of that age, will be presumed to know enough to get out of the way of a moving street car if he saw it coming.

[See Annotation to *Hargrave* v. *Hart*, 9 D.L.R. 521, on Contributory Negligence of Child injured while crossing highway.]

2. EVIDENCE (§ XII D—944)—CONTRIBUTORY NEGLIGENCE OF CHILD—ADMISSIBILITY OF THE CHILD'S EVIDENCE—OATH—UNSWORN EVIDENCE.

In an action to recover for the alleged negligence of a railway company in running over a child eight and one-half years of age, where the testimony of the witnesses fails to bring out a material point as to the question of the contributory negligence of the child (*ex. gr.*, why he failed to observe the approach of the car) it is error on the part of the trial judge not to permit the child to testify either under oath or in the form of unsworn evidence received under the provisions of sec. 39 of the Evidence Act, R.S.M. 1902, ch. 57, where it appears that the child understood the duty of telling the truth.

3. DAMAGES (§ III I 1—169)—PERSONAL INJURIES—RECOVERY BY INFANT—INCOME—ACCIDENTS OF LIFE.

In awarding damages for injuries sustained by a child eight and one-half years old by reason of a collision with a street railway car, whereby the child's right arm had to be amputated below the elbow, the jury ought not to give the plaintiff such a sum as, if invested, would produce the full amount of income which he might be expected to earn if he had not been injured, but they should take into account the accidents of life and other matters, and give to the plaintiff what they consider, under all the circumstances, a fair compensation for the loss.

[*Rowley* v. *London & N.W.R. Co.*, L.R. 8 Ex. 221, and *Johnston* v. *Great W.R. Co.*, [1904] 2 K.B. 250, referred to.]

Statement

APPEAL by defendants from judgment of Metcalfe, J., allowing jury to bring in a general verdict in favour of the plaintiff for $8,000 damages.

The appeal was allowed and a new trial granted.

M. J. Finkelstein, and *E. R. Levinson*, for the plaintiff.

E. Anderson, K.C., and *R. D. Guy*, for defendants.

The judgment of the Court was delivered by

PERDUE, J.A.:—The plaintiff Shay Schwartz sues by his father and next friend to recover damages for injuries caused to him by a street car of the defendants. At the time of the occurrence the boy was about eight and a half years old. While attempting to cross Dufferin street, in this city, he was struck by the car and knocked down. The front wheels of the car passed over his right arm below the elbow, injuring it in such a manner that it had to be amputated.

The plaintiff sets up several charges of negligence: (1) excessive speed of the car; (2) that the gong was not sounded; (3) that the fender of the car was not in proper working order; (4) that the wheels were not sufficiently protected with guards; (5) that the defendants did not have or use proper means of stopping the car promptly; (6) that they had not the car under proper control; (7) that a proper lookout was not kept. Metcalfe, J., allowed the jury to bring in a general verdict, which they found in favour of the plaintiff, awarding $8,000 damages. There is nothing to shew upon what act or acts of negligence the jury based their verdict.

Only two witnesses were called at the trial who actually saw the occurrence of the injury. One of these, the witness Taylor, was called by the plaintiff. The other was the motorman in charge of the car, and he gave evidence for the defence. Their accounts of what took place differ in material respects. It was, of course, the right of the jury to believe the evidence of Taylor and, if they thought proper, to disbelieve the motorman. The plaintiff's case was based upon Taylor's evidence as shewing how the accident occurred and as establishing the negligence of the defendants, which it is claimed was the cause of the plaintiff's injury. I have carefully read the evidence of that witness, and I must say that I am far from satisfied that his account of what took place established a case of negligence against the defendants so that a jury would be justified in resting their verdict upon his testimony alone.

If there is to be a new trial in this case it would not be proper to comment fully upon evidence which would have to be repeated at another trial. It is necessary, however, to point out certain things which influence my mind in coming to the conclusion that there should be a new trial.

It appears that the plaintiff on the night of the injury was engaged with other boys in making noise outside Taylor's store and annoying him. This was on 9th April, at about nine o'clock

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Perdue, J.A.

at night, a time when the boy's parents should have seen that he was at home and in bed. Taylor came out of his store, which was on the north side of Dufferin street, and drove the boys away. They ran west along the sidewalk, jeering him. The plaintiff, according to Taylor, went first with the other boys and then turned across Dufferin street. Taylor's store was the second one west from where Schultz street intersects Dufferin. There is a double line of street car tracks on Dufferin street, the west bound cars running on the north line. The boy started to cross the street from opposite the west window of Taylor's store. The car which caused the injury was travelling west, and Taylor says he first saw it when it was at the east side of Schultz street, which would be about a hundred feet away from where he was standing. The boy was then out on the street about three feet from the sidewalk, and, as Taylor says, about three feet from him. Taylor gives no sufficient explanation why he did not call to the boy to look out for the car. When it was about forty feet from the boy Taylor shouted to the motorman and held up his hands to stop the car. At no time did he call to the boy or warn him. It would appear from Taylor's evidence that the boy continued across Dufferin street, in a direction slanting a little to the east, until the car collided with him. Apparently there was nothing to prevent the boy from seeing and hearing the approaching car.

We must take it that the boy had the ordinary intelligence of a child of his years. It must be assumed that a boy of his age would know enough to get out of the way of a moving street car if he saw it coming. The place where the accident occurred was well lighted and there was no difficulty in seeing the approaching car. The lights in the car would also serve to warn anyone of its proximity who took the care to look. The car could certainly be as easily seen by the boy as the boy could be seen by the motorman.

The motorman says that he saw the boy running eastward half-way between the car track and the sidewalk, but looking over his shoulder, that he, the motorman, sounded his gong, that the boy when close to the car suddenly turned and ran in front of it. Taylor and others of the plaintiff's witnesses say they did not hear the gong. Taylor says the car was making the usual noise of a street car. This would give some warning of its approach, and if Taylor heard it, the boy was in a still better position to hear it.

The boy's evidence was tendered, but the learned trial Judge did not think that the boy understood the nature of an oath and did not permit him to be sworn. Even if the trial Judge considered himself justified in so holding, still I am not sure that the boy's unsworn evidence as to what occurred was properly excluded. Some of his answers indicate that he understood the

duty of telling the truth. He might have been questioned more fully as to this, with a view of admitting his statement under sec. 39 of the Evidence Act, R.S.M. 1902, ch. 57. If his evidence had been received it might have thrown light upon some things that are obscure at present. He might have been able to explain why he failed to see the approaching car, and why he continued on his course until it collided with him. Was there something that distracted his attention? Was he running from Taylor with his head turned towards the latter and not looking out for any danger in front? I think it would be well to have his statement as to this, either in the form of evidence under oath or in the form of unsworn evidence received under the provision in the Evidence Act.

I think the damages awarded were, under the circumstances of this case, exceedingly large, if not excessive. The sum of $8,000, which the jury has allowed in this case, would, if properly invested, taking into account the boy's condition in life, support him for the rest of his days. In awarding the damages the jury ought not to give the plaintiff such a sum as, if invested, would produce the full amount of income which he might be expected to earn if he had not been injured, but ought in estimating the damages to take into account the accidents of life and other matters, and to give the plaintiff what they consider, under all the circumstances, a fair compensation for his loss: *Rowley* v. *London & N. W. R. Co.*, L.R. 8 Ex. 221; *Johnston* v. *Great W. R. Co.*, [1904] 2 K.B. 250.

The plaintiff has not been completely disabled, although his earning powers have been seriously affected. In assessing the damages in an action like the present the proper direction to the jury is

> that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation: *per* Brett, J., in *Rowley* v. *London & N.W.R. Co.*, L.R. 8 Ex. 221, at 231.

It appears to me that there must have been some misconception on the part of the jury as to the amount of damages they should allow, and that they sought to give him complete compensation instead of that fair and reasonable compensation which they might award.

Considering the unsatisfactory account of the accident as given by Taylor and the absence of any evidence by the boy, sworn or unsworn, and the very large damages awarded in the circumstances of this case, I think there should be a new trial. The costs of the former trial and of this appeal should be costs in the cause.

New trial granted.

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June 17.

Re HARRISON.

Ontario Supreme Court, Lennox, J. June 17, 1913.

1. HUSBAND AND WIFE (§ II F 2—95)—CONVEYANCE OF REAL ESTATE BY MARRIED WOMAN—EFFECT OF DEVISE FREE FROM CONTROL OF HUSBAND.

Only on the termination of coverture may a married woman alienate her real estate acquired by a devise of it, although expressed to be free from the interference, control or management of her husband, if it be also expressed to be for her maintenance and support with a direction against any alienation or mortgage thereof.

Statement

MOTION, under Con. Rule 938, for an order determining questions arising upon the construction of the will of Louisa Ann Harrison, deceased.

W. B. Raymond, for all parties interested.

Lennox, J

LENNOX, J.:—Mr. Raymond, applying for construction of the will, states that he represents all the parties interested in the property. The person who took the life estate is dead. Mrs. Kemp, Mrs. Verner, and Mrs. Stringer are now entitled to a fee simple in possession. The question to be determined is, can they sell the property? At the time of the making of the will in question, they were married women, and their husbands were alive. After the use of words sufficient to vest a fee in the lands in question in the three beneficiaries above-named, the will provides: "With regard to the property and estate hereby and hereinbefore given and bequeathed . . . I do hereby declare that the same is now hereby given and bequeathed to each of them for her aliment, maintenance and support and the same is to be held and possessed by each of them free from the interference or control or management of any husband they or any of them have or may have . . . nor shall the same or any part thereof be liable or be subject to be seized attached or be otherwise taken from any of them either for her debts or the debts of any husband any of them may have nor shall the same be pledged disposed of mortgaged or alienated to any person or persons whomsoever on any condition or pretence whatsoever."

The intention of the donor is the thing which governs, provided that it does not purport to go beyond the limits allowed as to perpetuities and the like: *In re Bown, O'Halloran* v. *King*, 27 Ch.D. 411. The right to limit the estate during coverture in the way it is here attempted to be limited is recognised in *Tullett* v. *Armstrong*, 1 Beav. 21, and many other cases. When the coverture ceases, the widow can exercise the ordinary rights incident to separate estates and alienate the property. Two of these devisees are now widows. These two have the right and power to alienate their shares. The lady whose husband is

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still alive has not. As I intimated upon the argument, this property being physically indivisible, the parties may find a way of carrying out what they desire by partition proceedings, and a sale as incidental thereto. It is a case in which all parties would be benefited by disposing of the property, and I should be glad if I had an Act enabling me to remove the restraint, as the Court has in England—the Conveyancing and Law of Property Act.

Costs as between solicitor and client out of the estate.

Order accordingly.

LONG v. SMILEY.

(Decision No. 2.)

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June 20.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. June 20, 1913.

1. TROVER (§ I B 2—15)—WHAT CONSTITUTES—REFUSAL OF BROKER TO DELIVER STOCK TO PURCHASER.

Where shares of stock, purchased by a broker for the plaintiff, were, with the assent of the latter, retained by the former in order to be readily transferred and delivered on sale, the broker, on subsequently selling such shares, is not answerable for a conversion thereof, where, at all times, he had on hand a sufficient quantity of that particular stock, fully paid up, to meet a demand for its delivery; notwithstanding his books shewed a sale to the plaintiff of the particular shares afterwards sold by the broker.

[*Long* v. *Smiley*, 6 D.L.R. 904, 4 O.W.N. 229, affirmed.]

Statement

APPEAL by Georgina Long, the plaintiff in a High Court action brought against a firm of brokers to recover moneys intrusted to them for investment in mining stocks, from the judgment of Riddell, J., 6 D.L.R. 904, 4 O.W.N. 229, dismissing the action.

The judgment of Riddell, J., dealt also with a County Court action brought by Kate Long, the sister of Georgina Long, against the same firm of brokers; but in the County Court action there was no appeal.

The appeal was dismissed.

A. J. Russell Snow, K.C., for the plaintiff.

T. N. Phelan, for the defendants.

Clute, J.

CLUTE, J.:—The defendants, as brokers, purchased for the plaintiff certain mining stocks, which were paid for in full at the time of purchase. A bought note was, in each case, sent to either the plaintiff, Georgina Long, or her sister, Kate, and the number of the scrip was entered opposite the name of the plaintiff or her sister in the defendants' stock-book.

Subsequently there appear entries in the defendants' stock-book shewing that this particular scrip was sold, at a profit, and passed out of the defendants' hands.

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The plaintiff, Georgina Long, now seeks to recover the proceeds of what she claims to have been her shares or scrip. The defendants answer, in effect, that they did not sell her shares, as they were not authorised so to do, but that they sold certain shares for other principals, and that the particular scrip representing her shares were handed out to such purchasers, the defendants always retaining sufficient scrip on hand, fully paid-up and of the same issue, to meet the plaintiff's demand for the same when made.

My brother Riddell has found "that when any stock was ordered to be bought it was intended to be left in the hands of the brokers in a convenient form for immediate sale, and that the plaintiffs quite understood and assented to it. Stocks which were paying dividends were of course to be transferred into the name of the purchasers, but not others. When dividend-paying stock was bought, it was so transferred." He further finds that sufficient of the scrip was held on hand to give every customer the amount held by him. He finds further that the plaintiff and her sister, Kate Long, quite understood that the stock had to be in such shape as that it could be delivered on a sale at a moment's notice. He expressly gives credit to the defendants' witnesses, and states that he cannot rely upon the accuracy of the memory of the plaintiff and her sister as to what took place between them and the defendants.

The evidence supports the findings of the trial Judge. As to the 500 shares of Otisse and 500 shares of Gifford, taken in the name of Kate Long, the defendant McCausland points out that they could not obtain it in lots of 250 shares at the market-price, and it was, therefore, taken in the name of the plaintiff's sister, Kate Long, instead of 250 shares in the name of each.

He further states that it was with the consent of the plaintiff and her sister that the shares were left with the defendants, for safe-keeping; that they never asked for delivery until 1911, when similar shares of the same issue were delivered to them. He further states that from the time the first purchases were made for the plaintiffs to the time the stock was finally delivered to them, there never was a "single moment" that they did not have on hand a sufficient amount of stock to meet their demands, and the demands of other customers who had a similar kind of stock; that they were never hypothecated or pledged or used in any way for the defendants' benefit; that these shares of their various principals were put in an envelope endorsed with so many shares for each principal, and that they were never short of any of the shares.

The plaintiff's case then is reduced to what the defendants admit, namely, that the defendants did not keep any par-

ticular certificate for the plaintiff, but on making a sale delivered the scrip that first came to hand, and in this way handed out those certificates which had been designated by their numbers as having been bought for the plaintiff in the stock-book.

Did this, on the facts, as found by the learned trial Judge, amount to a conversion? I think not. The effect of what was done between the parties was to authorise the defendants to keep the scrip of those stocks which were not paying dividends in such form as could be readily transferred in case of sale. That, in fact, was done, and scrip of the like amount was always on hand and ready for delivery to the plaintiff when demanded.

It is solely upon the findings of the trial Judge, in this particular case, and without giving effect to any alleged custom, that the plaintiff, in my opinion, fails.

If, at any time, the defendants had parted with the scrip, without retaining sufficient of a like issue to satisfy not only the plaintiff but all other principals for whom they were acting, a different question would have arisen. A pledging or any dealing with the scrip for the defendants' benefit and without the plaintiff's knowledge or consent, where, as in this case, the stock had been fully paid for, would have amounted to a conversion, but nothing of that kind took place.

I also think, as held by the trial Judge, "that the dealings of the two sisters were of such a character that transferring stock certificates to one of them, Kate, under such a form as that they could be easily divided between the two sisters, was a sufficient compliance with the duty of the brokers." See *Sutherland* v. *Cox*, 6 O.R. 505; *Ames* v. *Conmee*, 10 O.L.R. 159; S.C., *sub nom. Conmee* v. *Securities Holding Co.*, 38 Can. S.C.R. 601; *Langdon* v. *Waitte*, L.R. 6 Eq. 165; *Le Croy* v. *Eastman*, 10 Mod. 499; Dos Passos, 2nd ed., pp. 250 to 255; *Scott & Horton* v. *Godfrey*, [1901] 2 K.B. 726; *Wilson* v. *Finlay*, [1913] 1 Ch. 247; *Clark* v. *Baillie*, 19 O.R. 545, 20 O.L.R. 611.

To what extent principals may be affected by the custom of brokers, is fully discussed in *Robinson* v. *Mollett*, L.R. 7 H.L. 802.

While I think that, under the circumstances of this particular case, there has been no conversion, and the plaintiff has not been damnified, yet the careless and irregular manner in which the business was conducted has led to this litigation, and ought not to be encouraged.

It is the duty of a broker to keep, and be ready at all times to give, a strict account of his dealings, so as to satisfy a reasonable principal. The manner in which the books were kept and the fact that the numbers of the certificates were

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placed opposite the plaintiff's name, and sales were afterwards made of these numbered certificates, raised a natural but erroneous suspicion on the part of the plaintiff that the defendants had been selling the plaintiff's stock and keeping the proceeds, and had bought in the same number of shares, when the stock had fallen in the market, to meet the plaintiff's demand.

Under all the circumstances of the case, I think there should be no costs of this appeal.

Mulock, C.J.
Leitch, J.

MULOCK, C.J., and LEITCH, J., concurred.

Sutherland, J.

SUTHERLAND, J., also concurred. He was of opinion, for reasons stated by him in writing, that there was either an absence of agreement to keep on hand the identical stock or there was acquiescence on the part of the plaintiff in the defendants dealing with the identical certificates as they did. He was of opinion that the appeal should be dismissed with costs.

Appeal dismissed without costs; SUTHERLAND, J., *dissenting as to costs.*

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June 18.

CAMERON v. SMITH.

Ontario Supreme Court. Trial before Boyd, C. June 18, 1913.

1. LIMITATION OF ACTIONS (§ II B—42)—WHEN STATUTE RUNS—MORTGAGE —DEFAULT IN PAYMENT OF INTEREST—EFFECT OF.

An action to recover money due on a mortgage in statutory form, providing that in default of the payment of the interest the principal shall become payable, is barred, under 10 Edw. VII. ch. 34, sec. 49 (*k*), unless action is brought within ten years from default in the payment of interest, notwithstanding ten years has not elapsed since the principal would have become payable apart from the acceleration clause.

[*McFadden* v. *Brandon*, 8 O.L.R. 610, followed.]

Statement

An action upon a mortgage.

J. E. Thompson, for the plaintiff.

R. J. Slattery, for the defendant.

Boyd, C.

BOYD, C.:—I disposed of this case at the close of the evidence in favour of the plaintiff, but reserved the legal question as to the effect of the Statute of Limitations.

The mortgagee sues to foreclose and to recover money on the covenants. So far as foreclosure is asked, the action is for the recovery of land, and must be brought within ten years after the right of action first accrued: *Heath* v. *Pugh*, 6 Q.B.D. 345.

So far as the recovery of money due on the covenant to pay

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is concerned, the action must also be within ten years after the cause of action arose: 10 Edw. VII. ch. 34, sec. 49 (k). In mortgages made prior to 1894, the period of limitation was longer, but this mortgage is dated in 1901. The statutory form of mortgage is used, and it provides that, in default of payment of interest, the principal shall become payable. The principal of $1,500 was to be paid two years from the date of the mortgage, which would be on the 18th May, 1903; the payment of interest was to be annually, and the first payment was due on the 18th May, 1902, and was not paid, nor has anything been paid on the mortgage.

The action was begun on the 16th July, 1912, over ten years from the first default in payment of interest.

The effect of this acceleration clause on the Statute of Limitations has been considered in *McFadden* v. *Brandon*, 6 O.L.R. 247, and it was held that the cause of action in respect of the whole sum arose on the default respecting payment of the interest, and that the statute began to run upon that first default. This decision of Mr. Justice Street was affirmed by the Court of Appeal; S.C. *McFadden* v. *Brandon*, 8 O.L.R. 610. The reason of the thing is fully discussed by the Court in *Hemp* v. *Garland*, 4 Q.B. 519 (1843), which has been a leading case ever since.

The inaction of the plaintiff for more than ten years since the first default has, therefore (under the statute), deprived him of all remedy upon this mortgage; and the action must be dismissed.

However, as the defendant raised various defences on the facts, which failed, I think that he should pay the costs in proportion; and, to avoid the trouble of apportionment, I would fix the extent of his success as equivalent to one-fifth of the whole, and direct that the defendant pay four-fifths of the plaintiff's costs.

Action dismissed.

JUST v. STEWART.

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June 2.

Manitoba King's Bench, Curran, J. June 2, 1913.

1. LANDLORD AND TENANT (§ II E—37)—LEASE—COVENANTS — BREACH—SUB-LETTING.

Permitting a real estate dealer to use for his business any portion of a leased store building during the day-time, and to display cards in the windows, without paying rent therefor, or having a key to the premises, is not a breach of a covenant against sub-letting, since he was merely a licensee.

2. LANDLORD AND TENANT (§ II B 1—10)—LEASE — COVENANT AGAINST DISPLAY OF SIGNS—BREACH—SIGNS PLACED BEFORE MAKING COVENANT.

A landlord may disentitle himself to take objection, under a tenant's covenant, against the display of projecting or window signs on a de-

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mised building to signs previously put up by the lessee while in possession under a prior tenancy without restrictive covenants, if, at the time of executing the lease containing such covenant, the lessor knew of the display of such signs and made no objection to them.

3. LANDLORD AND TENANT (§ II D—33)—LEASE — COVENANT OF DOUBTFUL MEANING—FORFEITURE NOT DECLARED FOR BREACH OF.

The addition of a public shoe shining business will not be declared a breach of a covenant that demised premises should be used as a "store only," and that no other trade or business should be carried on where, with the consent of the lessor, the lessee conducted a shoe repairing shop on the premises; and a forfeiture of the lease will not be declared under the circumstances, since the true construction of such covenant was doubtful.

Statement

APPLICATION under the Landlords and Tenants Act (Man.) by Just, the landlord, to eviet Stewart, the tenant, on the ground of forfeiture of his lease for breaches of covenant.

The application was dismissed.

E. T. Leech, for plaintiff.

J. J. McCready, for defendant.

Curran, J.

CURRAN, J.:—The lease is in writing and under seal, is dated April 25, 1913, and is for a term of two years and eight days from March 19, 1913. The tenant was in possession for about a month before the lease was signed, which probably accounts for the term commencing on March 19, whereas the lease was not made until April 25 following.

The lease purports to be made in pursuance of the Short Forms Act, and contains the usual statutory covenant on the part of the tenant against assigning or sub-letting without leave, and the following special covenants:—

And that the said lessee shall use and occupy the said premises as a store only, and will not carry on or permit to be carried on any other trade or business;

And, further, that the said lessee shall use no projecting signs but only flat signs or window signs, and then only of such size and design as the lessor may approve of in writing.

The lease contains the usual proviso for re-entry on non-performance of covenants, which is exercisable immediately on default being made.

The landlord claims that the tenant has committed breaches of all three of these covenants, and accordingly, on 9th of May instant, gave him written notice that, on account of such breaches of covenant he declared the term forfeited and demanded possession of the premises. The tenant denies all breaches alleged, and refuses to give up possession, hence this application.

The breach of the covenant against sub-letting is alleged by the landlord to arise in virtue of a sub-letting to a real estate firm of Prior & Hales, of a part of the demised premises without his consent and against his will. He says that the tenant asked his permission for this sub-letting but was refused.

If it was in fact a sub-letting which took place, this would, under the circumstances, doubtless, work a forfeiture of the lease. The demised premises consist of the south half of the main floor of No. 483 Main street in the city of Winnipeg. The store is divided from east to west by a partition down the centre; the entrance is wide and from it doors give access to each of these premises. The landlord, who occupies the north half himself, said that he does not know of any lease to Prior & Hales being made by the tenant; but that they were occupying the demised premises along with the tenant. The tenant denies that he ever leased any portion of the premises to Prior & Hales, but admits that he gave them permission to put their cards in the window and to use any part of the premises any time of the day they wished, but that he has the sole control of the premises in his own hands. There was some evidence that this real estate firm appeared to be doing some business on these premises. But I must hold, upon the evidence, that there was no actual sub-letting in the sense that these people became tenants of any part of the demised premises. They paid no rent, had no key and had not the exclusive use or possession of the whole or any part of the demised premises. They were, in my opinion, simply licensees and not tenants. The tenant retained possession and control of the whole of the premises, and merely permitted this firm to make use of them in conjunction with himself, but without parting with any of his own legal rights to the whole of the premises.

I refer to Woodfall on Landlord and Tenant, 18th ed., 572; *Peebles* v. *Crossthwaite* (1897), 13 T.L.R. 37, 198; *Mashiter* v. *Smith* (1887), 3 T.L.R. 673.

I hold that there has been no breach of the tenant's covenant against assigning or sub-letting entitling the landlord to re-enter and forfeit the lease.

Next, it is claimed that there has been a breach of the covenant as to projecting signs. The evidence is that there is a wooden sign projecting some 10 feet from the building; that there are some 13 cards or flat signs nailed to the front of the building. The landlord says he did not assent to any of these signs being put up, and objects to them. The tenant says, and he is not contradicted in this, that the projecting sign was put up on April 4, and the flat signs on April 15, of course, before the lease was executed. The landlord admits that he knew some of the flat signs had been put up before the lease was granted, but won't say that he knew of the projecting sign. I think he did know. I do not see how he could have avoided seeing it, as it was a most conspicuous object, and I think when he got the tenant to sign the lease he was fully apprised of the situation as to these signs.

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It is argued on behalf of the tenant that the lease must be considered not to have referred to these signs, and I think this contention is reasonable. I hold that the landlord accepted the situation as it then was when he granted the lease, and cannot now be heard to say that what was done before the lease was signed is a breach of this covenant. I think this covenant had no retroactive effect, is only binding on the tenant as to future acts, and that there has been no breach of this covenant proved.

If it were otherwise a great hardship would be entailed on the tenant in forfeiting his lease on such a ground, as I am satisfied that the signs were put up by him in good faith before he knew or could know that this was prohibited. The landlord should, in all honesty, have objected, if he ever intended to object, to these signs, before the lease was executed. As he did not do this and granted the lease with knowledge as to the signs, I think he has clearly waived any right to object now after the fact: *Holman* v. *Knox*, 3 D.L.R. 207.

In my opinion there has been no breach of this covenant by the tenant which would operate as a forfeiture of the lease.

There remains now to be considered the alleged breach of the covenant to use and occupy the premises as a store only, and not to carry on or permit to be carried on any other trade or business.

It is objected for the tenant that this covenant is meaningless. In Bell's Landlord and Tenant, 585, it is laid down:—

> Where a covenant, accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, a forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling the defendant to relief.

The authority for this proposition of law is a case of *McLaren* v. *Kerr*, 39 U.C.R. 507.

I have looked at this case, and the above citation is taken from the text of the judgment of Harrison, C.J., and at the conclusion of the judgment I find this expression:—

> The Courts always lean against forfeitures, and plaintiffs seeking to take advantage of forfeitures, knowing this, should be in such a position as to claim their rights without asking any favour from any Court.

In another case *Doe d. Wyndham* v. *Carew*, 2 Q.B. 317, where a proviso in a lease which it was claimed gave rise to a forfeiture was very involved in its language, and doubtful in its meaning, Lord Denman said, p. 321:—

> I am of opinion that the Court is not bound to find out a meaning for a proviso framed as this is.

Now, is the meaning of the covenant in question obscure or doubtful? It imposes two obligations, one positive to use and occupy the premises as a store only; the other negative not to

carry on or permit to be carried on any other trade or business. The question is, what is meant by the expression "use the premises as a store only?" Again, what trade or business is here meant, in the negative part of the covenant? Is the Court bound to find a meaning for this proviso, if it cannot easily be ascertained from the language used? I will endeavour to do so, although I think I might well have done as the Court did in *Wyndham* v. *Carew*, 2 Q.B. 317, above referred to.

The Century Dictionary gives a variety of definitions of the word "store." Among them I find this:—

A place where goods are kept for sale by either wholesale or retail; a shop, as a book-store, a dry-goods store.

The word seems to be sometimes the equivalent of "shop," which is defined by the same authority as

a booth or store where wares were usually both made and displayed for sale, hence a building or a room or suite of rooms appropriated to the selling of wares at retail; a room or building in which the making, preparing or repairing of any article is carried on, or in which any industry is pursued, as a machine shop, a barber shop, a carpenter shop.

This latter definition, however, refers particularly to the English word "shop" and may not be applicable in this country to the term "store." In Words and Phrases Judicially Defined, vol. 7, 6672, "store" is defined as "any place where goods are sold either by wholesale or retail."

The breaches of this covenant assigned are: (1) that the tenant permitted the business of a real estate agent and of selling real estate to be carried on upon the premises; (2) that he carried on or permitted to be carried on the business of shoe shining on the premises.

As to the first of these alleged breaches the evidence does not bear out the allegation, even if there was a breach of the covenant. The landlord's contention must fail as to this allegation.

The fact of the second is admitted by the tenant; but he denies that it is a breach, and, in any event, claims that it was authorized or permitted by the landlord. I find that the landlord did authorize the tenant to do shoe shining in connection with his repairing work, but that such permission did not go beyond that. At first the tenant restricted this branch of his business to the permission given, but finding it profitable enlarged his operations so as to serve the general public.

Now, it is admitted that the tenant rented the premises for the purpose of doing a boot and shoe repairing business, and that he intended to put in a stock of boots and shoes for sale by retail in the usual way. This latter was not done. The tenant says shoe shining is part and parcel of the business of repairing shoes, and is now generally recognized as a legitimate and usual

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part of such a business in the city of Winnipeg, and justifies his right to do such a business on this ground. I have no other evidence upon the point but that of the tenant.

It seems to me, however, that even the business of shoe repairing does not properly come within the terms of the covenant, having regard to the definitions of the word "store" referred to. I can see no difference in principle between shoe repairing or cobbling, and shoe shining, that is as an occupation. The first may require more skill than the latter, but they are both mechanical occupations wholly unconnected with the selling of goods or merchandise. If cobbling is within the covenant, and so permissible, I think shoe shining is also within it. But, in my opinion, neither are, strictly speaking, within the covenant.

The landlord admits that there is no objection to shoe repairing on the premises, and indeed he could not object to that because the premises were in part rented for this express purpose. He impliedly admits that the covenant does not touch this class of business; to be consistent, how then can he object that the other class of business is prohibited by the covenant?

I think the landlord, who is himself only a lessee of the premises, is influenced to take these proceedings in consequence of the restriction as to shoe shining referred to in the letter, ex. 3, which is the consent of the owner to the sub-lease. It is possible the landlord's own tenancy may be in jeopardy on account of what his tenant is doing upon the premises in this respect, and it is to protect himself from a possible forfeiture of his lease that he takes this action. He must, however, rely upon the provisions of the lease which he himself caused to be prepared with his tenant, and if the covenant in restriction of the business to be carried on upon the premises by the tenant is ineffective for the purpose of preventing the business of shoe shining from being there carried on, it is his own fault.

Upon the whole, I think the landlord has failed to meet the onus undoubtedly upon him to prove a breach of this covenant, and while I think the tenant, having seen the letter, ex. 3, knew that the superior landlord prohibited shoe shining on the premises, still he was not bound by that letter, but only by the terms of his lease. As the true construction of the covenant is doubtful, I feel, but not without some hesitation, that I cannot hold that the tenant has committed the alleged breach.

The landlord has, therefore, in my opinion failed to prove the breaches assigned, and his application must be dismissed with costs.

Application dismissed.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. February 10, 1913.

1. COSTS (§ II—35)—FIXING BY STATUTE—RIGHT OF SOLICITOR TO RECOVER WITHOUT DELIVERY OF BILL OF COSTS.

Where, by private act of Parliament, 2 Geo. V. (Ont.), ch. 125, sec. 6, the costs of the plaintiff in an action against a township were fixed "as between solicitor and client" at $1,800 to be paid by the township, the plaintiff's solicitors acquired no rights from the Act against him as to compensation, and they can maintain an action therefor only after the delivery of a detailed bill of costs as required by the Solicitors Act, R.S.O. 1897, ch. 174.

[*Gundy* v. *Johnston*, 7 D.L.R. 300, affirmed in part; *Jarvis* v. *Great Western R. Co.*, 8 U.C.C.P. 280; *Drew* v. *Clifford*, (1825), 2 C. & P. 69, referred to.]

2. SOLICITORS AND CLIENT (§ II—30)—BILL OF COSTS—SUFFICIENCY OF.

A lump charge by a solicitor in a bill of costs for litigation in a certain matter as settled by agreement between the parties, and as fixed by a private Act of Parliament at a designated sum, is not such a bill of fees, charges and disbursements as is required by sec. 34 of the Solicitor's Act (Ont.), 2 Geo. V. ch. 28.

[*Drew* v. *Clifford* (1825), 2 C. & P. 69; *Philby* v. *Hazle* (1860), 29 L.J.C.P. 370; *Cobbett* v. *Wood*, [1908] 1 K.B. 590, [1908] 2 K.B. 420, referred to; *Williams* v. *Griffith* (1840), 6 M. & W. 32, distinguished.]

3. SOLICITOR AND CLIENT (§ II—30)—BILL OF COSTS—IMPROPER STATEMENT—DISALLOWANCE OF ITEM—RECOVERY ON REMAINDER OF BILL.

The fact that the main item in a solicitor's bill of costs was improperly stated does not prevent him recovering from his client for such items as were properly stated.

[*Haigh* v. *Ousey*, 26 L.J.Q.B. 217; *Pilgrim* v. *Hirchfelt*, 9 L.J.N.S. 288, referred to.]

Statement

APPEAL by plaintiffs from the judgment at trial dismissing an action by solicitors to recover certain solicitor and client costs without the delivery of a bill under the Solicitors Act (Ont.).

The judgment appealed from is reported, *Gundy* v. *Johnston*, 7 D.L.R. 300, 4 O.W.N. 121.

The judgment below was varied.

Argument

M. Wilson, K.C., for the plaintiffs. The plaintiffs, on behalf of the defendant, opposed the passing of the bill to confirm the by-law; but the bill was finally passed, with certain modifications, and became an Act of the Province of Ontario, 2 Geo. V. ch. 125. One of the amendments made to the bill before it became law provided that the Township of Tilbury East (instead of paying to the defendant his party and party costs) should pay the defendant his costs as between solicitor and client. The Township of Tilbury East thus having become parties primarily interested in the amount of these solicitor and client costs, a bill of these costs was delivered by the plaintiffs

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to the solicitor for the township, and, by agreement between the parties, submitted to a special committee of the Legislature for taxation and to fix the amount of these costs, which were fixed by the committee, and the amount so fixed was mentioned in and made payable by the Act. The Legislature refused to allow the defendant anything beyond his solicitor and client costs on the passing of the Act: and it would be manifestly unfair and contrary to established practice and a fraud on the Legislature if, after the amount of the solicitor and client costs had been fixed as between the defendant and the party liable to pay them to him, the defendant should afterwards be permitted to pay his solicitors a smaller amount, and retain the balance for his own use. The amount of the solicitor and client costs, having been fixed by the Legislature, was thereby finally adjudicated upon and became payable; and the enactment that "such costs are hereby fixed at eighteen hundred dollars" was and is binding and conclusive upon all persons whomsoever; and that amount became payable, not as made up of taxable items, but as a fixed amount under the Act. If the plaintiffs had sued for items of solicitor and client costs amounting to a sum in excess of $1,800, the defendant could, under the Act, have resisted payment of any amount over $1,800; and the Act is equally effective to make the defendant liable up to $1,800. Section 6 of the Act fixes the amount of the costs, not only as between the township and the defendant, but as between the plaintiffs and the defendant. At any rate, the plaintiffs, having delivered a bill of costs more than one month previous to action begun, are entitled to recover the amount shewn by the bill to be payable. No answer whatever has been given to the other items of the bill, and no taxation of them has been demanded. It was open to the defendant to obtain an order for taxation during the month after the bill of costs was rendered, or even pending the action. If such an order had been obtained prior to action, the plaintiffs could not commence any action in respect to the matters referred: Con. Rule 1185; the Solicitors Act, 2 Geo. V. ch. 28, sec. 38; *Brock* v. *Bond* (1846), 3 U.C.R. 349; *Armour* v. *Kilmer* (1897), 28 O.R. 618; *Paradis* v. *Bossé* (1892), 21 Can. S.C.R. 419; *Regina* v. *McLeod*, *In re Miller* v. *McLeod*, 10 U.C.R. 588; *Belcourt* v. *Crain*, 22 O.L.R. 591.

M. Houston, for the defendant. The judgment of the learned trial Judge is right, and should be upheld, for the reasons advanced by him. The plaintiffs were employed to go to Toronto and look after the defendant's interests, not their own. If their present contention be correct, they were merely acting in their own interests, although the defendant was liable to pay them, and had employed them to go to Toronto. To allow

that would establish a dangerous precedent; it never was intended by the statute. If the judgment is not upheld, a great injustice will be done to the defendant, as he will be liable for other moneys not provided for in the statute; and the intention of the statute was to give the defendant the $1,800, out of which he would pay the plaintiffs their legitimate costs, and would pay other legitimate costs, and would have other moneys for the payment of which he was liable in connection with the litigation and opposing the bill, which was really the meaning of and the intention of the statute; and the money in the hands of the Township of Tilbury East is his money, and not the plaintiffs' money. The plaintiffs are not parties to the statute, and are not affected, either beneficially or otherwise, by the statute: Maxwell on Statutes, 4th ed., pp. 37, 78, 152, 285, 299; *Western Counties R.W. Co.* v. *Windsor and Annapolis R. W. Co.* (1882), 7 App. Cas. 178, at p. 188; *Commissioner of Public Works (Cape Colony)* v. *Logan*, [1903] A.C. 355; *Re Solicitor*, 21 O.L.R. 255, 257, 22 O.L.R. 30; *Re Solicitor* (1912), 3 O.W.N. 1132; *Re Solicitor*, 14 O.L.R. 464; *Re Mowat*, 17 P.R. 180. As to the small bill of costs, others are liable as well as the defendant, whose names are not shewn on the bill as rendered, and this bill could not be properly taxed without the names of the others liable being known and set out in the bill; and a part of this bill is for work done by the plaintiffs in order to collect from the Township of Tilbury East the $1,800, and against the interest of the defendant; and the work was done for the benefit of the plaintiffs, and not for the benefit of the defendant: *Re Cameron and Lee* (1898), 18 P.R. 176; *In re Allen, Davies* v. *Chatwood* (1879), 11 Ch. D. 244. The defendant is willing to pay the plaintiffs any amount which may justly be due, and has offered to do so, and has urged the plaintiffs to deliver a proper bill of costs, so that he will be able to know how much he should pay them.

Wilson, in reply.

February 10, 1913. MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment of Lennox, J., dated the 15th October, 1912, after the trial before him, sitting without a jury, at Chatham, on the 9th of the same month, by which the plaintiffs' action was dismissed, with "the right to bring another action in respect to their claim or claims for costs against the defendant."

Meredith, C.J.O.

The appellants are a firm of solicitors, who were employed by and acted for the respondent and certain other persons as their solicitors in certain proceedings before the Drainage Referee, and for the respondent only before this Court on an appeal from the Referee, which resulted in a by-law passed by

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the Council of the Township of Tilbury East, under the Drainage Act, being quashed with costs.

After the decision of this Court on the appeal, the corporation of the township applied to the Legislature for an Act confirming the by-law, and the application was opposed by the respondent, who was represented before the Private Bills Committee.

The application resulted in the passing of the Act 2 Geo. V. ch. 125, which confirmed the by-law, and, by its sixth section, provided that "the township shall pay to the plaintiff, James Johnston, his costs, as between solicitor and client, in the litigation over the said by-law, both in the High Court and in the Court of Appeal, and such costs are hereby fixed at eighteen hundred dollars."

The action is brought to recover the costs in respect of the matters mentioned in the section payable by the respondent to the appellants and some other small sums claimed for costs in other matters.

The appellants' contention is, that sec. 6 fixes the amount of the costs, not only as between the corporation of the township and the respondent, but also as between him and them; and that, if that contention cannot prevail, having delivered a bill of their costs more than one month before the commencement of the action, they are entitled to recover the amount shewn by the bill to be payable.

The bill which was delivered, so far as it is material to the present inquiry, contains one item, which is as follows:—

"1912, April 15. Solicitor and client costs in litigation over by-law No. 17 of 1910 of the Township of Tilbury East, concerning the Forbes drainage works, both in the High Court and in the Court of Appeal, as settled by agreement between the parties and fixed by statute of the Province of Ontario, passed on or about April 15, 1912, which costs, as settled and fixed as aforesaid, were by the said statute directed to be paid by the Township of Tilbury East to you .....$1,800.00."

The learned trial Judge was of opinion that neither contention was well-founded; and in that I agree.

Section 6 of the special Act does not—in terms, at all events—purport to do more than fix the amount of the costs with which it deals as between the township and the respondent, and I see no reason why the direction which it contains should have any different operation from that which a similar direction embodied in a judgment of a Court would have, and it could not be seriously contended that such a direction would fix the amount of the costs as between the person to whom they were to be paid and his solicitor.

In *Jarvis* v. *Great Western R. Co.*, 8 U.C.C.P. 280,

Draper, C.J., said (p. 288): "The form of judgment shews that in law the costs are treated as belonging to the client; they are adjudged to him. An execution for them must be in his name. The statutes 23 Hen. VIII. and 4 Jac. I. give them to defendants;" and it was on that ground that it was held in that case that, inasmuch as, by the arrangement between the defendants and their attorney, he was not entitled to look to them for costs incurred in litigation, they were not entitled to tax costs against the defendants, although costs were awarded to them by the judgment.

In *Drew* v. *Clifford* (1825), 2 C. & P. 69, an action had been brought by the defendant against one Austin, and judgment recovered against him with costs, which were taxed at £51.13.0, and a bill was delivered by the attorney for the plaintiff, which contained only the following particulars: "*Austin* v. *Clifford*. An action having been brought, and judgment obtained, the costs of the action were taxed at £51.13s." And it was held by Abbott, C.J., that the plaintiffs could not recover that sum, and he added: "A bill must be delivered with items, if for no other purpose, at least to shew that the party is not charged for the same thing twice over."

If the contention of the appellants is well-founded, no bill was necessary in that case, as the amount had been fixed by the judgment against Austin.

There is, as I have said, nothing in sec. 6 to indicate that the Legislature intended to fix the amount of the costs otherwise than as between the township and the respondent; and it contains nothing which would prevent the appellants from recovering from the respondent a sum in excess of $1,800, if their costs between solicitor and client amounted to more.

There remains to be considered the question whether the bill delivered was a bill of the fees, charges, and disbursements, within the meaning of sec. 34 of the Act respecting Solicitors, 2 Geo. V. ch. 28.

That it was not, is shewn by *Drew* v. *Clifford*, 2 C. & P. 69, already referred to, and by *Philby* v. *Hazle* (1860), 29 L.J.C.P. 370. These cases were decided upon 6 & 7 Vict. ch. 73, sec. 37, the provisions of which are substantially the same as those of secs. 34 to 36, inclusive, of the Ontario Act; and it is clear, therefore, that the action, so far as it is an action for the recovery of the fees, charges, and disbursements of the appellants in the litigation to which sec. 6 refers, is not maintainable.

Williams v. *Griffith* (1840), 6 M. & W. 32, has no application. In order to understand the question that arose and the point that was decided in that case, it is necessary to refer to some of the provisions of 2 Geo. II. ch. 23, which was superseded by 6 & 7 Vict. ch. 73, already referred to. Section 23 of

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the earlier Act, after making provision that no attorney . . . should commence or maintain an action or suit for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after he should have delivered to the party to be charged therewith . . . a bill of such fees, charges, or disbursements . . . made provision for an order being made to refer the bill for taxation, upon the submission of the party chargeable with the bill . . . to pay the whole sum that upon taxation should appear to be due to the attorney. The action was upon an attorneys bill; and, after declaration and before plea entered, the *defendant* applied for an order to refer the bill for taxation without his being required to enter into the usual undertaking, *i.e.*, the undertaking to pay the amount of the bill as taxed. It was contended on the part of the plaintiff that the reference ought not to be made without the undertaking being given; and what was decided by the Court was, that, where a bill contains taxable items, there was authority, after action brought, on the application of the client, to refer it for taxation without requiring an admission of liability on the bill or calling upon the defendant to abandon any defence which he might have at *nisi prius;* and it was pointed out that it would be a hardship on the defendant if it were otherwise, because, according to the practice at *nisi prius*, he would be precluded from disputing the items of the bill there.

In the case of *Watson* v. *Postan* (1832), 2 Cr. & J. 370, referred to in *Williams* v. *Griffith*, 6 M. & W. 32, it had been decided that in an action on an attorney's bill against two defendants, on the application of one of them an order might be made for the taxation of the bill without requiring from the applicant or his attorney an undertaking to pay the costs which should be taxed; and Lord Lyndhurst, C.B., pointed out that the order was not made in pursuance of the Act (2 Geo. II. ch. 23, sec. 23), but under the jurisdiction which the Court had at common law.

It was not until 6 & 7 Vict. ch. 73 was passed that there was any authority in the Court to refer an attorney's bill for taxation on the application of the attorney; but, by sec. 37 of that Act, it was provided that such a reference might be made, either upon the application of the attorney or his executor, administrator, or assignee, *whose bill had been delivered within the month*, "with such directions and subject to such conditions as the Court or Judge making such reference should think proper;" and, by sec. 43, it was provided that payment of the amount certified to be due and directed to be paid on the taxation might be enforced according to the course of the Court in which the reference should be made; and, where the reference was made

by a Court of common law, authority was given to the Court or Judge to order judgment to be entered up for the amount with costs, unless the retainer were disputed.

The provisions of the Solicitors Act of this Province which are relevant to the present inquiry are practically the same as those of the English Act 6 & 7 Vict. ch. 73, which deal with the same matters; secs. 34 to 37, inclusive, of the Ontario Act, being, with some verbal changes, substantially a reproduction of sec. 37 of the English Act, except that under that Act, if the costs as taxed are less by one-sixth than the bill delivered, the costs of the reference are to be paid by the attorney, or, if not less by one-sixth, by the party chargeable, while under the Ontario Act the costs of the reference are in the discretion of the Court or Judge or of the Taxing Officer, subject to appeal.

It is clear from the provisions of these Acts to which I have referred that it is only when a bill has been delivered in accordance with the Act that the order for reference to taxation can be made, on the application of the solicitor; though, where a bill has not been delivered, the Court or Judge may order the delivery of a bill, and when the bill is delivered an order may be made to refer it for taxation; and it would indeed be anomalous if a solicitor, who could not maintain an action for his costs because a sufficient bill had not been delivered, should be in a position to obtain an order for the taxation of the insufficient bill with the right to issue execution for the amount found due to him on taxation.

Besides the item of $1,800, there were in the bill delivered items, sufficiently stated, amounting to $84.68, and the respondents are entitled to recover these items, unless the bill delivered, being insufficient as to the main item, is to be treated as not being a bill within the meaning of the Act.

There was in England a conflict of authority on the question whether, where the bill contained items not properly stated and items which were properly stated, the attorney could recover in an action for any part of the bill—the Courts of Queen's Bench and Common Pleas holding that he could, and the Court of Exchequer that he could not: *Haigh* v. *Ousey* (1857), 26 L.J. Q.B. 217, where the conflicting decisions are referred to; *Pilgrim* v. *Hirchfelt* (1863), 9 L.T.N.S. 288.

I think that we should follow the rule in the Court of Queen's Bench; and that, if the appellants so desire, they should have judgment for the $84.68, but in that case the judgment should be with costs on the Division Court scale, with the right to the respondent to set off the difference between his taxable costs on the Division Court scale and his costs on the High Court scale, and to recover the excess of the latter over the former, and that the appellants should pay the costs of the appeal to this Court.

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If the appellants do not desire to have judgment for the $84.68 on these terms, the appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

MAGEE, J.A.:—The plaintiffs, a firm of solicitors, sue for $1,564.68, the amount of an account for professional services and disbursements rendered to the defendant. One item is stated thus:—

"1912, April 15. Solicitor and client costs in litigation over by-law No. 17 of 1910 of the Township of Tilbury East, concerning the Forbes drainage works, both in the High Court and in the Court of Appeal, as settled by agreement between the parties and fixed by statute of the Province of Ontario, passed on or about April 15, 1912, which costs, as settled and fixed as aforesaid, were by the said statute directed to be paid by the Township of Tilbury to you .....$1,800."

The remainder of the account is made up of detailed items, in all $23.06, for services in 1908 in relation to a drainage by-law (No. 37 of 1907) of the Township of Tilbury East, which was repealed later on in 1908, and detailed items, in all $45.52, in relation to appeals to the Court of Revision and therefrom to the County Court Judge, in 1910, against assessments under a substituted by-law (No. 17 of 1910) and detailed items amounting to $11.10 in relation to collection of the $1,800 from the township, and an item of $5 in relation to an action by the defendant in a Division Court. These items make in all $1,884.68, and the plaintiffs give credit for $320 received.

The defence is, that the plaintiffs did not, before action, deliver a proper bill of their fees, charges, and disbursements, so that the defendant could have it subjected to taxation.

For the plaintiffs it is said that the Act of 1912 referred to in the account (2 Geo. V. ch. 125, sec. 6) fixed the amount of $1,800 not only as between the township and the defendant, but also as between the defendant and themselves, and that the account as rendered is sufficient to entitle them to maintain their action.

I am unable to find in the Act itself, or in the evidence, anything to shew that the Legislature intended to settle or interfere with, or has settled or interfered with, the state of accounts between the defendant and his solicitors, or to do more than settle what amount the Township of Tilbury East should pay to the defendant.

The special Act was being asked for by the township to declare valid a by-law which, at the defendant's instance, had been declared by the Court not to have been legally passed. The

township had been ordered by the Court to pay the costs in the High Court and Court of Appeal, as between party and party; and it was urged by Mr. Gundy, for the defendant, before the legislative committee, that, as a condition of getting the legislation, the township should be required to pay the defendant, not only the costs between party and party, but also his additional costs as between solicitor and client, and including the costs of appearing before the Legislature; and, further, that the amount so to be paid by the township should be fixed by the Act, so that the township should not be entitled to have them taxed. This was opposed by the township, but assented to by the committee; and, at their instance, Mr. Gundy put in before a subcommittee of members of the legal profession a rough draft, previously prepared, of the bill of costs between party and party, to which he added other items; the whole amounting to about $2,500; which, however, included some $225 already paid by the township. What these other items were does not appear; nor does it appear whether or not they included the services now charged for in 1908 and 1909, in relation to the by-law of 1907 and the assessment appeals; but they did include costs and expenses in relation to the opposition to the special Act; and Mr. Gundy admits that no amount was put in by him for the defendant's own witness fees or travelling expenses in the litigation. The sub-committee cut down the amount to $1,800, but what items they reduced or rejected does not appear. The section was then introduced into the special Act directing the township to pay to the defendant "his costs, as between solicitor and client, in the litigation over the said by-law, both in the High Court and in the Court of Appeal, and such costs are hereby fixed at eighteen hundred dollars." Although this mentions only costs in the two Courts, and the plaintiffs' account rendered to the defendant and the statement of claim in this action only mention the same as forming the item of $1,800, it is admitted by the plaintiffs that the $1,800 was intended to include also the costs of the opposition to the special Act as introduced; and that, if the plaintiffs should be paid the amount sued for, they would not have any further claim for services before the Legislature. The plaintiffs further concede that the defendant's fees and expenses as a witness, although not mentioned before the committee, should also be allowed to him. So far as appears, the time and expenses of the defendant's son, who attended with Mr. Gundy before the committee—the defendant being ill—may also have been included by the committee. There does not seem to have been any mention before the committee of the amount, $320, already paid to the plaintiffs by the defendant. The defendant himself was not before the committee, and his son had left the committee before the amount was fixed; and it does

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not appear that the son ever saw the statement of costs submitted to the committee, or had any authority to make a settlement with the plaintiffs. He, indeed, says that he was told by counsel for the defendant that there would probably be allowed an amount which would leave a substantial balance for the defendant. All these things make evident that the idea of making a settlement between the solicitors and the client, was not present to the Legislature or its committee, nor even to the parties.

It is, I think, clear that the solicitors, having put in a claim for nearly $2,300, would not have been bound to accept a less sum from their client merely because the committee did not consider that the township should pay so much. If the solicitor was not bound, the client could not be expected to be. There is nothing in the Act to indicate more than that the amount was fixed as between the township and the defendant, just as is constantly directed, even when costs are taxed, by the formal judgments of the Courts specifying the amount to be paid by one party to the other, leaving the question how much the solicitor is to be paid by the client to be settled between themselves—as between other agents and principals.

The amount not having been settled by the Legislature as between these parties, it follows that the special Act cannot take the place of a written agreement between them as to a fixed amount for remuneration. The plaintiffs were, therefore, not entitled to bring an action without previously delivering a proper bill.

Then, was a bill containing a lump sum—such as this $1,800—a sufficient compliance with the Act which requires a bill of the solicitor's costs and charges to be delivered a month before action? Clearly, upon the authorities, it was not. A solicitor should give such particulars as will enable the client to consider the propriety of the charges made for each item, and the advisability of asking for taxation of the bill, and enable a Taxing Officer to understand what is being charged for.

In *Drew* v. *Clifford*, 2 C. & P. 69, the bill contained in one item the amount of the costs taxed against the opposite party, and it was held not sufficient, and that the action could not succeed.

In *Wilkinson* v. *Smart* (1875), 33 L.T.N.S. 573, which somewhat resembles the present case, the opposite party had undertaken to pay the client a lump sum, which included £25, at which he agreed that the attorney's costs should be taken, and the client had agreed to that settlement. The attorney rendered a bill which included this one lump sum of £25 as the charge for his services, and it was held that he could not succeed as to that item.

In *Pigot* v. *Cadman* (1857), 1 H. & N. 837, the action was for costs between solicitor and client, not taxable between party

and party, and the detailed bill delivered had made no mention of the items taxed against the other party, thereby treating it as a lump sum already paid. It was held that no proper bill had been delivered.

In *Blake* v. *Hummel* (1884), Cab. & Ell. 345, a lump sum of £38.10 was charged for services described generally and relating to a purchase of land, and the solicitor failed as to that item, but was given judgment for other items properly specified.

So in *Waller* v. *Lacy* (1840), 8 Dowl. 563, lump sums of £5.10 and £17.12.1 for separate matters were disallowed, but the solicitor recovered as to items properly set out.

As the action is improperly brought in respect of that item of $1,800, it is not, I think, within the power of the Court, in this proceeding, to maintain the action as to that item by referring it for taxation; and cases which have arisen upon orders for taxation, when charges untaxable in themselves for want of particulars, have in some cases been allowed to be supplemented by itemised bills subsequently delivered, have no application.

But the insufficiency of the bill as to this one large item does not affect the plaintiffs' right to succeed as to the other items sued for. They are for matters entirely independent of the proceedings in the High Court or Court of Appeal or before the Legislature, and are properly enough the subject of separate bills and are separate causes of action. The propriety of these charges has not been attacked, and the plaintiffs should have judgment for these items, amounting to $84.68; but, as they have received much more than this amount, though not appropriated thereto, and the substantial dispute has been on the item of $1,800, the plaintiffs should bear the defendant's costs of action and of this appeal, and the judgment should be without prejudice to the plaintiffs' right to recover in other actions or proceedings for their other services and disbursements, giving credit therein for the sum of $320 received.

HODGINS, J.A.:—No stronger argument can be made for the sufficiency of this bill of costs than what was quoted by Pickford, J., in *Cobbett* v. *Wood*, [1908] 1 K.B. 590, at p. 594: "A client has no ground of objection to a bill who is in possession of all the information that can be reasonably wanted for consulting on taxation" (per Lord Campbell, C.J., in *Cook* v. *Gillard* (1852), 1 E. & B. 26, 37). Hodgins, J.A.

But the Court of Appeal, in *Cobbett* v. *Wood*, [1908] 2 K.B. 420, declined to accept that excuse for the non-delivery of a bill of fees, charges, and expenses under the Solicitors Act, 1843, sec. 37—which is similar in its terms to our Act 2 Geo. V. ch. 28, sec. 34

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The bill of costs in question contains other items, small in amount, but yet conforming to the statutory requirements. While we cannot refer the bill for taxation (as against the client's plea in defence) under the inherent jurisdiction of the Court over its officers: *Williams* v. *Griffith* (1840-42), 6 M. & W. 32, 10 M. & W. 124; we can direct that judgment be entered in favour of the appellants for the amount of the items properly delivered, $84.68, and dismiss the appeal with costs, to be set off against the Division Court costs to which the appellants will be entitled.

In view of the expressions contained in *Metropolitan District R.W. Co.* v. *Sharpe* (1880), 5 App. Cas. 425, I am not satisfied that the provisions in the Act in question, 2 Geo. V. ch. 125, are exactly analogous to a direction contained in a judgment of the Court.

Judgment below varied as stated by MEREDITH, C.J.O.

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April 17.

MANSON v. POLLOCK.

Manitoba King's Bench. Trial before Galt, J. April 17, 1913.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT—NOTICE CONDITION PRECEDENT, WHEN—BONA FIDE DELAY.

Where an agreement for the sale of land stipulates that, in case of default by the vendee, rescission by the vendor is to be effected by a prescribed written notice, such notice is a condition precedent to cancellation by the vendor, and a short delay in making the down payment (pending negotiations for a sale between the same parties of contiguous land to obviate a restrictive building clause in the original agreement) is not ground for rescission, although time was expressly of the essence of the agreement, it appearing that the vendee was always ready and willing to carry out his contract.

[*Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, distinguished; Fry on Specific Performance, 5th ed., 504, 505, 506, specially referred to.]

Statement

THIS action was originally brought for a declaration that the defendant has no interest or estate in certain lands situate in Winnipeg, and the plaintiff claims that a certain caveat registered by the defendant on or about May 16, 1912, against the said lands may be ordered to be vacated.

The action was dismissed and the counterclaim of defendant allowed.

J. B. Coyne, and *H. Mackenzie*, for plaintiff.

A. B. Hudson, and *A. E. Bowles*, for defendant.

Galt, J.

GALT, J.:—The defendant sets up that on or about the 15th day of April, 1912, the plaintiff entered into negotiations with the defendant to sell the lands in question for the sum of $3,768,

payable $1,256 in cash, and $1,256 on April 16, 1913, and $1,256 on April 16, 1914; that a formal agreement of sale was prepared, expressed to be between Julia Rachel Manson, wife of the plaintiff, as vendor (in whose name the property had been placed by the plaintiff) and the defendant as purchaser; that the defendant paid to the plaintiff on account of said purchase money the sum of $25, and has tendered the plaintiff the balance of the cash payment, but the plaintiff has neglected and refused to accept the same, and now repudiates the said agreement of sale.

The plaintiff in his reply alleges that on or about the 15th day of April, 1912, Julia Rachel Manson, his wife, was the registered owner of the lands, and on that date the defendant agreed to purchase from the said Julia Rachel Manson the said land at and for the price of $3,768, upon certain terms and conditions and the defendant paid $25 on account; and the plaintiff further says that on or about the 22nd day of April, 1912, the defendant abandoned his intention and repudiated his contract to purchase the said land and so informed the said Julia Rachel Manson, and the said Julia Rachel Manson acquiesced in said abandonment by the defendant, and on May 15, 1912, transferred the said land to the plaintiff by a transfer under the Real Property Act.

At the trial the plaintiff was allowed to amend his statement of claim by setting up that, under the agreement the sum of $1,256 was payable in cash, and time was of the essence of the agreement, and that such cash payment was a condition precedent to the defendant's rights under said agreement, and that defendant's conduct in not making such payment amounted to a repudiation of the agreement. The plaintiff also sets up that the property was of a speculative character and the defendant's laches has disentitled him to specific performance.

The defendant has amended his statement of defence and alleges that the agreement in question was prepared by the plaintiff's solicitor and duly executed by the plaintiff's wife, and delivered to the defendant's solicitor for execution by the defendant, and was thereupon executed by the defendant, and the defendant further says that within a reasonable time after the making of the said agreement, namely on or about the 14th day of May, 1912, the defendant tendered to the plaintiff the balance of the cash payment, and on or prior to the said date, delivered to the plaintiff the said written agreement duly executed by him; also that the plaintiff never served the defendant with any notice of intention to cancel or repudiate the said agreement on the ground of delay and never complained of any such delay until the trial of this action. The defendant then counterclaims for specific performance of the said agreement.

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The evidence shews that the plaintiff had purchased the property with his own money and simply registered it in his wife's name for his own convenience, so that, for the purposes of this action, he may be regarded as having been the beneficial owner throughout.

The transaction in question arose in the following manner: Early in April, 1912, one W. H. McKinnon, a real estate agent, asked the plaintiff whether the property was for sale, and stated that he had a party who wanted it for a residence. The property was situated at the corner of Ruby and Westminster streets, and consisted of 47 feet frontage or thereabouts. Shortly afterwards the plaintiff told McKinnon he was prepared to sell the land at $80 a foot, and told him to accept a deposit from the purchaser and take it to plaintiff's solicitors, McKenzie & McQueen. The plaintiff then telephoned instructions to his lawyers, and on April 18th, the agreement of sale was executed by Julia Rachel Manson. Meanwhile McKinnon, who states that he was acting as agent for the plaintiff, informed the defendant of the success of his mission and received $25 deposit, which he handed to McKenzie & McQueen. The defendant thereupon, on April 23rd, attended his lawyer, Mr. Bowles, gave him the balance of the cash payment, namely $1,231 to be applied on the purchase and executed the agreement of sale, which had already been executed by the plaintiff's wife.

Up to this point no hitch had occurred, and under ordinary circumstances the cash payment and the agreement bearing defendant's signature would have been handed over to the plaintiff's solicitors. In the events which followed, McKinnon continued to take an interest in the transaction, and the parties have endeavoured to treat his as agent, first for the plaintiff and then for the defendant, as their interests dictated. In my opinion, McKinnon, at first was agent for the plaintiff. Both he and the plaintiff admit this and the plaintiff promised to pay him a commission on the sale. Later on the evidence indicates that McKinnon was acting much more in the interest of the defendant than of the plaintiff. My own view is that as soon as the plaintiff directed McKinnon to take the deposit to Messrs. McKenzie & McQueen, with instructions to the latter to close out the transaction, McKinnon's agency for the plaintiff ceased, and that he had no authority to bind the plaintiff by representations or otherwise after that date. For the same reason, if it can be held (as it very well might) on the evidence, that McKinnon was also acting as agent for the defendant, I think this agency completely terminated when the defendant, to the knowledge of McKinnon, placed himself in the hands of his solicitor, Mr. Bowles, to attend to the transaction.

Before proceeding farther with the evidence, it is advisable

to refer to the terms of the agreement of sale. It is dated April 15, 1912, and expressed to be between Julia Rachel Manson, wife of Lawrence L. Manson, as vendor of the first part, and Alexander Pollock, purchaser of the second part. The material clauses of the agreement are as follows:—

1. The vendor agrees to sell to the purchaser, who agrees to purchase all and singular (the land in question) at and for the sum of thirty-seven hundred and sixty-eight dollars in gold, or its equivalent, to be paid to the vendor at Winnipeg as follows: twelve hundred and fifty-six dollars at or before the execution and delivery of these presents (receipt whereof is hereby acknowledged); twelve hundred and fifty-six dollars on April 16, 1913, and twelve hundred and fifty-six dollars on April 16, 1914, with interest thereon at the rate of six per cent. per annum from the date hereof to be paid on the said sum or so much thereof as shall from time to time remain unpaid, whether before or after the same becomes due; . . . and in the event of default being made in payment of principal, interest, taxes or premiums of insurance or any part thereof, the whole purchase money shall become due and payable.

2. The purchaser covenants with the vendor that he will pay to the said vendor the said sum together with interest thereon on the days and times and in the manner above set forth, and also that he will pay all costs and expenses incurred by the vendor in cancelling or attempting to cancel this agreement under the provisions hereinafter contained.

5. In consideration whereof and on payment of all sums due hereunder as aforesaid the vendor agrees to convey the said lands to the purchaser by a transfer under the Real Property Act, etc.

9. If the purchaser shall fail to make the payments aforesaid, or any of them, at the times above limited or shall fail to carry out in their entirety the conditions of this contract or any of them, in the manner and within the times herein mentioned (the time of payment as aforesaid being the essence of this contract) and such default shall continue for one calendar month, then the vendor shall have the right to mail to the purchaser a notice in writing signed by the vendor, or by the vendor's solicitor, and enclosed in an envelope, post paid, and registered and addressed to the purchaser at Winnipeg to the effect that unless such payment or payments, is or are made or such condition or conditions is or are complied with within one calendar month from the mailing thereof, this contract shall be void, etc.

12. Time shall be in every respect the essence of this agreement.

14. The purchaser further covenants with the vendor that he will not erect upon said land any building for store, shop or work purposes and that he will not erect upon said land any apartment block or similar building, but that any building that he may erect upon said land shall be built and used for strictly private residential purposes only.

According to Mr. Bowles' evidence, after the defendant had executed the agreement on April 23, and had handed the cash payment to Mr. Bowles, a discussion arose between them as to the effect of clause 14 above quoted, with regard to building restrictions. The defendant was desirous of having these restrictions removed or modified if possible. The matter was

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taken up between Mr. Bowles, Mr. McKenzie, and McKinnon. It then appeared that the plaintiff was also the owner of the adjoining 33 feet frontage, and Mr. Bowles suggested that if the plaintiff would sell these 33 feet also (comprising all the plaintiff's holding on the street) the plaintiff could have no object in imposing restrictions at all. Accordingly negotiations were commenced with that object in view. Mr. McKenzie states that these negotiations lasted for a week or ten days.

Meanwhile, McKinnon (who, doubtless, had his commission in view) went to see the plaintiff and endeavoured to persuade him to abandon the restrictions on the 47 feet, or to sell the remaining 33 feet without restrictions on any of the land. The plaintiff, after a day or two's consideration, said he would sell the remaining 33 feet, but would insist on $125 per foot payment for it, which McKinnon thought very excessive. The plaintiff's account of the interview, as set forth in answers 147 to 152 of his examination for discovery, is as follows:—

147. Q. When Mr. McKinnon came to you and said Pollock objected to the restrictions, you did not call the deal off at that time? A. No, he wanted to make a deal of $80 for the whole piece, $80 a foot for the whole piece.

148. Q. That day? A. Yes, that day.

149. Q. And did you say you would consider it? A. I told him I would let him know the next day; no, he asked me to consider it until the next day.

150. Q. And the next day? A. The next day I told him I would not sell any of the property, to call the deal off.

151. Q. Now that is correct? A. Yes.

152. Q. That is the first intimation that you had about Pollock's objections? A. Yes.

The plaintiff's object in calling off the deal during this conversation with McKinnon may, in part at least, be gathered from the following answers in his depositions:—

171. Q. And you say, Mr. Manson, that the fact that the property has increased in value—at least I understand you to say this—might have had something to do with your wanting to close the deal? A. Well, the property was increasing——

172. Q. (Interrupting). And the fact had something to do with your calling the deal off? A. Yes, that had something to do with it, I expect.

This conversation between the plaintiff and McKinnon must have occurred between April 23, when the agreement was executed by the defendant, and April 26, when McKinnon, having been told by the plaintiff that the deal was off, and having failed to obtain from the plaintiff or his wife a return of the $25 deposit, went to the defendant's office and left a cheque for $25 in favour of the defendant, whose good opinion he was anxious to retain.

This return of $25 by McKinnon to the defendant, who at

first refused to receive it, but subsequently accepted the cheque and returned $12.50 of it to McKinnon, has been strongly relied upon by the plaintiff as indicating the final stage of calling off the deal; but it must be borne in mind that the $25 in question was not the deposit, which the plaintiff and his wife insisted on retaining, but was only a similar amount which, for business reasons, McKinnon thought it advisable to pay over to the defendant. It must also be borne in mind that McKinnon's agency for either or both of the parties had terminated several days before. I think, therefore, that this incident cannot be relied upon for the purpose claimed by the plaintiff.

Mr. Bowles appears to have understood from McKinnon that the plaintiff would not waive or modify the existing restrictions, nor would he sell the remaining 33 feet except at an exorbitant figure, and that the plaintiff had called the deal off. At this time Mr. Bowles had in his possession the agreement, signed by both parties, and the money wherewith to make the cash payment. Mr. McKenzie knew that the agreement had been executed by his client, but he was not aware, and did not inquire, whether it had been executed by the . . . defendant. Mr. McKenzie says that when the plaintiff refused to waive the restrictions and also refused to sell the remaining 33 feet at $80 per foot, he communicated by telephone with Mr. Bowles and Bowles said that Pollock would not go on with the transaction and asked McKenzie to return the deposit. Bowles says that when the deal appeared to have been called off he asked McKenzie if he would return the deposit as he wanted the deal closed out or called off. He furthermore says that he has no recollection of telling McKenzie that Pollock had abandoned the deal.

If McKenzie really thought that the deal was at an end, it seems strange that he never made any inquiry as to whether the agreement had or had not been executed by Pollock, and that he never, by telephone or otherwise, demanded the return of the agreement (executed by his own client), which had been delivered to Mr. Bowles. And if Mr. Bowles thought that the agreement respecting the 47 feet had been actually and legally called off by the plaintiff, or in any way repudiated by the defendant, it seems inexplicable that he should have retained, up to the date of trial, the money which had been handed to him by the defendant for the express purpose of making the cash payment. Certainly the defendant himself does not appear to have intended to abandon any rights which he had under the executed agreement, for, as Mr. Bowles says: "I was never authorized by Mr. Pollock to abandon any rights he had under the contract." This statement by Mr. Bowles would, of course, not be conclusive, but it is an important element to be considered when it

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is said that he was abandoning the contract on behalf of the defendant.

In my opinion the transaction was allowed by both parties to drift along at loose ends until the balance of the cash payment was tendered by Mr. Bowles to Mr. McKenzie on May 14. The tender was refused on the ground that the deal was off. No objection was taken either as to the form or amount of the tender.

On May 15, the plaintiff took a conveyance from his wife and registered it, and on May 16 the defendant registered his caveat. The amendment allowed to the plaintiff at the trial is based upon certain points dealt with by the Supreme Court of Canada in the recent case of *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555. Mr. Coyne, on behalf of the plaintiff, naturally relied very strongly upon that case, and has furnished me with a copy of the case on appeal, setting forth the agreement there in question.

There the purchaser (plaintiff) not only neglected, but positively refused to make the cash payment of $10,000 unless the vendors (defendants) would remove, or undertake to have discharged within a reasonable time, a certain mortgage for $15,000 which covered the lands in question and other lands.

It will be noticed, by comparing the terms of the agreement there with the terms of the agreement here, that the mode of payment, the covenant for payment and the stipulation that time is to be of the essence, are almost identical; and also the first portion of the provision as to the vendor's right to terminate the agreement "if the purchaser should fail to make the payments aforesaid or any of them."

The decision arrived at by the Supreme Court of Canada (reversing the judgment of the Supreme Court of Alberta) was that the plaintiff's failure to make the cash payment was a bar to a claim for specific performance or any other relief. The decision itself is clear enough, but the reasons on which it is based present some difficulties. Davies, and Anglin, JJ., hold that the execution of the agreement constituting the relationship of vendor and purchaser was the consideration for the cash payment and in default the vendor's obligation to sell did not become binding. Duff, and Brodeur, JJ., hold that the payment of the $10,000 in cash was a condition precedent to any obligation on vendors to convey or shew a good title. Idington, J., holds that the purchaser's refusal to pay the $10,000 was a repudiation of the agreement. The Chief Justice merely announces the allowance of the appeal without giving any reasons therefor. But all the first four mentioned Judges agree that the covenant for payment and the paragraph of the agreement relating to what should occur in case the purchaser should make

default only apply to the balance of the purchase money and not to the cash payment of $10,000.

As put by Duff, J., "the stipulations presuppose that the first payment has already been made." But suppose that the purchaser, being in default for non-payment of the $10,000, the vendors had been minded to hold the purchaser to his bargain, could they not have sued him for the amount as being part of "the said sum of money above-mentioned" (namely, the total purchase price) which he had covenanted to pay? Or suppose that the vendors were desirous, upon said default, to declare the agreement null and void under the provision which purports to enable them to do so, "if the purchaser should fail to make *the payments aforesaid or any of them* within the times above limited, or fail to carry out in their entirety the conditions and stipulations of this agreement in the manner and within the times before-mentioned." Could they not have successfully contended that the first payment was as much within the provision as any other subsequent payment? The majority of the Judges apparently exclude this construction.

But, after all, the decision itself is based upon widely different facts from those existing here. In *Cushing* v. *Knight*, 6 D. L.R. 820, 46 Can. S.C.R. 555, the respondent (purchaser) intentionally refused to make the first cash payment (having, as he thought, legal grounds for his refusal), notwithstanding a four days' notice given him by the vendors warning him that if the money were not paid they would cancel the agreement. In the present case there was certainly neglect on the part of the purchaser, extending over a period of some three weeks, but part of that time was consumed in negotiations, and there was no refusal to make the payment. The radical difference between neglect and refusal in such a case is shewn in Fry, on Specific Performance, 5th ed., 504, 505, 506.

The agreement remained in force. No claim was made by the plaintiff or his solicitor based on default in making the cash payment and no repudiation by the purchaser was shewn to have taken place. On the contrary, the only repudiation shewn by the evidence was by the plaintiff and his wife in their interview with McKinnon on or about April 25.

It will be remembered that negotiations were pending for either a modification of the existing agreement or for a purchase by the defendant of the additional 33 feet, and no doubt, if this had been secured, a new agreement would have been drawn covering the whole land, omitting any building restrictions, and providing for a cash payment of larger amount.

During the negotiations by the parties, and up to the time when the plaintiff renounced the contract, I do not think the

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defendant can fairly be said to have been in default as regards his cash payment.

The law applicable to this state of affairs is set forth in Leake, on Contracts, 6th ed., 639, as follows:—

> Renunciation of the contract, if not accepted by the other party as a present breach, may be withdrawn at any time before the performance is due; but if not in fact withdrawn it is evidence of continued intention to the same effect. Therefore it operates as a continuing waiver and discharge of conditions precedent to the liability for the performance; such as a demand of performance, the lapse of a reasonable time or an appointed time, the tender of money or goods or the like: citing *Ripley* v. *McClure* (1849), 18 L.J. Ex. 419.

See also *Hochster* v. *De la Tour*, 2 E. & B. 678, and *Braithwaite* v. *Foreign Hardwood Co.*, [1905] 2 K.B. 543.

A further point was taken by the plaintiff, likewise based upon certain observations in *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, that the land in question was of a speculative value, and the delay even of three weeks deprived the defendant of any right to specific performance. This point, like the other, was an afterthought by the plaintiff and was not raised until the trial. Even assuming that the property in question was of a speculative value throughout, I think the plaintiff's renunciation of the contract above-mentioned is an answer to this point also. But there is no evidence that the land was of a speculative value at the date of the agreement, although there is evidence that at a later date, in May, some neighbouring property was quoted in the newspapers at an advanced price.

If, instead of renouncing the contract, the plaintiff had given even one day's notice to the defendant of an intention to cancel the contract unless the cash payment were made, I do not doubt the money would have been paid forthwith. Under the circumstances, I do not think the delay of three weeks was sufficient to bar the defendant's right to specific performance.

I am, therefore, of opinion that the action should be dismissed with costs and the counterclaim allowed with costs.

Action dismissed.

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April 23.

WILLIAMS v. BOX.

Manitoba King's Bench. Trial before Galt, J. April 23, 1913.

1. MORTGAGE (§ I E—22)—RIGHTS AND LIABILITIES OF PARTIES—MORTGAGEE IN POSSESSION—LOSS OF RENT FROM NON-REPAIR.

A mortgagee in possession of mortgaged premises is chargeable with rents which he might have received had he made necessary repairs to the premises from time to time during his possession with money which he did receive as rent, where it appears that when he went into possession the property was in good condition, but during his occupation he allowed it to run down.

[*Williams* v. *Box*, 44 Can. S.C.R. 1, referred to.]

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2. MORTGAGE (§ VI D—86)—ENFORCEMENT — EFFECT OF TENDER — INTEREST.

While, under ordinary circumstances, a mortgagee even if in possession is entitled to his full interest down to the date of payment, he is not entitled to rely upon that rule if he has denied the mortgagor's right to redeem; so on an accounting between a mortgagee in possession who had refused to be redeemed, where it appears that the mortgagee refused to accept a reasonable offer of the mortgagor, that a sum sufficient to satisfy the mortgagee's claim be set aside out of a fund then on deposit in court by reason of an expropriation of the land in question, the mortgagee is properly refused interest at the rate stipulated in the mortgage from the time of such failure to accept the offer and is allowed only the rate of interest accrued upon the fund in court.

[*National Bank of Australasia* v. *United Hand, etc., Co.*, 4 A.C. 391, applied.]

Statement

APPEAL from a report made by the Master on a reference directed by an order herein, dated January 8, 1912, for the purpose of ascertaining the amount, if any, required to be paid by the plaintiff to the defendant in order to redeem the lands in question.

The appeal was allowed.

J. B. Coyne, for the plaintiff.

G. W. Baker, for the defendant.

Galt, J.

GALT, J.:—The evidence adduced by the parties on affidavit is very conflicting, and, in attempting to decide the questions involved, some assistance may be derived from the previous history of this case. The following facts are extracted from the report of the case, *Williams* v. *Box*, 19 Man. L.R. 560. On August 10, 1904, the plaintiff executed a mortgage in favour of one Devine, to secure $2,000 and interest at 8 per cent. On October 30, 1905, the mortgage was transferred to the defendant. A small amount of principal and interest having fallen into arrear, the defendant attempted to sell the property in August, 1907, but failed. He then obtained a final order of foreclosure, and a certificate of title was issued in his name. The first intimation that the plaintiff or her agent had that the property had been foreclosed was when one of the tenants informed her that notice had been given not to pay the rent to her. The plaintiff then took immediate steps to redeem. As soon as she could ascertain the defendant's address she went to see him. He either did not know, or pretended not to know that the mortgage had been foreclosed. The defendant said that he was quite willing to take his money and let her have the property, provided his "partner" was agreeable, but that he would have to consult him before finally deciding. As a matter of fact, his partner was a myth, and he probably told her this falsehood for the purpose of putting her off until he had time to ascertain what right he had to hold the property. The plaintiff was ready and willing to pay the defendant the amount due under the mortgage, in-

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terest and costs. The defendant finally refused to accept it, and this action was begun. The plaintiff acquired the property about the year 1900. It had then only a cottage and a stable upon it. In 1904, she erected a double house at a cost of upwards of $3,000. For a time she occupied the house for the purpose of keeping boarders and roomers, but her health failing, she had to give it up. Afterwards, until foreclosure, the house was occupied by tenants whose rent was her entire source of income. The total amount due under the mortgage was in the neighbourhood of $2,000, and the evidence shewed that the property was worth five or six times the amount against it.

The action resulted in a decision given by the Supreme Court of Canada, *Williams* v. *Box*, 44 Can. S.C.R. 1, in favour of the plaintiff, declaring her entitled to redeem the mortgaged premises upon payment of redemption moneys to be fixed according to the usual practice of the Court of King's Bench for Manitoba.

During the progress of the action the Canadian Northern Railway Company expropriated the mortgaged premises and paid into Court to the credit of the matter between the Canadian Northern Railway Company and John Box and Jane Williams, the Standard Plumbing and Heating Company, Limited; and in the matter of the Railway Act, being ch. 37 of the Revised Statutes of Canada, 1906, the sum of $18,000 together with $186 interest up to December 5, 1911.

After the decision rendered by the Supreme Court of Canada, an order was made by the Chief Justice of this Court on January 8, 1912, reciting the above payments into Court, and that Jane Williams (the plaintiff herein) was entitled to the sum of $11,116.72, less whatever sum may properly be due to John Box (the defendant herein), in respect of his mortgage for $2,000; and ordering, amongst other things, that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for the redemption of the premises in question; and for this purpose that the cause be referred to the Master at Winnipeg; and that the amount, if any, found due from the plaintiff to the defendant should be paid to the defendant on confirmation of the Master's report out of the moneys in Court to the credit of the matter of the Canadian Northern Railway, etc.; and in case any balance should be found by the Master to be due from the defendant to the plaintiff the defendant should pay such balance to the plaintiff forthwith after confirmation of the Master's report; and that the moneys in Court in the above matter should be paid out accordingly. And it was further ordered that the costs of and incidental to the proceedings in the Master's office be reserved. [See *Williams* v. *Box*, 3 D.L.R. 684, 22 Man. L.R. 258, judgment of Manitoba Court of Appeal dismiss-

ing appeal from judgment of Mathers, J., affirming a ruling of the taxing officer.]

On November 30, 1912, the Master made his report finding that there was due from the plaintiff to the defendant in respect of the mortgage the sum of $1,147.34, after making all deductions specified in the order. The Master reported specially at the request of the plaintiff that he had not allowed her anything in respect of her surcharge for additional rents amounting to about $1,500 which the plaintiff claims might have been received if the defendant had expended reasonable sums in repairing the mortgaged premises, the Master holding that the defendant was not bound to apply the rents as received in repairing the premises as such rents were never sufficient to satisfy the arrears of interest accruing from time to time and the sums paid out by the defendant for taxes and insurance premiums. The Master also allowed the defendant interest at 8 per cent on the balances from time to time up to the date of said report, notwithstanding that the money for payment of the defendant's claim was paid into Court by the Canadian Northern Railway Co. on August 2, 1911. Also that before the date of the judgment in the action the solicitors of the plaintiff applied several times by letters which were proved before the Master to the defendant's solicitors for a statement of what they claimed to be due under defendant's mortgage suggesting the possibility of a settlement without the necessity of a reference, to which letters the defendant's solicitors made no written reply, and the plaintiff received no statement.

The plaintiff appeals from the said report in respect of the following matters:—

1. That the learned Master erred in not charging the defendant with rent, amounting to about the sum of $1,500, which the defendant might have received had he made small necessary repairs from time to time with moneys in his hands received from the premises.

2. That the learned Master erred in allowing costs of foreclosure in the land titles office amounting to $36.90, and interest thereon, as the foreclosure was obtained by an untrue affidavit of the defendant.

3. That the learned Master also erred in allowing interest at 8 per cent. upon the balance which he found from time to time owing, as since July, 1911, there has been moneys in Court to pay whatever sum, if any, is owing to the defendant.

In determining the question involved in this protracted litigation the following dates may be noted. On May 18, 1908, the defendant (wrongfully as has been held by the Supreme Court of Canada) obtained his certificate of title. At that date and for some years previously the property on which were built

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two houses, a stable and a shanty, had been rented, the houses each renting at $25 a month, the stable and shanty each at $2 a month, making a total monthly rental of $54. One of the houses was rented to Mrs. Bolton, who had paid her rent in advance to May 28, 1908, and the other to Mrs. Smith, who had paid her rent in advance to June 15, 1908.

On October 15, 1908, the plaintiff's solicitors wrote the defendant's solicitors for a statement of what the defendant claims to be due under his mortgage. To this letter no reply was received.

In April, 1909, the action was tried and final judgment pronounced by the Supreme Court in November, 1910. In July, 1911, the defendant petitioned the Privy Council for leave to appeal, but this was refused and certain costs were awarded to the plaintiff in opposing said petition amounting $228.66.

On August 2, 1911, the plaintiff's solicitors again endeavoured to obtain a statement from the defendant's solicitors as to what they claimed to be due in reference to the mortgage, but received only a verbal answer that they were unable to give any statement. This was followed up by similar letters on August 30 and September 15, but no statement was forthcoming.

At the reference before the Master, the defendant filed affidavits by himself and agents from which I extract the following:—

John Box: On May 18, 1908, I obtained certificate of title in my name to the land referred in this action. I entered into possession of said lands and collected the rents after the date of the issue of the certificate of title. I did not let the houses situate on said lands or collect the rents personally. I employed agents to do so. The agents I employed were Robert H. Metcalfe, George William Baker and John Scaife. When I entered into possession of the said land, the houses were not in a good state of repair and during the time of my possession I was continually troubled by the health authorities of the city of Winnipeg, because of the unsanitary condition of the houses. Shortly after I entered into possession of said land, the Grand Trunk Railway Co. surveyed said land and I believed they were about to take over said land.

Robert H. Metcalfe: I am a real estate and renting agent. During the years 1908 and 1909 I collected rents from the property referred to in this action on behalf of the defendant. During the time I looked after said property it was in very bad repair, and it was almost impossible to get tenants to live in the houses. There were continual complaints from the tenants. The plaster was broken and the houses were generally in a bad state of repair. I am informed, and believe, that the city authorities were continually complaining to the tenants of the unsanitary state of the houses.

In a subsequent affidavit Mr. Metcalfe further says that there is no basement in the houses and no furnace or heating apparatus. The water-pipes are on the surface, and they were

continually freezing during the winter and the houses were empty the greater part of the time. And that he could not secure permanent tenants and the class of tenants he did rent the houses to were of the very poorest class.

The defendant himself, in another affidavit, states that during the winter months while he was in possession of the houses situate on the lands in question they were uninhabitable. There is no basement in the houses and no furnace or heating apparatus. The water-pipes are on the surface and became frozen whenever the cold weather commenced. That the houses were raised on blocks, and that the foundations were loose and naturally they were cold during the winter and the tenants would not live in them, and that during five months of the year the houses were not rentable. He also states that in the summer of 1910 the health authorities of the city of Winnipeg condemned the houses as unsanitary, and put up placards on the houses.

On the other hand the following evidence is given on behalf of the plaintiff:—

Charles Millican says that he collected the rents for Mrs. Williams for the property in question in this action and has knowledge of the matters deposed to; that at the time the defendant served notice upon the plaintiffs to pay rent to him, the houses known as 102 and 104 Bell avenue were rented at $25 per month to Mrs. Smith and Mrs. Bolton respectively. The shanty on the property was rented to John Scaife at $2 per month, and although the stable was not rented at that time it had been, and he believed, could be rented at $2 per month. That the sum of $54 was in his opinion the reasonable monthly rental value of this property from the time that Mr. Box took possession of the property in the month of June, 1908, until the time when the Canadian Northern Railway Co. took possession of the property about the end of August, 1911.

Thomas Anderson Irvine states that he has read the affidavits of John Box and R. H. Metcalfe. That the water-pipes are not on the surface as pleaded in said affidavit; that the water-pipes pass under the houses and go to the centre of the houses and then go upwards one on either side of the centre partition. That there was a shut-off cock six feet below the ground level which could be operated from the ground floor. That there is no reason why the water should ever freeze because it could be turned off from this stop cock and it could never freeze unless the temperature in the houses went down below freezing point. He also says in answer to Mr. Box's statement that the houses were raised on blocks, etc., that as a matter of fact the houses were built with a surface stone foundation completely enclosing the houses. That there was no necessity of putting in a basement or going to any expense of that kind for the purpose of making the houses tenantable at any time.

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Jane Williams the plaintiff says that she occupied house No. 102 from July, 1904, to March, 1906, continuously and No. 104 from July, 1904, to December, 1905. That the water-pipes never froze up during that time nor during her possession of the houses. That the water-pipes were provided with stop and waste cock taps which were placed some six feet below the ground level, so that the water could be turned off and the pipes drained if the houses were unoccupied. That she had her rooms, except those required for her private use, continually occupied, and had no complaints from any of the roomers. And that, until Mr. Box took possession, the houses were kept in good repair.

James Thoms says that he is a builder and valuator, having been engaged in the building trade thirty-six years. That he was instructed to make a valuation of the houses known as Nos. 102 and 104 Bell avenue for the purposes of an arbitration with the Canadian Northern Railway Co.. That he thoroughly and carefully inspected them at that time. That his estimate of the cost of putting the houses into reasonable repair fit for good tenants in the month of August, 1911, would have been from $150 to $200. And that the said houses had a substantial surface stone foundation which was in good repair.

Isabel Smith says that she resided at 102 Bell avenue from February, 1907, to June, 1908, as tenant of Mrs. Jane Williams and was frequently in No. 104 Bell avenue during that time. That during this period there was no trouble with the water-pipes freezing and the houses were kept in good repair.

Zella Lawrence French says that she was tenant of No. 104 Bell avenue from September, 1906, until February 15, 1907. That during this period she had no trouble with water-pipes freezing and the house was kept in good repair.

Joseph Henry Lawrence says that he was tenant of and resided at No. 102 Bell avenue from April, 1906, until December 31, 1906. That during this period there was not at any time trouble through water-pipes freezing and that during that period the house was kept in good repair and was in good repair when the family moved away.

A consideration of the above affidavits satisfies me that up to the time when the defendant took possession in May, 1908, the houses and out-houses were in good, tenantable repair, bringing in a regular monthly rental of $54 or thereabouts.

The defendant has been convicted of falsehood by the learned trial Judge, who very unwillingly gave judgment in his favour on certain points of law which were subsequently reversed by the Supreme Court of Canada.

I am inclined to think that the clue to the defendant's conduct in permitting the buildings to become out of repair is to

be found in the last clause of his affidavit sworn on May 18, 1912, when he says,

shortly after I entered into possession of said land the Grand Trunk Railway Co. surveyed the said land and I believed they were about to take over said land.

The general statements made by his principal collecting agent Robert H. Metcalfe are categorically contradicted by witnesses for the plaintiff after a careful examination of the premises. Mr. Metcalfe states that during the years 1908 and 1909 he collected the rents and that he is informed and believes that the city authorities were continually complaining to the tenants of the unsanitary state of the houses, yet the defendant himself shews that this trouble about sanitation only arose in 1910.

Under the judgment of the Supreme Court of Canada, *Williams* v. *Box*, 44 Can. S.C.R. 1, the defendant, after taking possession under his certificate of title, must be treated as mortgagee in possession. Under ordinary circumstances he would be entitled to repay himself from the rents and profits, the amount due or accruing due upon his mortgage, together with interest at the stipulated rate. On the other hand, he must not overlook the interests of the mortgagor. From the numerous authorities cited by Mr. Coyne, on behalf of the plaintiff, I would specially refer to the following: Halsbury's Laws of England, vol. 21, sec. 364:—

A mortgagee who goes into possession of the mortgaged property, and thereby excludes the mortgagor from control of it, is bound to account to the mortgagor, not only for the rents and profits which he actually receives, but also for the rents and profits which, but for his wilful default or neglect, he might have received. It is based on the principle that, since the property is only a security for the money, the mortgagee must be diligent in realizing the amount due in order that he may restore the property to the mortgagor.

365. When the mortgaged property is let at the time of the mortgagee taking possession, he is charged with the rents at the rate reserved, provided that he could, with due diligence, have recovered them. When the property is not let, he must use due diligence to let it; and, if it remains unlet through his default, he is charged with the rents which ought to have been obtained: see also *Sherwin* v. *Shakspear* (1854), 5 DeG. M. & G. 517, 536; *Kensington* v. *Bouverie*, 7 DeG. M. & G. 134, 157; *Moore* v. *Painter* (1842), 6 Jur. pt. 1, 903.

A mortgagee is not liable for rent while the property, from its ruinous condition or otherwise, is incapable of beneficial occupation: see *Marshall* v. *Cave* (1824), 3 L.J. Ch. 57.

But it is idle for the defendant to contend, on the evidence before me, that when he took possession, the houses, or any of them, were in a ruinous condition. They had been built only four years previously, and were rented by respectable tenants who appeared to be quite satisfied to remain.

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The authority principally relied upon by Mr. Young, on behalf of the defendant, on this branch of the case was *Richards* v. *Morgan* (1753), 4 Younge & Collyer, 570. The report is fragmentary, merely stating:—

> Lord Chancellor said that a mortgagee in possession ought to do such repairs as he can repay by the rents of the estate, if his interest is paid; but he need not re-build or lay out large sums beyond the rent, for that would be to lend more principal money upon, perhaps, a deficient security.

The defendant states in one of his affidavits sworn June 3, that after he obtained his certificate of title he had a contractor look over the houses with the object of putting basements in. He said it would cost $2,000 to put basements in and to make the houses tenantable, and he considered this too much money to spend on the houses. The defendant does not mention who the contractor was, and, of course, he could not be called upon to pay out such a sum as $2,000 to put the premises in repair. But I am satisfied from the other affidavits filed herein that this vague statement was based upon a misapprehension as to the actual state of the premises and as to the amount which might be required to put them in complete repair. A large expenditure would be unjustifiable because it might be unfair to charge the mortgagor with it. A small expenditure for necessary repairs would be a benefit to both the mortgagor and mortgagee.

It is manifest to me that the defendant had in view the expropriation of the property, and he simply determined to spend nothing upon it in the meantime. Yet, even after three years of this neglect, namely, in the month of August, 1911, James Thoms, the builder and valuator, states that the sum requisite for putting the houses into reasonable repair, fit for good tenants would be only from $150 to $200. Probably a very much smaller expenditure than this would have kept the property in good repair if any attempt had been made by the defendant with that object in view.

The tenancy of the stable and the shanty may be said to have been of a more precarious nature, and I think justice will be done by charging the defendant with a rental of $50 per month from the time he took possession down to the time when the Canadian Northern Railway Company expropriated the property; and allowing the defendant, in his account, the sum of $200 to cover all small repairs requisite during defendant's possession.

With regard to the other two branches of the appeal, namely, as to the rate of interest allowed by the learned Master and the costs of foreclosure, under ordinary circumstances, a mortgagee, even in possession, is entitled to the full amount of his interest and costs down to the date of payment. But I cannot believe that a mortgagee who has denied the mortgagor's right

to redeem, and has, by every means in his power prevented the mortgagor from paying him off, is entitled to rely upon the usual rule. The contrary has been held, and the principle explained in *The National Bank of Australasia* v. *United Hand in Hand Co.*, 4 A.C. 391.

It is argued on behalf of the plaintiff that the defendant should be penalized for not responding to the letters requesting a statement of the amount due written by the plaintiff's solicitors on October 15, October 23, and November 1, 1908. At that time, however, the defendant was in possession of a certificate of title and was entitled to claim as owner until the judgment of the Supreme Court of Canada. Even down to August, 1911, when the plaintiff's solicitors again endeavoured, but without success, to obtain a statement from the defendant's solicitors, I do not think the defendant's conduct absolutely precluded his right to interest at the stipulated rate; for no tender was made, nor was any money set apart by the plaintiff for the purpose. But, on August 30, 1911, the plaintiff's solicitors wrote to the defendant's solicitors the following letter:—

> As you are aware, the Canadian Northern Railway Co. is taking all of this land north of the railroad track and has paid into Court the sum of $21,000. The amount of Mr. Box's claim under the mortgage, aside from any deductions, we understand is in the neighbourhood of $2,600. We propose that, out of the moneys deposited in Court by the C.N.R., $3,000 should be transferred to the credit of the action of Williams and Box. This money could remain there until the exact amount payable to Mr. Box has been ascertained.
>
> In the meantime we would like to have a transfer of the land in question in the action of Williams and Box to Mrs. Williams, and a consent to payment out of all the moneys except the $3,000, transferred to the credit of Williams and Box. We are enclosing transfer herewith.

No reply to this letter appears to have been received. I think the offer therein contained was so reasonable that the defendant should certainly have accepted it. The money was in Court, and a sufficient balance over and above the total amount claimed by the defendant would have remained in Court to answer any possible question of interest. Instead of accepting it, the defendant has protracted the litigation and has obstructed the plaintiff by putting her to all the delay and expense possible. The interest allowed to the plaintiff on the moneys in Court is only 3 per cent., and I think it would be inequitable that she should have to pay the defendant 8 per cent. on any portion due to him. Allowing two days for a reply to the above letter of August 30, 1911, I would hold that from and after September 1, 1911, the defendant was only entitled to interest on his claim at the rate of 3 per cent.

The only other item in dispute relates to the costs of the foreclosure proceedings, amounting to $36.90, and interest thereon,

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under which the defendant wrongfully obtained his certificate of title, which have been allowed to the defendant by the learned Master. I think that these costs, having been wrongfully incurred by the defendant, are not properly chargeable against the plaintiff.

I am therefore of opinion that the plaintiff's appeal in respect of the rents and rate of interest and costs of foreclosure should be allowed with costs, and that the account between the parties should be re-adjusted on the basis above set forth in respect of each of said grounds of appeal. The costs in the Master's office having been reserved, will be dealt with on further directions.

Appeal allowed.

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McINNIS FARMS, Limited v. McKENZIE.

Manitoba King's Bench. Trial before Curran, J. April 11, 1913.

1. CONTRACTS (§ I E 5—105)—STATUTE OF FRAUDS—INDEFINITE TERMS OF WRITING.

The Statute of Frauds is not satisfied where the written instrument or correspondence constituting the memorandum required by the statute, though otherwise satisfactory, fails to fix definitely the amounts of the deferred payments on a sale of land or the times when such payments are to be made.

2. CONTRACTS (§ I E 5—103)—STATUTE OF FRAUDS—SIGNATURE BY ONE OF TWO ADMINISTRATORS.

An offer to sell land belonging to the estate of a deceased person is not a sufficient memorandum under the Statute of Frauds where the offer is signed by only one of two of the personal representatives of the deceased.

[*Gibb* v. *McMahon*, 37 Can. S.C.R. 362, applied.]

3. VENDOR AND PURCHASER (§ III—39)—PURCHASER'S DIRECTION TO CONVEY TO THIRD PARTY.

A company has no right to sue on an agreement for the purchase of land where the offer was made to and accepted by someone else, though the offeree, previous to the acceptance of the offer, had requested that the deed be made out in the company's name.

4. EXECUTORS AND ADMINISTRATORS (§ II A 2—40)—POWERS — DISPOSAL OF REAL PROPERTY.

Under the provisions of the Devolution of Estates Act (Man.), as amended by sec. 2, of ch. 21 of 5 and 6 Edw. VII., Statutes of 1906 (Man.), a sale of land of a decedent cannot be made by the administrators without the approval of the Registrar-General where there are no debts and there are adult heirs who do not concur in the sale, or where there are infants interested.

5. CONTRACTS (§ I E 6—115)—STATUTE OF FRAUDS—ACTS OF PART PERFORMANCE.

Acts of part performance in order to be effective to take a contract for the sale of land out of the operation of the Statute of Frauds, must be done by the person asserting the contract with the knowledge of the person sought to be charged that the acts are being done and are so done on the faith of the contract; and such acts must be consistent with the contract alleged, and performed on the faith thereof.

[Fry on Specific Performance, 5th ed., sec. 588, specially referred to, and *Maddison* v. *Alderson*, 8 A.C. 467, referred to.]

This action was brought for specific performance of an alleged agreement for the sale by the defendants Margaret E. McKenzie and John McLean, as the administrators of Alexander McLean, deceased, to the plaintiff, of the east half of sec. 9 and the west half of sec. 10, both in township 13, range 8, west of the principal meridian in the Province of Manitoba.

The action was dismissed.

D. A. Stacpoole, and *L. J. Elliott*, for the plaintiffs.
E. Anderson, K.C., and *E. Frith*, for the defendants.

Curran, J.

Curran, J.:—The agreement is contained in certain correspondence between the defendant Margaret E. McKenzie and one Donald McInnis, carried on between March 3, 1911, and April 17, 1912.

The defendants are sued as administrators of Alexander McLean, deceased, but no formal proof of their representative capacity has been adduced.

The defendants deny the alleged agreement, and plead the Statute of Frauds.

The defendant John McLean was called by the plaintiff, and swore that his co-defendant, Margaret E. McKenzie, and her daughter, Ernestine McLean, were and are the sole beneficial owners of the land in question which had belonged to Alexander McLean, deceased. The defendant Margaret E. McKenzie is the widow and Ernestine McLean is the daughter of the said Alexander McLean, deceased. The female defendant is now the wife of Adam McKenzie.

The letters relied on by the plaintiff as constituting the contract of sale were admitted by the defendants and put in evidence as exhibits 1, 2, 4 and 5. Exhibit 1 is a letter dated January 4, 1912, from Donald McInnis to the female defendant; exhibit 2 is a letter, prior in point of date to exhibit 1, and is dated March 3, 1911, from the female defendant to Donald McInnis; exhibit 4 is a letter, dated March 15th, no year being given, from the female defendant to Donald McInnis, supposed to be a reply to exhibit 1, and I think I may fairly assume that it is a reply to this exhibit; exhibit 5 is an admitted copy of a letter, dated April 17, 1912, from the plaintiff's solicitors to the female defendant, and which the plaintiff relies upon as an acceptance of the alleged offer to sell at the price and upon the terms contained in exhibit 4. The subsequent correspondence is all between solicitors and relates to the formalities of completing the alleged sale.

It was admitted, subject to objection of defendant's counsel, that it was not evidence for or against anyone, and I am inclined to think that, under the circumstances, the objection was well taken; but in the view I take of the case it is not necessary for

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me to look at these letters, and I therefore disregard them in forming my conclusion.

The plaintiff is a company incorporated under the laws of Manitoba; but no evidence was given of the purposes, objects or powers of the company. Its title, however, indicates that it is a farming corporation, and I think I am justified in inferring that such a contract as the one in question, if made with the plaintiff company, was one that was fairly within its corporate powers, particularly as no defence is raised suggesting that such a transaction was *ultra vires*. But was the alleged agreement made with the plaintiff company, or even on its behalf?

Let us examine the letters. The first in point of date is exhibit 2, a letter from the female defendant to D. McInnis, dated March 3, 1911. The only material part of this letter, if indeed it can be said to be either material or relevant, is as follows:—

Re selling the Macdonald farm, I have written my daughter *re* same. She is satisfied with whatever I think best, and Mr. McKenzie has told you that as far as I was concerned that I was. Kindly let me know what amount you would pay down.

This letter apparently relates to the land in question, and I think refers to some negotiations in the fall of 1910 between McInnis and Adam McKenzie, the husband of the female defendant (see part of McInnis' examination for discovery, put in as part of plaintiff's case by consent, page 5), and which negotiations did not result in anything.

The next letter is exhibit 1, from McInnis to the female defendant, and is as follows:—

Toronto, Jan. 4, 1912.

Mrs. A. McKenzie,
Camaguay, Cuba.

Dear Mrs. McKenzie,—I have talked the matter of buying the farm at Macdonald, Man., over with my partners. We have decided we would like to buy it and we would pay one-quarter down, $6,000, and you make the deed over to us in the name of the McInnis Farms, Ltd., and we will give you a mortgage on the farm for the balance, $18,000, at 6% interest. We to make such payments as we can each year, or about $2,500 per year until paid off, when we will receive the deed. We could not see our way for much larger cash outlay owing to the land being dirty

Wishing to hear from you as soon as possible and trusting you are well. Write to

Yours truly,

D. McINNIS,
34 Dundonald St., Toronto, Ont.

To this letter the female defendant replied, apparently by exhibit 4, which is as follows:—

D. McInnis, Esq.,

Macdonald, Man.

Dear Sir,—In answer to your letter about buying McLean farm, I

wish to tell you that we will sell it for $24,000, one third cash and the balance to be paid out of the crops as you suggest, at 7% interest.

Sincerely yours,

Margaret E. McKenzie.

March 15th.

Le Pas,

Camaguay, Cuba.

On April 17, 1912, this offer was accepted in terms by the letter of which exhibit 5 is a copy, and is as follows:—

April 17, 1912.

Margaret E. McKenzie,

Le Pas, Camaguay, Cuba, W.I.

Dear Madam,—On behalf of D. McInnis, we beg to state that he accepts your offer contained in your letter of March 15, 1912, to sell the McLean farm, namely, the east half of section 9 and the west half of section 10 in township 13, and range 8, west of the first meridian, in the Province of Manitoba, for the sum of $24,000, one-third cash and the balance to be paid out of the crop from the farm at the rate of about $2,500 a year, with interest at 7%.

We understand that Mr. Edward Anderson is acting as solicitor for the estate. We have therefore communicated with Mr. Anderson, and have asked him to take the matter up for the estate in order that it may be closed out. You will no doubt hear from Mr. Anderson.

Yours truly,

Sharpe, Stacpoole, Elliott & Montague.

There was no answer to this letter from the female defendant and the subsequent correspondence, as before indicated, was wholly between the solicitors and relates to matters of title and the conveyances necessary for carrying out the proposed sale. It appears that deeds were prepared by Mr. Anderson, acting for the estate, and a mortgage back by the plaintiff's solicitors. The deeds were sent by Mr. Anderson to the female defendant to her Cuban address and returned by her husband, Adam McKenzie, unexecuted by her, as she had left there for Manitoba.

There were no personal interviews with the female defendant, and admittedly McInnis never discussed the question of the purchase with the male defendant, who has not signed anything in the way of letters, agreement or deed, in connection with the alleged purchase. Whatever information he had about the alleged sale was derived from McInnis and Mr. Anderson, and Mr. Anderson's knowledge was seemingly derived from the same source, McInnis.

The female defendant and her daughter, Ernestine McLean, returned from Cuba some time in the summer or fall of 1912, and in October of that year the daughter, in the presence of her mother, the female defendant, instructed defendant McLean not to sign the deeds of the farm, as she was not satisfied with the proposed sale, and for this reason the transaction was not carried out.

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I do not think the plaintiff has made out an agreement in writing for the sale of the lands in question sufficient to satisfy the Statute of Frauds, and upon which the personal representatives of the estate of the deceased Alexander McLean can be charged. These representatives are the only persons who could legally sell or agree to sell these lands. The letters in question at most establish a contract between the female defendant personally and Donald McInnis personally; but not a contract in form sufficient to satisfy the Statute of Frauds, because such letters do not fix definitely the amounts of the deferred payments, nor the times when such payments were to be made. These are material terms of the agreement, which must be definitely settled and stated in the written instrument or correspondence which constitutes the memorandum required by the Statute of Frauds. Again, the offer to sell, exhibit 4, is not signed by a person who had the sole legal right to sell the land. To be binding upon the estate, this offer should have been signed by both of the personal representatives of the deceased Alexander McLean. It is signed by one only, and is therefore non-enforceable against the estate: *Gibb* v. *McMahon*, 9 O.L.R. 522, affirmed 37 Can. S.C.R. 362.

Again, the acceptance, exhibit 5, is not that of the plaintiff company or on its behalf, but is an acceptance on behalf of D. McInnis of an offer to sell, made to him personally by the female defendant. The offer was not made to the plaintiff company nor accepted by it. The plaintiff company is in no way obligated by or concerned in the proposals made and accepted by McInnis further than may be inferred from his request in exhibit 1 to have the conveyance made in its name.

The defendants furthermore rely upon the provisions of the Devolution of Estates Act, as amended by sec. 2 of ch. 21, of 5 and 6 Edw. VII. Statutes of 1906. I read this section as limiting the power of administrators in whom land of a deceased person is vested to sell when there are no debts and there are adult heirs who do not concur in the sale, or where there are infants interested. Here there is either an infant or a non-concurring adult interested, Ernestine McLean. If, under these circumstances, both the administrators had made a sale, such sale would not, by the terms of this enactment, be valid unless made with the approval of the Registrar-General, which it is admitted was not obtained.

The plaintiff relied upon certain acts of part performance as taking the case out of the statute. It appears that Donald McInnis had been tenant of the lands in question under a written lease, exhibit 21, for one year from November 1, 1909, to November 1, 1910; that he continued as such tenant for the next succeeding year under an arrangement with the landlord, and was still in possession as tenant when the negotiations for purchase

took place. The improvements were made and done by Donald McInnis in 1912, at what dates does not appear. He swears that they were done on the condition that "we (the company) were purchasing the farm," and that they would not have been done if there had not been a purchase of the land.

This is not enough. He admits that the female defendant had no notice or knowledge of these improvements, and the defendant McLean swears he did not know of them, and he is not contradicted upon this point. Acts of part performance must in all cases be done by the person asserting the contract with the knowledge of the person sought to be charged, that the acts are being done and are being done on the faith of the contract: Fry on Specific Performance, sec. 588. Again, to make the acts of part performance effective to take the contract out of the Statute of Frauds, they must be consistent with the contract alleged, and also such as cannot be referred to any other title than a contract, nor have been done with any other view or design than to perform a contract: Fry on Specific Performance, 5th ed., sec. 584; *Maddison* v. *Alderson*, 8 A.C. 467, at 479 and 480.

This statement of the law assumes the existence of a previous contract, and that the acts of part performance were done solely with reference to that contract and with the knowledge of the party sought to be charged. I cannot find that such was the case here. The acts relied on were done without the knowledge of the defendants. There was no previous contract or agreement between the plaintiff and defendants to which these acts could be referable. The only transaction in the nature of a contract of sale proved was that contained in the correspondence before referred to, and this at most established an attempted sale by one of two administrators to D. McInnis personally. The plaintiff company has not established an enforceable contract of sale upon which the personal representatives of Alexander McLean, deceased, can be held or charged, and must fail in their action.

There will be judgment dismissing the plaintiff's action with costs, which will include the costs of any examinations for discovery.

Action dismissed.

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Re PHILLIPPS AND WHITLA.
(Decision No. 4.)

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. April 14, 1913.

1. SOLICITORS (§ II C—33)—SETTLEMENT NEGOTIATIONS—REMUNERATION.

In the taxation of a bill of solicitor and client for effecting a settlement of matters in litigation, and conducting such litigation, the taxing officer has a wide discretion as to the amount to be allowed to the solicitor as a "fee on settlement," and, in determining the amount of that fee, he should take into account all of the facts and circumstances, the amount involved in the litigation, the result achieved, the time spent in the negotiations, etc., but the *quantum* should be fixed in accordance with the principles of the tariff promulgated under the King's Bench Act, and not upon the basis of a percentage in the absence of an express contract for a commission even if the latter be permissible under the Legal Profession Act, R.S.M. 1902, ch. 95, sec. 65, to cover such services.

[*Re Phillipps and Whitla* (No. 3), 9 D.L.R. 79, reversed; *Re Johnston*, 3 O.L.R. 1, and *Re Attorneys*, 26 U.C.C.P. 495, distinguished.]

Statement

APPEAL from decision of Metcalfe, J., *Re Phillipps and Whitla* (No. 3), 9 D.L.R. 79.

The appeal was allowed, HAGGART, J.A., dissenting.

A. B. Hudson, for the solicitors.

G. W. Jameson, for the client.

Howell, C.J.M.

HOWELL, C.J.M.:—The bill of costs in this matter as taxed is for a suit which proceeded as far as statement of claim, statement of defence and order for production.

The bill may be divided into three parts, first, up to negotiations for settlement, taxed at $435.07, a very few dollars of which is for disbursements. This includes large counsel fees for advising before action is begun. A counsel fee of $20 on statement of claim is included, and for receiving or writing seven letters $100 is taxed. The second part is for negotiating settlement, which was taxed at $3,500. The third part is for charges carrying out the settlement by various conveyancing charges, negotiating a loan, letters and attendances, taxed at $409.43. The total disbursements in the whole bill of costs is $34.

From my knowledge of the tariff and of professional charges I would think that the taxing master, as to the first and third divisions of the bill has been excessively liberal—for instance, he allowed the sum of $315 for negotiating a loan after settlement had been agreed upon; but as this and other items which seem to me unusually large were not opposed in the appeal, they need not be further considered, except that they should be taken into account in considering the real point in dispute.

The second division of the bill is the item of $3,500, taxed

and allowed as a fee or allowance on settlement of the suit. The solicitors were fully armed for this settlement by having already charged liberally for investigating the law and the facts and they have set forth in the bill minutely what they did by way of work in arriving at this settlement, and they should be paid for this according to the tariff. I am a great believer in settling suits, and I think this should be encouraged, for justice is more often thereby done, and the fees allowed therefor should be liberal, and I think something in the nature of counsel fees in large matters should be allowed. If the matters at stake are large, the solicitors would probably take greater care and have more anxiety and should be allowed accordingly. The solicitors, however, are mere employees to be paid for their work, and there is no magic about it. They must be paid according to the tariff. When they have taken proceedings to save costs or compromise actions, the Master is to make an "allowance" for this work; but it must be on the principles of the tariff. If the cause had been taken down to trial, with preliminary examinations, subpœnas, briefs, consultations and a long, anxious and weary trial, the solicitors at the end of it, even if they had acted as counsel and entitled to all the fees, could not, it seems to me, have taxed as large a bill as the one now under discussion.

I think the Master should reconsider this one item in the bill of costs, which, to my mind, is altogether excessive, and should fix it on the principles of the tariff, and should, in doing this, consider also the amount already allowed for the other services set forth in the bill of costs.

The judgment of Mr. Justice Metcalfe is reversed with costs, this appeal is allowed with costs, and the matter is referred back to the Taxing Master to reconsider the fee of $3,500 taxed and allowed by him, and to fix the fee or allowance for settlement.

Perdue, J.A.

PERDUE, J.A.:—The main question that arose in this matter was settled by the judgment of Robson, J., a judgment with which I fully concur. The bill as rendered in the first place consisted of one item: "Fee on settlement, $9,500." An order had been obtained on *præcipe* for the taxation of the bill. Both the client and the solicitors attended on the taxation and neither party took any objection to the validity of the order or to the jurisdiction of the taxing officer. The taxing officer allowed the solicitors, as remuneration for their services, five per cent. on the estimated value of the property recovered. From this an appeal was taken to Robson, J., who held that the above method of arriving at the amount to be allowed to the solicitors was not authorized. The bill was referred back and the solicitors were given liberty to deliver an amended itemized bill.

Accordingly an itemized bill was delivered. This bill has

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been taxed and only one item was disputed on the appeal to this Court. That item was the fee allowed upon the settlement of the suit of McGibbon, the client, against Messrs. Oldfield, Kirby & Gardner. In making the charge there was a lengthy *précis* of the conferences, negotiations, attendances, etc., by the solicitors extending over a period of more than a month while the settlement was being discussed and brought to a conclusion. It was regarded as one item by the parties and was taxed as a fee on settlement which would include all the work of the solicitors during the month or so they were engaged in effecting the settlement. I see no reason why a separate charge should be made for each conference or attendance while they were so engaged. The taxing officer could take into account, as no doubt he did, all the work done, the time spent and the skill exercised in effecting the settlement; and while arriving at the amount of the fee, he could look at the summary of the work accompanying the charge in order to estimate the volume of the work done and the time spent upon it.

The fee on settlement was charged at $8,480, and the taxing officer allowed $3,500. Upon appeal Metcalfe, J., said, in giving judgment: "I cannot find that the sum allowed is either exorbitant or so excessive as to justify my interference." He therefore dismissed the appeal with costs.

The item in the tariff relating to fee on settlement, referred to by Robson, J., in his judgment, gives the taxing officer the very widest discretion as to the amount to be allowed, subject, of course, to appeal. In arriving at the quantum to be taxed on such item, the taxing officer may well take into account the amount involved, the time expended, the skill exercised in the negotiations, and the success achieved. In the present case the client obtained everything he sought to recover by the suit. The solicitors are to be credited with having conducted the litigation and the negotiations for settlement with great professional skill and business capacity, and with having been completely successful in their efforts. The taxing officer should, therefore, allow them a fee which would, in his judgment and discretion, be commensurate with the services rendered. But, taking into account everything that should be considered, has he exercised a proper discretion in allowing so large a sum as $3,500 in respect of this one item? This charge, I find, covers conferences, consultations, correspondence and advice extending over a period from 18th October to 24th November. Something was done in connection with the settlement on twenty days out of that period, but on several of these merely a letter was written or a communication from the client read and considered.

If the action had been proceeded with in the ordinary way down to trial and judgment, without any settlement having been proposed or considered, and the client had been completely

successful, is it reasonably probable that the solicitor and client bill in the suit, from instructions to trial and judgment and including counsel fees, would have been taxed at as much as the single item that has been allowed as a fee on settlement? We must bear in mind that there was no special contract made, as the statute permits, between the solicitors and the client, and that all question as to remuneration by way of percentage on amount recovered has been eliminated by the judgment of Robson, J., which is binding upon the parties. The taxing officer should allow, under this item, only the amount which the solicitors' services in respect of the settlement were reasonably worth, taking all the circumstances into consideration, but bearing in mind that in the rest of the bill liberal remuneration has been allowed for every other service performed by the solicitors in connection with the suit.

Cases such as *Re Johnston*, 3 O.L.R. 1, and *Re Attorneys*, 26 U.C.C.P. 495, do not affect the question under consideration in this appeal. They referred to services performed in connection with matters not in actual litigation and in respect of which there was no tariff provided. The "fee on settlement" in this bill of costs covers the compromise of a suit in actual litigation and is an item specified in the tariff.

I think the bill should be referred back to the taxing officer in respect of this item only, and that he should reduce it to such an amount as should reasonably be allowed, taking into account all the facts and circumstances, the amount involved, the result achieved, the time spent in the negotiations, etc. At the same time the taxing officer should bear in mind that he is taxing an item in a bill of costs relating to litigation, and that the quantum should be fixed in accordance with the intention of the tariff. The amount to be allowed as a fee on settlement should be in some measure commensurate with what is usually taxed in respect of items of similar or greater importance, such as counsel fees, having regard to the circumstances to which I have above referred.

Cameron, J.A.

CAMERON, J.A.:—This appeal arises out of a bill of costs rendered by the solicitors to their client, such costs having been incurred in and incidental to an action brought against the parties defendant to set aside a sale of certain land in Winnipeg. This action proceeded as far as the pleadings and an order for production, and was then compromised, the defendants conceding the plaintiff's claim and re-conveying the property, each side bearing their own costs.

In the first instance a bill was rendered containing items of disbursements which were not disputed, and an additional item: "Fee on settlement, $9,500." On taxation this was reduced to $7,976.44, being at the rate of 5% on the difference between the

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amount of the sale and the value of the property as estimated by the client. This taxation was reviewed on appeal by Mr. Justice Robson, who held that the method applied by the taxing officer was unauthorized, but gave liberty to the solicitors to deliver an amended itemized bill.

Thereupon the bill now in question was delivered. Objection was taken on taxation mainly to two of the items: that of $255 for searching the titles to properties adjacent to that in question, in which certain of the defendants had been interested; and the other of "Fee on settlement as per negotiations, October 18 to November 24, $8,480." This item is preceded by a series of statements as to interviews, consultations, etc., with reference to the settlement ultimately carried out, extending from October 18 to November 24. In respect of these, charges are not made, it being indicated that they should be considered as contained in the charge of $8,480.

The item of $255 was reduced by the taxing officer to $153, and that of $8,480 was reduced to $3,500.

From this taxation the client appealed to Mr. Justice Metcalfe, who refused to interfere and dismissed the appeal with costs. It is from this order of Mr. Justice Metcalfe that the present appeal is taken.

I take it that Mr. Justice Robson is unquestionably sound in his view that, unless there is a contract between a solicitor and client for a percentage under sec. 65, R.S.M. ch. 95, the tariff promulgated under the King's Bench Act provides us with the only measure of a solicitor's remuneration for litigious business. The Legislature has expressly provided that a solicitor may make a contract with his client for remuneration "in lieu of or in addition to the costs which by any tariff in force are allowed." Such remuneration may be a portion of the proceeds of the subject-matter of the action or "in the way of commission or percentage on the amount recovered . . . or on the value of the property" in question in any action (sec. 65, ch. 95, R.S.M.) All of which enabling provisions negative the proposition or contention that the solicitor, in the absence of a contract, can recover from the client for charges based on the measure authorized for the first time by the above section.

Is that not precisely what the solicitors are doing here? It is true that they have detailed at length particulars of interviews and consultations and correspondence. But that does not affect the consideration that the charge here made is, not in form, but in substance, the same as that allowed by the taxing officer on the first taxation. I do not mean, of course, that the amounts are the same, but the basis upon which the charge is constructed is substantially the same in one case as the other. That is to say, the solicitors in making the charge, though not formally adopting a percentage basis, are doing so in reality.

The amount of the charge clearly bears a relation to the amount apparently saved to the client by the institution of the action; it is because the value of the property recovered is large that the fee charged is of such commanding proportions. This has, it is true, been reduced by the taxing officer, but even when so reduced remains a charge based on the value of the property, is therefore fixed on a commission or percentage basis, and consequently not authorized by law.

But the tariff of fees now in force does make provision for a charge for compromise of action. "When it is proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance to be made therefor, in the discretion of the taxing officer." How is the word "allowance" to be interpreted? Clearly I should say by reference to the other items found in the published tariff. The taxing officer is to make an allowance in such cases in analogy to those allowable under the fixed items of the tariff, and his discretion is to be exercised with respect thereto as in the cases where the amounts are expressly stated. Having this in view, and examining the tariff throughout, I can see nothing that authorizes the taxation of such an allowance as $3,500. Supposing there had been inserted opposite the tariff item above quoted as taxable the sum of $50, an amount larger than any other that appears in the tariff, I would say that the charge of $3,500 allowed is so disproportionate as to be manifestly different in kind from that contemplated by the tariff, and therefore not within the limits of items taxable in litigious business as between solicitor and client. The result follows that, if solicitors wish to take advantage of the provisions of sec. 65, they must do so, directly, by express contract, and that they cannot do so, indirectly, by framing their charges on the veiled assumption that the section applies whether there be a contract or not. In the absence of an express contract the solicitors are left to their strict rights.

This conclusion is in accord with the considered judgment of Mr. Justice Robson, which has not, as I see it, been strictly followed by the solicitors or by the taxing officer. It does not seem to me that the bill (on examination of the items thereof in dispute) is made up as he directed and intended. But it would be of no advantage to require the solicitors to furnish a new bill.

No authority in the English or Ontario Courts has been quoted to us to justify the charge objected to, and I do not consider that the authorities of the Courts of the United States are of assistance.

Mr. Justice Metcalfe in his judgment considered that *Re Johnston*, 3 O.L.R. 1, applies, and that a lump sum by way of *quantum meruit* could properly be allowed. But Mr. Justice Robson points out a material distinction which more fully appears

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in *Re Richardson*, 3 Ch. Ch.R. 144. In that case the solicitor became an agent for the sale of lands by virtue of a power of attorney. The present Chancellor of Ontario, then Master-in-Ordinary, held that commissions charged as part of a bill were taxable. He quotes with approval the following from Pulling on Attorneys:—

It comes within the legitimate and peculiar province of attorneys and solicitors at the present day to draw and prepare agreements, wills, deeds, settlements, securities and documents, and also to conduct negotiations, procure and solicit loans, superintend the management of and the letting, purchasing and selling of property, estates and annuities, to collect and receive rents, debts, etc., invest and dispose of moneys, and find sufficient securities for such purposes, etc., etc., thus acting generally in the distinct characters of procurators, negotiators, conveyancers, confidential advisers, agents, stewards, receivers, collectors, and scriveners.

Clearly the commissions on sales there claimed came within the limitations above specified by Pulling. And the Master found there existed a usage in Ontario, as in England, that an agent, whether solicitor or not, selling lands and collecting proceeds, should be paid by commission upon prices obtained and moneys remitted.

In *Re Richardson*, 3 Ch. Ch.R. 144, was followed by *Re Attorney*, 26 U.C.C.P. 495, where a commission was allowed on moneys paid out by a solicitor in the purchase of lands. In *Re Johnston, supra*, a solicitor was allowed a lump sum of $3,200 for the collection of $70,000 from nine insurance companies.

The distinction between these cases and that now before us is apparent and is pointed out by Mr. Justice Robson, and that is that a percentage basis may be applied in such cases as the sale of property and the receiving and investing or otherwise disbursing moneys, but it by no means follows that the services of solicitors in litigious business can be remunerated according to any such measure. On the contrary, we have a specific rule of our tariff covering exactly the case in point, and, reading the tariff as a whole, considering its various items and directions, it is impossible for me to come to any other conclusion than that the fee on settlement as charged and as taxed is not contemplated by its terms. No attempt has been made to support it by evidence of any binding usage that has grown up in England or in this province.

The client's expressed willingness to pay generously for services rendered constitutes nothing binding upon him.

I would not criticize the other items of the bill. They have not been closely scrutinized, and are not now seriously questioned, although allowed upon a generous scale. But, as to the principal item, it is simply a case where the solicitors might, at one stage, have protected themselves by a contract. Whether they could or could not is, however, immaterial. They have not

done so and cannot now evade the statute by claiming to recover on an implied contract what an express contract alone could give them. It is asserted, and not controverted, that the solicitors gave to their client skilful and effective service. But I see nothing in any of the circumstances that entitles them to remuneration on any other scale than that prescribed by the tariff.

I would allow the appeal and would refer the bill back for taxation, under and in accordance with the provisions of the tariff now in force, to the taxing officer, who should, in fixing the principal item in dispute, not lose sight of the liberal allowance made the solicitors in respect of the undisputed items.

Cameron, J.A.

HAGGART, J.A., dissented, but delivered no written opinion.

Haggart, J.A.

Appeal allowed, HAGGART, J.A., *dissenting*.

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Manitoba King's Bench. Trial before Curran, J. April 23, 1913.

1. CORPORATIONS AND COMPANIES (§ V E 4—230)—DIVIDENDS—IMPAIRED CAPITAL.

It is *ultra vires* on the part of a stock company to declare a dividend, no matter how small, at a time when its capital is impaired.

2. CORPORATIONS AND COMPANIES (§ V C—185)—TRANSFER OF SHARES—PURCHASE OF ITS OWN SHARES.

A joint-stock company, incorporated in Manitoba, has no right to purchase its own shares.

[*Trevor* v. *Whitworth*, 12 A.C. 409, referred to.]

3. CORPORATIONS AND COMPANIES (§ IV D 4—90)—ULTRA VIRES TRANSACTION—RATIFICATION PRECLUDED.

An illegal or *ultra vires* transaction on the part of a stock company cannot be ratified, sanctioned or authorized by the shareholders, either through a majority or by the whole body acting in concert.

[*Trevor* v. *Whitworth*, 12 A.C. 409, referred to.]

4. CORPORATIONS AND COMPANIES (§ V A—168)—CAPITAL STOCK—BONUS SHARES.

The issue of paid-up shares of stock to the promotors of a stock company, otherwise than for value, is a breach of trust on the part of the directors, and the company or its creditors are entitled to have such shares treated as not paid-up, unless they are in the hands of a *bonâ fide* holder for value without notice of the facts, or perhaps unless they are in the hands of persons who though they have notice themselves, derived their title through a *bonâ fide* holder for value without notice, or unless the company is otherwise precluded from shewing that they have not been paid up.

[Lindley on Companies, 6th ed., 548, specially referred to.]

5. CORPORATIONS AND COMPANIES (§ IV C—55)—CORPORATE ACTION—USE OF COMPANY'S NAME AS PLAINTIFF.

Though the name of a joint-stock company cannot be used as a party plaintiff in an action unless authorized by resolution of the directors or shareholders, where such objection is interposed by the defendants as against a rival faction suing as shareholders to set aside an *ultra vires* transaction of the company, the court may refuse to

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strike out the name of the company as a party plaintiff where it is clear that the rights of the company should be protected either by having it a party plaintiff or party defendant, and where the defence has not produced any evidence to shew that the personal plaintiffs do not represent the majority of the shares.

[*Foss* v. *Harbottle*, 2 Hare 491; *Russell* v. *Wakefield Water Works Co.*, L.R. 20 Eq. Cas. 474; *Lindsay* v. *Imperial Steel and Wire Co.*, 21 O.L.R. 375; *Re McGill Chair Co.* (*Munro's* case), 5 D.L.R. 73, and *Re Jones and Moore Electric Co.*, 18 Man. L.R. 549, referred to.]

Statement

THE plaintiffs in this action were the Colonial Assurance Company, R. M. Simpson and J. Halpenny, who sued as well on behalf of themselves as of other shareholders of the company. The defendants were William Smith and Mary E. Smith, his wife.

The action was brought to set aside certain allotments of stock, and for repayment of the moneys received by defendants.

Judgment was given for the plaintiffs.

G. A. Elliott, K.C., and *W. L. McLaws*, for the plaintiffs.

A. B. Hudson, and *T. H. Johnson*, for the defendants.

Curran, J.

CURRAN, J.:—This is an action brought in the name of the company and of Robert M. Simpson and Jasper Halpenny, shareholders, who sue as well on behalf of themselves as of all other shareholders of the company, against the defendants, who are also shareholders of the company and are man and wife. The male defendant is the manager and president of the plaintiff company.

The company in question was originally the Manitoba Insurance Association, incorporated by special Act of the Manitoba Legislature in the year 1889, ch. 52 of the statutes of that year.

By sec. 6 of the Act the capital stock of the company was fixed at $250,000 divided into 2,500 shares of $100 each, "which shares shall be and are hereby vested in the several persons who shall subscribe for the same, etc."

Section 13 provides that the board of directors shall require five per cent. of the capital stock subscribed to be paid at the time of subscribing for the same and makes provision for calls on capital stock as required, limited to an amount not greater than ten per cent. of the amount subscribed, and provides that three months shall elapse between calls. Provision is also made that the board may, by resolution, forfeit shares in case the owner shall neglect or refuse to pay any call thereon for three months after the same has become payable.

Section 15 gives the usual power to the directors to administer the affairs of the company, to regulate the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of stock certificates, the transfer of stock, the declaring and paying of dividends, etc.

Section 16, which was repealed in the year 1909, empowered the board of directors to appropriate and pay the holders of capital stock out of the profits, interest not exceeding 10 per cent. per annum on the amount actually paid in on such stock, and after payment of such interest, to appropriate and pay to such shareholders such amount of the net profits, in such proportions as they shall deem safe and expedient, as dividends or bonuses; but not at any time to exceed four-fifths of such net profits, provided that no such dividend or bonus shall be paid until at least 10 per cent. of the gross amount of risks carried by the company shall be set aside and held as a guarantee and reserve fund by the company.

Section 19 prohibited assignments of stock until all arrears in respect thereof had been fully paid up.

Section 21 prohibited the company from commencing business until $50,000 of stock had been subscribed, and 10 per cent. therein actually paid in and deposited with the provincial treasurer in cash or in the stock, debentures or securities of the Government of the Dominion of Canada, or of this Province, or of any school district thereof.

It is not necessary to notice any other of the provisions of this Act.

Apparently nothing was done with the charter, and in the year 1900, the defendant, William Smith, acquired it for the sum of $100—just how, does not appear—and caused a change of name to the Colonial Assurance Co. to be made.

At this time there appears to have been associated with the male defendant, J.————, H. E. Robison, and Israel Bennetto, who paid in to him the sum of $50 each, evidently in connection with the acquisition of the charter.

The male defendant was the manager of the Colonial Investment Company, engaged in the loaning of money upon mortgages of real property. In connection with such mortgages, insurance against fire, was placed upon the buildings situated upon any mortgage security. This evidently suggested the idea to the defendant, William Smith, of acquiring this old charter and going into the business of fire insurance himself; but, before doing so, however, he decided to give the matter a practical test as to profits, and during the five years between 1900 and 1905, the business of insuring borrowers of the loan company against loss by fire was carried on, apparently by the Investment Company through the defendant William Smith. No policies of insurance were issued, nor any kind of contract to protect the insured, who were, moreover, ignorant of this omission, and apparent lack of protection. The premiums for such alleged insurances were collected from the borrowers by the Investment Company and always retained by that company, and these pre-

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miums accumulated during the said period of five years to the sum of $3,669.15 net. This money, I think, really belonged to the Investment Company, who, during these five years, had virtually become their own insurers. The Assurance Company had not yet been organized and was not in any way responsible for or connected with these alleged insurances. The entries shewing the receipt of the various sums of money for premiums of insurance by the Investment Company during this five-year period appear on pages 4 to 27, both inclusive, of exhibit 4, which is a cash-book of the Investment Company.

Such then was the position of matters in February, 1905, when the defendant William Smith and his associates before-named, decided to organize the Colonial Assurance Company and commence business. The first meeting of shareholders was held on February 16, 1905, at which Bennetto, J. ———, Robison, and the defendants were the only persons present, and such persons were treated as shareholders of the company, with the usual legal rights in the premises. A code of by-laws was enacted and the same five persons were elected the first directors of the company.

By by-law 17 of the shareholders, appearing on page 40 of exhibit 3, which is the minute book of the company, the directors were required to issue $50,000 of stock of the company, of which $25,000 shall be fully paid up. The directors elect held a meeting after the shareholders meeting had adjourned and proceeded to pass the following resolution:—

That the promoters of the company be allotted the sum of $25,000 in fully paid-up stock of the company, such allotment to be as compensation for organizing the company, costs of obtaining the charter, procuring the amendments thereto and for all services and expenses of and incidental thereto.

At the same meeting the directors passed another resolution, which is as follows:—

That the applications of Israel Bennetto, J———, William Smith, H. E. Robison and M. E. Smith for $5,000 of stock each be accepted and stock so applied for be allotted to each of the said parties and certificates of the same be issued, dated January 1, 1905; that 15 per cent. be the first call upon this stock.

At the same meeting the directors passed another resolution in the following words:—

That the directors borrow from the Colonial Investment Co. of Winnipeg, the sum of $1,600 at 8 per cent. per annum, interest payable half yearly.

The promoters of the company, Bennetto, J.———, Robison, and the two defendants, made application for the issue of promoters stock in accordance with the first of these resolutions. These applications were put in at the trial as exhibit 2, are

signed by the promoters, and are dated January 16, 1905. In each one the applicant applies for 50 shares of stock of The Colonial Assurance Co., said shares to be fully paid up.

In accordance with these applications and the resolution of the directors before recited, stock certificates, exhibit 6, for 50 shares each, were issued to each of these parties, stating the said shares to be fully paid up. These shares were known as series "A" in the company's dealings, and are so designated in this judgment.

All these shares subsequently were acquired by the defendant William Smith, and were afterwards surrendered by him to the company for a cash consideration, as will more fully appear hereafter.

In pursuance of the second resolution of the directors, before referred to, written applications for shares were made by Bennetto, J. ————, and Robison and the two defendants each for 50 shares of stock. These applications are dated January 16, 1905, and were put in at the trial as exhibit 5, and by them the applicants each applied for 50 shares of stock of the Colonial Assurance Co.,

on which a call of 15 per cent. shall be made, and the balance in accordance with the by-laws of the company.

Accordingly, stock certificates for 50 shares each to these parties were issued, shewing 15 per cent. paid thereon. These certificates were put in at the trial as exhibit 7, and were known to the company as series "B," and are so designated in this judgment.

With regard to series "A." or promoters stock, I find as a fact, that no money or money's worth whatever was paid by the holders of these shares to the company as the consideration for the issue of such shares, but that such issue was a gift pure and simple, to the recipients. Smith, on his examination for discovery, attempts to give some explanation to the effect that there was a consideration for the issue of this stock, which I think is wholly illusory. He says that he and his associates estimated that the value of the business which had been procured during the five years, the connection formed, and the prospects of future business, would be worth $25,000 to the Assurance Company; and this is the only explanation that he can give. He admits that no money whatever was paid for this stock. Now, from the way in which the alleged insurance business had been carried on during the five years prior to the organization of the Assurance Company, I think that any good-will which attached to such business, if there was any, belonged to the Investment Company, and to no one else, and holding this view, I do not see how this good-will could be put forward as a consideration from these promoters to the Assurance Company to support the issue of

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this large block of stock; but I will deal with the legal aspect of this later on and proceed to discuss the facts in connection with the issue of series "B."

The 15 per cent. call on series "B" stock would amount to $3,750, and apparently to lend colour to the payment of this money by the individuals to whom the stock was issued, namely, J. ————, Bennetto, Robison and the two defendants, certain entries were made in exhibit 4, a cash-book of the Investment Company, on p. 34, from which it is made to appear that the sum of $750 had been received from each of these parties, or was at their credit with the Investment Company. The defendant William Smith was interrogated as to the source from which this money came, and he says it came from the Colonial Investment Company, that no cheques were issued to these parties for the amounts, but that there was merely a transfer made in the books.

The witness Dick, who was the secretary of the plaintiff company, swore that he did not know where this money came from, that the money was paid in on February 16, 1905, to the Investment Company, in whose custody it has always remained. He further stated that not a penny of this money was ever paid out to the Assurance Company.

I think there can be no doubt but that this fund was, to the extent of $3669.15, made up of the accumulations before referred to from insurance premiums in the hands of the Investment Company. In fact, Dick says in his evidence, that the entire fund which the Assurance Company began with was $5,469.15, made up of this $3,669.15 in the hands of the Investment Company, $200 put in by the promoters and $1,600 borrowed from the Investment Company; but it must be borne in mind that none of this money ever found its way into the treasury of the Assurance Company, but always remained in the custody and under the control of the Investment Company.

I cannot see, therefore, how any part of this fund can be considered as belonging to any of the promoters. To the extent of the accumulations in the hands of the Investment Company, I hold that such money was the property of the Investment Company and was not the property of the Assurance Company or of the promoters.

Now, it is claimed by the defendants that the Assurance Company invested $5,000 of its funds on January 1, 1905, in preferred permanent stock of the Investment Company (exhibit 29) and again another $5,000 on January 1, 1906, in the same class of stock of the Investment Company (exhibit 25), and that both of these investments were repaid by the Investment Company to the Assurance Company on September 14, 1911, by exhibit 30. I cannot find that the Assurance Company had $5,000

of its own funds to invest on January 1, 1905; no shares were authorized to be sold until February 17, 1905, and then only 250 shares, on which the directors purported only to call up 15 per cent. or $3,750. Even if this call had been paid, which it was not, it would not have produced sufficient capital to make this investment. I think this stock transaction by which exhibit 29 was issued was wholly fictitious to lend colour to the attempt to shew that the Assurance Company had received payment of the 15 per cent. call, and that the series "B" stock was validly issued.

I hold, therefore, as a question of fact, that the 15 per cent. required to be paid upon series "B" by the applicants for that stock was never in fact paid, and that the statement in the stock certificates themselves that such payment had been made was wholly untrue.

The next transaction called in question in this suit affecting these shares, both series "A" and "B" took place on February 14, 1906, at the first annual meeting of the shareholders of the Assurance Company, when the following resolution was passed:—

> That a dividend of 12½ per cent. be declared upon the subscribed stock of $50,000, and that cheques for that amount be drawn.
>
> Also,
>
> That a call of 25 per cent. on the subscribed stock of $25,000 which is not fully paid up be made, and that the amount of said call be paid within twenty-one days from the date thereof.

In accordance with the first of these resolutions, cheques for $1,250 each, of the Investment Company, put in as exhibit 9, were issued to Bennetto, Robison, J ———, and each of the defendants. These cheques were in payment of the 12½ per cent. dividend on both series "A" and "B" of the company's stock. The money to pay this dividend would, in the ordinary course of business, have come out of the Investment Company's bank account, and was not paid by the Assurance Company at all. None of these cheques, were, however, cashed by the individuals to whom they were made payable, but were endorsed over to the Assurance Company and further endorsed by it to the Colonial Investment Company, so that the issue of these cheques did not in any way disturb the funds of either company, and so far as the Investment Company was concerned, simply resulted in a cross-entry in its bank account. The reason for the cheques being used in this way is to be found in the second of these two resolutions, making a 25 per cent. call on series "B." Out of this dividend this call of 25 per cent. was paid, and accordingly, to give colour to the transaction, new stock certificates were issued to the promoters for series "B" stock to replace exhibit 7, the original certificates; such new certificates shewing on their

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face that 40 per cent. had been paid by the holders in respect of their shares.

It is contended by the plaintiffs that the payment of this dividend was wholly illegal—firstly, because no reserve fund had been provided for as required by sec. 16 of the company's act of incorporation. Smith, in his examination for discovery, expressly admits this fact; secondly, because at that time there were no profits out of which such a dividend could be declared, and that it was of necessity paid out of capital. I agree with both of these contentions.

The call of 25 per cent. was illegal as being in excess of what was permitted by the act of incorporation, and furthermore, I am of opinion, that the payment of this dividend to these parties was illegal because their stock was then in arrears in respect of the first call of 15 per cent., which I hold had not been paid, and which was required to be paid by the resolution of February 17, 1905, and even if the Assurance Company was then in a position legally to pay a dividend of this amount, these parties, being in arrears, in respect of their stock, had no right to receive any dividends, nor had the company any right to pay them any dividends.

No further dividends were paid until the year 1910. During this interval, the defendant, William Smith, appears to have acquired all the shares held by Bennetto, J ————, and Robison; these gentlemen having retired from the company. Their resignations as directors were accepted by the company at a meeting of shareholders held on May 7, 1909. The defendant William Smith claims to have paid J————, the sum of $5,126.75, and to Robison the sum of $6,000, for their respective holdings of both series "A" and "B" stock. It does not appear what he claims to have paid Bennetto. This transaction may have been a *bonâ fide* one so far as the payment of the money was concerned; but in buying this stock from these parties, the defendant William Smith, did so with his eyes open; he knew every fact and circumstance in connection with the issue of this stock from the time it was first allotted, and he cannot claim that he was a *bonâ fide* purchaser from a duly registered owner without notice or knowledge of any defects in the title of such registered owner. Apparently this purchase included both series "A" and "B" held by these parties; but I have no means of knowing how much of the alleged purchase price should be allocated to series "A" and how much to series "B." At this time it would appear that, on series "B," 40 per cent. had been credited by the Assurance Company. It would appear that section 19 of the Act of incorporation was a bar to any legal assignment of this stock from these parties to the defendant William Smith, as nothing whatever had been paid upon either series.

On February 16, 1910, the directors of the Assurance Company passed the following resolution:—

That a dividend of 20 per cent. be paid on the par value of series "A" stock and 50 per cent. on series "B," "C" and "D" on the amounts paid in for these several classes of stock.

and a further resolution,

that calls be made upon holders of series "B," "C" and "D" classes of stock to the amount of 5 per cent. per annum for each 10 per cent. paid on account of stock—equalling in each case the amount of dividend declared.

It may be noted here that stock series "C" and "D" are not in any way called in question in this suit, so that these resolutions must be regarded, for the purposes of this suit, as dealing only with series "A" and "B."

In pursuance of the first of these resolutions a dividend of $5,000 was paid to the defendant William Smith, by cheque of the Colonial Fire Assurance Co., dated February 22, 1910, put in at the trial as exhibit 12. The defendant William Smith, upon his examination for discovery, page 59, says that this cheque, referred to on such examination as exhibit Y. was in payment of the 20 per cent. dividend on series "A." He also says, at page 60 of such examination, that a further amount of $5,000 was paid to him by a cheque, exhibit 23, referred to on the examination as exhibit Z. This is also the cheque of the Colonial Fire Assurance Co., and is dated February 22, 1910. It covers 50 per cent. on the amount then alleged to have been paid in on series "B," namely, 40 per cent.; and 40 per cent. on $25,000 would be $10,000, and 50 per cent. of this last amount is the amount of this cheque.

The former of these cheques, exhibit 12, the defendant William Smith cashed and got the money for. The latter, exhibit 23, he deposited to the credit of the Assurance Company, so that the funds of that company were only disturbed by the payment of the former cheque, and not at all by the issue of the latter, the only effect of which was to give the defendant William Smith a further credit of $5,000 on his series "B" stock, and caused a cross-entry to appear in the Assurance Company's books.

As before stated, the defendant William Smith had acquired all the shares held by the original promoters, making his holdings in this respect 200 shares. The outstanding certificates shewing 40 per cent. paid were surrendered and the amount "forty" in each was changed or intended to be changed to "sixty," as appears in exhibit 21. Exhibit 21 apparently represents the existing stock certificates now outstanding for these shares.

At this time the clause in the Act of incorporation, section

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16, requiring a ten per cent. reserve fund, had been repealed, so that objection no longer existed as to the payment of dividends.

It was urged that this dividend was illegal because paid out of capital. The reports issued by the company for the previous year, 1910, to their shareholders, were produced, also the returns made to the Government, and from these, counsel for the plaintiffs, attempted to shew that there was a deficit of at least $45,000 on capital account. I do not pretend to be able to analyze these statements and say definitely whether or not there was such deficit. I do not think sufficient evidence upon this point has been produced as to the company's transactions during the year 1910, to enable me, even if I were competent to do so, to give a reliable answer to this question. However, I am not driven to do this. The witness Hooper, who was one of the auditors of the Assurance Company, and was also a director, and who had been in touch with the affairs of the Assurance Company for some years, says that there was impaired stock ever since 1909; that he knew there was impaired capital when these dividends were paid. Hooper is a witness put forward by the defence, and I think, from his knowledge of the affairs of the company, I am justified in accepting his statement upon this point, and in finding as a question of fact, that there was impairment of capital in the years 1909 and 1910. Certainly, under such circumstances, no company could justify the payment of even the smallest dividend.

I do not think, however, that there was in fact any *bonâ fide* payment of this dividend in 1910, on series "B" stock. At most it was a paper transaction which benefited the defendant William Smith and did not take out of the treasury of the Assurance Company one dollar; its ultimate effect, however, would be detrimental to the company, and its other shareholders, as, if effect is given to this payment, the company's liability in respect of this stock series "B" will, of course, be increased by that much and its paid-up capital, upon which dividends in the future will be payable thereby illegally increased.

There remains but one more transaction to investigate, and one which, to my mind, is even more extraordinary than those which I have so far considered. As stated before, the defendant William Smith had become possessed of all of the series "A" stock outstanding, held by Bennetto, Robison and J——— and his co-defendant, amounting to 200 shares, on which as I have already found, nothing whatever had been paid to the company. At a meeting of the directors of the Assurance Company, held on January 11, 1911, the following resolution was passed:—

> That the company, out of its funds, pay to William Smith, president and manager of the company, the sum of $9,000 in consideration of his surrendering and cancelling to the company certificates of stock No. 35,

36, 37, 38 and 39, representing 250 shares of series "A" stock of the company, fully paid up, of the par value of $25,000.

This resolution covered not only the shares of the three other promoters, but the shares held by both defendants, being in fact, the whole allotment of promoters stock authorized at the meeting of February 17, 1905. This resolution of the directors was confirmed at the annual meeting of shareholders held on February 22, 1911, and in accordance with these resolutions the plaintiff company issued its cheque, dated May 16, 1911, to William Smith for $9,000. This cheque is put in as exhibit 13, and was duly cashed by the defendant William Smith, and the stock certificates before referred to were surrendered to the company.

In his examination for discovery, the defendant William Smith says, as to this transaction, that the real consideration for surrendering this stock was $14,000, made up of $5,000, the dividend on series "A" stock paid by exhibit 12, before referred to, and the $9,000 then paid to him.

This transaction is objected to as being illegal and *ultra vires* the company, being, in effect, a transaction in the nature of a purchase by the company of its own stock. Even if these shares, series "A," had been validly issued in the first place, I think the transaction was beyond the powers of the company as it clearly amounted to a dealing by the company, by way of purchase, in its own shares. And I think it more than ever questionable when it is remembered that this stock was bonus or promotion stock, for which the company had never received a dollar of consideration, and the transaction, in my opinion, was little short of an act of plunder, which could only have been honestly assented to by the shareholders under a clear misunderstanding of the facts and the company's legal position. Whether or not Smith could command a majority of the votes of both directors and shareholders, which enabled him to carry through this transaction, I cannot say; but it was apparently sanctioned by the shareholders; and whether or not misrepresentation was resorted to, to secure their consent is immaterial in the view I take of the transaction.

The plaintiff Simpson was not at the shareholders' meeting at which this resolution was confirmed, and says he first learned of the transaction in the month of August or September following. The plaintiff, Halpenny, was at the meeting, and strongly objected to the transaction, and refrained from voting. He says, in his evidence, that there was no explanation given about the promoters stock, and that, to his mind, all that appeared was that $9,000 was going out for which nothing had been received.

An illegal or *ultra vires* transaction cannot be ratified, sanctioned or authorized by shareholders, either through a majority

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or by the whole body acting in concert, and I think this transaction was clearly illegal, and must be set aside. The case of *Trevor* v. *Whitworth*, 12 A.C. 409, is authority for this, that a limited company, incorporated under the English Joint Stock Companies Act has no power to purchase its own shares, and that a claim based upon an alleged purchase of shares by the company from a shareholder could not be sustained. The transaction was held to be *ultra vires*. I think this law applies to this case, and that this transaction was also illegal and *ultra vires* the company and cannot be supported.

With respect to the issue of series "A" stock, Lindley, on Companies, at 548, lays it down that the issue of paid-up shares otherwise than for value, is a breach of trust on the part of the directors, and the company and its creditors, are entitled to have such shares treated as not paid up unless they are in the hands of *bonâ fide* holders for value without notice of the facts, or, perhaps, unless they are in the hands of persons, who, though they have notice themselves, derived their title through a *bonâ fide* holder for value without notice, or unless the company is otherwise precluded from shewing that they have not been paid up.

I have examined a number of English authorities as well as Canadian authorities, and they all seem to point clearly to this proposition, that an allotment of shares, otherwise than for value —that is, for money or money's worth—is *ultra vires* of the company. In this case I have no doubt that it was not only *ultra vires*, but was an actual fraud upon those who might, in ignorance of the facts, subsequently become shareholders in this company. That it was the intention of the promoters to offer stock to the public was undoubted, and from the evidence of the individual plaintiffs I must hold that they purchased their stock in the plaintiff company in complete ignorance of the existence of these promoters paid-up shares.

The witness, Corelli, who is also a stockholder, and who says he is interested in the success of this litigation, alleges the same thing. He was employed by Smith to effect sales of the company's shares, and he sold nearly all the stock that was sold to the investing public; and yet he swears he was kept in entire ignorance of the fact that these 250 shares of stock had been issued as fully paid-up when, in fact, nothing had been paid for them. I am asked by the defendants' counsel to disbelieve Corelli on this point. I do not see why I should. The defendant William Smith has refrained from going into the box—to my mind a very significant circumstance. The plaintiffs have been obliged largely to prove their case from admissions obtained from this defendant upon his various examinations for discovery. It is true the witness, Hooper, called by the defence,

says that the arrangement for getting rid of this promoters' stock was instigated by Corelli for the purpose of assisting him in selling the company shares. He does not say directly that, to his knowledge, Corelli was aware of the fact that these shares had never been paid for. Corelli says that Smith told him that this stock had been paid for by assets of the old company, worth some $17,000. I think it highly probable that Smith did tell Corelli this, as the trend of his examinations for discovery seems to indicate that he had some idea in his mind that these promoters were giving some value for this stock; but I cannot believe that he entertained this belief *bonâ fide*. As a man of affairs, business experience, and knowledge of company transactions, it seems incredible that he could have honestly believed that value had been given by these promoters, including himself, for this stock.

A preliminary objection was taken at the trial by defendants' counsel to the use of the company's name as the plaintiff in this action without the authority of the company.

The witness, Dick, as secretary of the company, swore that no resolution of the company authorizing the individual plaintiffs to use the name of the company as a party plaintiff to this action had been passed. It is further urged that the statement of claim does not allege that the individual plaintiffs control a majority of the stock or that any effort has been made to obtain the company's approval to the use of its name, or that any *ultra vires* or illegal act is threatened.

These contentions, in point of fact, are correct, and at first I was inclined to think that the use of the company's name, being unauthorized by resolution of the directors, was fatal to the plaintiffs' right to succeed in this action. Upon consideration of the authorities, however, I have come to a different conclusion.

The general rule, as stated in Halsbury, vol. 5, sec. 473, that the company's name should be used as a plaintiff only by direction of the company—that is, the shareholders or directors—is subject to certain exceptions. If the use of the company's name as a party plaintiff cannot be justified, I have certainly power, under our rule 345, to amend the record by striking out the company as a party plaintiff, and adding it as a party defendant. Such an amendment was allowed upon demurrer in *Duckett* v. *Gower*, 6 Ch.D. 82, under the English rules of Court of 1875, Order 16, rule 12, and I would, if necessary, allow an amendment here in this way. But is this necessary?

Daniels Chancery Practice, 73, lays down the proposition, that the exceptions from the general rule depend very much upon the necessity of the case—that is, the necessity for the Court doing justice. Again, the dictum of Wigram, V.-C., in

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Foss v. *Harbottle*, 2 Hare 491, cited by Jessel, M.R., in *Russell* v. *Wakefield Water Works Co.*, L.R., 20 Eq. Cas. 474, makes it clear that, "the claims of justice will be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue." And again, the dictum of Jessel, M.R., himself, at 482, of the same case:—

> As I have before said, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with.

And again, the dictum of Malins, V.-C., in *Gray* v. *Lewis*, L.R. 8 Eq. Cas. 526, at 541:—

> It is, moreover, to be observed that, if this objection (one to the frame to a case where the interests of justice require the rule to be dispensed with. the official liquidator is a defendant, the result would not materially affect the constitution of the suit. I am of opinion, therefore, that the objections taken to the plaintiff are not fatal to the suit which must be decided on its merits.

In view of our rule, which gives the trial Judge complete discretion and control of the question of costs, what does it matter, in a case such as this, upon which side of the record the company is placed, if one can be assured that its rights and interests have been fully protected in the course of the litigation, and at the trial? I have no doubt that such was the case here, as the success of the individual plaintiffs meant the success of the company, and I am satisfied that everything in reason was done by the plaintiffs' solicitors to insure success in the action.

I have no means of knowing which set of shareholders has the control of the company, and can direct its motions. Undoubtedly, the company is split into two factions. It may be that the individual plaintiffs are in the minority, and could not obtain the requisite authority from the directors or shareholders to use the company's name as a plaintiff. If the purposes of the action were at all doubtful as to being in the company's interest, I would have little hesitation in giving effect to the defendants' objection. But a consideration of the statement of claim, to say nothing of the conclusions I have reached, indicate clearly that the purpose of the action is wholly beneficial to the company. When this is the case, have I any right to assume that the shareholders, other than those implicated in the alleged acts of wrongdoing, would not be favourable to the proceedings, the successful result of which could only benefit themselves? I think not.

It is necessary that the company should be a party to this litigation. It is such a party, and although the individual plaintiffs have not shewn any authority for the use of its name as a plaintiff, the merits of the case can, I think, be determined just as well with the company as a party plaintiff as if it had originally been joined and now appeared upon the record as a party

defendant. At any rate the authorities seem to be clear that a corporator who uses the name of a corporation as plaintiff need not have the previous sanction of the corporation for such use of its name: *Pender* v. *Lushington*, 6 Ch.D. 70; *Harbin* v. *Phillips*, 23 Ch.D. 14.

The defendants took formal objection to this want of authority, as a ground of defence, in clause 18 of their statement of defence, alleging that the company had been wrongfully and without its consent, and against its wishes joined as a party plaintiff in the action. Under such circumstances, the usual practice seems to be for the defendant to move to strike out the name of the company as having been used without authority of the directors, or of a general meeting, and the Court will take the means of ascertaining if this is so or not: Daniels Ch. Pr. 74; *Pender* v. *Lushington*, 6 Ch.D. 70; *McDougall* v. *Gardiner*, 1 Ch.D. 13, at 22.

In the latter case it is said by James, L.J.:—

> Anyone of the shareholders might have filed this bill in the name of the company and then, if the directors had said, "You are not the company; the majority do not act with you but with us," the Court would, as it has done in other cases, have taken the means of ascertaining which party, the plaintiff or the defendant, really represents a majority of the company.

The defendants have not taken this course, and have not offered any evidence at the trial to shew which party, plaintiffs or defendants, really represent the majority of the company. *Primâ facie*, the individual plaintiffs, being shareholders, had, in my opinion, the legal right to use the company's name to redress what are alleged to be wrongs to the company and the shareholders, other than the defendants, which a majority could not legally sanction, and to set aside a transaction said to be illegal, fraudulent, and *ultra vires* of the company. I think I have shewn abundant authority in the cases cited to support this proposition, and it was then open to the defendants to move in the matter if they contended that the majority were with them. If this had been shewn to be the case, and the acts complained of were, nevertheless illegal, fraudulent, or *ultra vires*, though done by a majority against the will of the minority, or if the concurrence of the minority had been obtained by fraud or misrepresentation, the result would be simply to make the company a party defendant, and allow the suit to proceed in the name of the individual corporators. I can see no valid reason now for refusing to proceed and decide the issues. I think I have the power to do so, and believe I ought, in justice to the complainants, to do so. I therefore overrule the objection taken by the defendants to the frame of the action.

I refer to the following cases, which I have considered and followed in reaching my conclusions as set forth in this judg-

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ment: *Lindsay* v. *Imperial Steel and Wire Co.*, 21 O.L.R. 375; *Re McGill Chair Co. (Munro's case)*, 5 D.L.R. 73; *Re Jones and Moore Electric Co.*, 18 Man. L.R. 549; *Welton* v. *Saffery*, [1897] A.C. 299, and particularly at pages 304, 305, 321, 322, 327, 328 and 329; *Trevor* v. *Whitworth*, 12 A.C. 409, at pp. 414, 415, 423, 424, and 438; *The Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125; *N.W. Electric Co.* v. *Walsh*, 29 Can. S.C.R. 33, at 46 and 47.

There will be judgment:—

1. Declaring the allotment and issue of series "A" stock *ultra vires* of the company and illegal and void *ab initio*, and setting aside the allotment and issue of series "A" stock and all subsequent transfers thereof under which the defendant William Smith acquired this series and directing the defendant William Smith to deliver up forthwith for cancellation, the certificates held by him, if any, representing the said series "A" stock.

2. A rectification of the register of shares of the company in accordance with the foregoing order.

3. That the stock issued to the defendants, and to Israel Bennetto, J. ————, and H. E. Robison, pursuant to the resolution of the directors of the company passed on February 17, 1905, known as series "B" stock, is now wholly unpaid; that no calls made thereon have been paid by anyone, and that the defendants now hold the said stock series "B" as wholly unpaid stock, and there will be a rectification of the register of shares of the company in this respect, if necessary.

4. That the defendants are not entitled to vote, and are hereby enjoined from voting at any meeting of shareholders in respect of said series "B" stock until all default in respect to payment of calls thereon is remedied.

5. That all resolutions of the company purporting to declare dividends upon series "A" and "B" stock of the company were and are *ultra vires* of the company and illegal and void, and that the same be rescinded and cancelled, and that all dividends paid upon series "A" and "B" stock to the defendants or either of them by the company be forthwith repaid to the company by the defendants in proportion to the amounts so received by them, together with interest thereon at the rate of 5 per cent. per annum, from the time when such moneys were so received by the defendants or either of them.

6. That the resolution of the directors of the company passed at its meeting on January 19, 1911, and the subsequent resolution of the shareholders of the company passed on February 22, 1911, confirming the said directors' resolution and authorizing the payment of $9,000 to the defendant William Smith in consideration of his surrendering and cancelling to

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the company certificates of stock Nos. 35, 36, 37, 38 and 39, representing 250 shares of the company, are *ultra vires* of the company and illegal and void and a fraud upon the company, and that the defendant William Smith shall forthwith repay to the company the said sum of $9,000, together with interest thereon at the rate of 5 per cent, per annum from the date when the same was received by him.

7. That the defendants pay the costs of this action, including all examinations for discovery purposes, and upon affidavits filed upon the motion for injunction made herein, and that, if necessary, the statutory limit as to costs be removed to enable the plaintiffs to recover their full taxed costs of the action and disbursements.

8. The defendants be enjoined from voting at any meeting of the company upon series "B" stock until the default in payment therefor as aforesaid is remedied, and that said defendants be further enjoined from disposing of or transferring said series "B" stock until such default is remedied.

9. There will be a reference to the Master of this Court to ascertain what moneys have been received by the defendants or either of them in respect of said series "B" stock, and I reserve further directions and costs of the reference until the said Master shall have made his report herein.

Judgment accordingly.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. May 6, 1913.

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May 6.

1. MALICIOUS PROSECUTION (§ II A—10)—REASONABLE AND PROBABLE CAUSE.

Reasonable and probable cause for the plaintiff's arrest is shewn by the fact that he took the defendant to the former's house and locked him in, releasing him only after by reason of threats and intimidation the defendant agreed to pay the plaintiff a large sum of money, and gave him three hundred dollars in cash.

APPEAL by the defendant from a judgment against him in an action tried with a jury. The ground of the appeal, *inter alia*, is that the verdict is against the weight of the evidence on the question of reasonable and probable cause.

The appeal was allowed and a new trial ordered.

W. A. Macdonald, K.C., for appellant (defendant).

W. B. A. Ritchie, K.C., for respondent (plaintiff).

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I have come to the conclusion that the verdict of the jury is against the overwhelming weight of the evidence and is perverse.

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It is only material to consider what took place at the crucial interview in the house on the 6th of September, when the threats are said to have been made. The defendant's story is very clear and is ample to support the charge which was laid against the plaintiff. It is not only so, but it is the only reasonable story. He was taken by the plaintiff to the plaintiff's house and the moment he got inside the door the door was locked and he only got out after he had agreed to pay $5,000 to the plaintiff. It is said by a witness that when he came out he was pale, and he at once went to consult his friends and his solicitors. Now, to say that he had voluntarily agreed to pay $5,000 to the plaintiff, ostensibly for the purpose of hushing the matter up, and immediately afterwards proceeded to publish it to the world seems to me to be wholly unreasonable. The defendant's story is the reasonable story.

That story is supported by the evidence of Reynolds who overheard what took place in the house. Reynolds' story is believed by the learned Judge. In fact, he told the jury that he did not see how they could disbelieve that evidence, and after reading it it has convinced me just as it convinced the learned trial Judge, and if Reynolds' testimony is true, then unquestionably the plaintiff can not succeed in his action.

The case does not, however, depend entirely upon the evidence of the defendant and Reynolds. We have the evidence of the three police officers. There is the evidence of Deputy Chief of Police Mulhearn who says that a friend of the plaintiff's came to see him at the police station just after his arrest and that the plaintiff told his friend that he had demanded this money from Harvey, and when, in rebuttal evidence, the plaintiff is asked to deny this, he will put it no stronger than "I don't say I said that." In fact, his rebuttal evidence very materially weakens his evidence-in-chief. Then we have the evidence of the Inspector of Detectives, Jackson, who says that he overheard the same conversation between the plaintiff and his friend, Watkins, and that the plaintiff told Watkins that he had demanded this money from Harvey and that he was sorry that he had not shot him. McLeod, another police officer, said that the plaintiff states, and I refer specifically to the evidence of McLeod because it is very strong, "When Mr. Dickinson took the $300 out of his pocket, he said: "That is the money that Harvey gave me. I did demand $5,000 from him for the support of my children or I would kill him. I am sorry I didn't kill him." And again on the following page: "I did demand $5,000 from Mr. Harvey for the keep of my children. I think, if he didn't give it to me I would kill him. I am sorry I didn't kill him."

Now, in rebuttal we have both the plaintiff and Watkins

giving evidence. Watkins is uncertain. His memory is very bad. He does not want to remember apparently what took place. He is first asked about his recollection. He said, "I have a dim recollection of it. I went into the station, when I seen him there I asked him what he was up against. I asked him what he was up against. He says 'I guess it is all up with me now, Bill.'"

Now, the plaintiff himself in rebuttal is asked if he had his hand in his pocket, and if he pretended or had said that he had pretended that he had a revolver in his pocket, says that he does not think so. That is, he does not think that he pretended he had a revolver in his pocket, but he admits that he had his hand in his pocket during that interview, just as the defendant says he had. Then he makes this statement, it being brought out by his own counsel in answer to the question "the defendant states you said, 'Do you think a Judge or jury would find me guilty if I shot you right here in cold blood?'" "Well, I may have said that, because I told him if I had been able to get out of bed (referring to a prior occasion) I certainly would have shot him." And again, at the next page, he was asked this, "Did you say that if he got out of the chair you would blow the head off him?" and his answer is, "No, I don't think I said any such thing as that." Then, further on he is asked again, "Did you on that occasion use the expression, 'I will blow your head off?'" and his answer is, "No, I don't think so." He repeats that again, "I don't think so." That is the strongest way he would put it.

As to his demanding the money, which he in his evidence-in-chief said he did not demand, he qualifies in this way in his rebuttal:—

Q. Then did you, yourself, say . . . you didn't say on that occasion at all that you demanded this money? A. No, I don't think so, no.

Q. Did you say, as McLeod states, "I did demand $5,000 from him or I would kill him." A. No, I don't think so. I told Mr. McLeod, I suppose I did, that I should have shot him.

Taking all this evidence, all considered with the defendant's story and quite inconsistent with the plaintiff's story, I think it is overwhelmingly in favour of the defendant's story. If that be so, there was no want of reasonable or probable cause in laying the charge which he did lay.

I am not disposed to find any fault with what took place at the trial in respect either of the admission of evidence or of the Judge's charge because, while there was a great deal of evidence put in that ought perhaps strictly to have been excluded, yet, it was not objected to in the main, and counsel for the defendant examined and cross-examined along the same lines.

With regard to the charge of the learned Judge, I think if

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the whole is read it will be seen that the matter was fairly put to the jury. It may have been that one of the questions, viz.: that by which the jury was asked if the defendant had taken proper care to inform himself, was confusing. The real question was, was the defendant's story of what took place at the crucial interview in the house on the 6th of September true or not true. If that story in their opinion was true, then the defendant had ample justification in laying the charges. If, on the other hand, it was untrue, then the verdict ought to have been for the plaintiff, because, if it were untrue, the defendant had no reasonable and probable cause.

I think, therefore, there ought to be a new trial.

Irving, J.A.

IRVING, J.A.:—I agree that the verdict is against the weight of evidence, the first ground of appeal taken. That seems to have been the opinion of the learned Judge from the way he expresses himself at p. 118, after the verdict was brought in.

I agree with what the learned Chief Justice has said, that the learned trial Judge was within his rights in controlling counsel in respect to the repetition of questions covering matters not really in dispute. I do not want to say anything more than that, because it is a delicate subject, the question of degree as to how far a Judge should go, when he should stop counsel. As a rule it is a thing to be avoided by a trial Judge, but, on the other hand he has charge of the case and he is pressed with business, he knows other cases are coming on and the time is, he thinks, being wasted, and the jury getting confused. When these things occur it is his business to interfere.

As to the charge, I think it might have been simpler. I think it was unduly prolonged by introducing two questions taken from the judgment in the case of *Abrath* v. *Northeastern Railway Co.*, 52 L.J.Q.B. 352, 620, 11 App. Cas. 247, two questions which the Judge there required to be answered for his own information in order that he might determine whether there was want of reasonable and probable cause. There Abrath, who was a doctor, was accused of conspiring with some men who had been injured in a railway accident to defraud the company. It was necessary for the Judge to ascertain whether the railway company, when they brought their charge of conspiring to defraud the company, had taken the trouble to collect the evidence fairly and whether they honestly believed in the case when they laid the charge. Now, in this case everything was in the breast of Harvey himself, and, therefore, these two questions could very well have been eliminated. On the whole, I am satisfied that the jury understood what they had to decide with reference to the other two questions, and their verdict, as I have already stated, was against the weight of the evidence. I

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think the Judge, having regard to the circumstances of the case, should have stated the grounds upon which they should proceed in assessing the damages. On the whole, I think the Judge was not unfair to either side.

I agree that there should be a new trial on the ground that the verdict was against the weight of evidence.

GALLIHER, J.A.:—I think there should be a new trial. Galliher, J.A.

MACDONALD, C.J.A.:—The costs of the appeal will be to the successful appellant, and the costs of the first trial will abide by the result of the new trial. Macdonald, C.J.A.

New trial ordered.

BOKER v. UPLANDS.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. April 7, 1913.

April 7.

1. APPEAL (§ II C 4—65)—AMOUNT NECESSARY TO CONFER JURISDICTION—JOINING CLAIMS.

Several claims for mechanics' liens, each for a sum insufficient to permit an appeal, cannot be joined in order to make up an appealable amount.

[*Gabriel* v. *Jackson Mines Limited*, 15 B.C.R. 373, and *Gillis Supply Company* v. *Allen*, 15 B.C.R. 375, followed.]

2. MECHANICS' LIENS (§ IV—15)—WORK ON SEWER BELOW SEA LEVEL—LIEN ON.

One performing labour on a sewer extending below low water-mark into the sea is nevertheless entitled, under sec. 6 of the Mechanics' Lien Act, B.C.R.S. 1911, ch. 154, to a lien for his services on that portion of the sewer on which he performed labour.

Statement

APPEAL in a mechanics' lien action; a preliminary objection was taken that each claim (except one) falls below the appealable amount, and that such small claims cannot be united for the purpose of making an appealable sum in the aggregate.

The objection was sustained.

Maclean, K.C., *Higgins*, and *Bass*, for appellants.

Bodwell, K.C., and *Moore*, for respondents.

Argument

Bodwell:—There is a preliminary objection taken to this appeal. $250 or over is the appealable amount, and in this case several of the claims were joined together and in that way the amount was made over $250, but each separate claim is less than $250 except that of Robert Cameron, and the question is whether they can be joined together for the purpose of making an appeal. I say they cannot, and my preliminary objection is on that ground.

MACDONALD, C.J.A.:—The preliminary objection is upheld. We follow the cases of *Gabriel* v. *Jackson Mines, Ltd.*, 15 B.C.R. Macdonald, C.J.A.

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373, 2 M.M.C. 399, and *Gillis Supply Company* v. *Allen*, 15 B.C.R. 375, 14 W.L.R. 458, in which we have already expressed the opinion that the individual claims must either, as under the original Act, have been adjudicated at sums not less than $250 or, under the present Act, the amount claimed must not be less than that sum. Therefore those claims which are under $250 are not appealable.

On the merits, I think it is quite clear that Cameron is entitled to a lien on that part of the sewer upon which he worked, which was below low water mark. I am not placing any interpretation on sec. 3. I think this case, so far as I propose my judgment to extend, is not affected in any way by sec. 3 of the Mechanics' Lien Act.

The said Act, sec. 6, clearly gives a lien to a workman upon a sewer. Here we have a sewer which extends below low water mark into the ocean. Upon that part of the sewer upon which he worked, I think this man is entitled to his lien.

I express no opinion at all upon the other questions, some of which are rather intricate ones.

The appeal will be allowed in so far as Cameron's case is concerned, with costs applicable to his case here and below on the scale applicable thereto.

Irving, J.A.
Martin, L.J.
Galliher, J.A.

IRVING, MARTIN, and GALLIHER, JJ.A., concurred in the judgment of MACDONALD, C.J.A.

Appeal allowed in part.

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DOUGLAS v. CANADIAN NORTHERN R. CO.

Manitoba King's Bench. Trial before Curran, J. April 23, 1913.

1. JUDGMENT (§ VII A—271)—INTERLOCUTORY JUDGMENT ON STRIKING OUT DEFENCE—RELIEF AGAINST.

Where an order has been made by a local Judge striking out the statement of defence in an action because of the failure on the part of the defendant to answer proper interrogatories, the same Judge has no jurisdiction, under the Manitoba practice, to set aside an interlocutory judgment signed against the defendant and to reinstate the statement of defence, notwithstanding that the defendant finally decided to answer the interrogatories and deliver answers thereto prior to the signing of such judgment against him, but subsequent to the granting of the order striking out the defence.

[*Preston Banking Co.* v. *Allsup*, [1895] 1 Ch.D. 141; *Re St. Nazaire Co.*, 12 Ch.D. 88; *Walker* v. *Robinson*, 15 Man. L.R. 445, and *Munroe* v. *Heubach*, 18 Man. L.R. 547, referred to.]

Statement

APPEAL from judgment of local Judge at Brandon, setting aside interlocutory judgment, signed against defendants, and reinstating statement of defence filed by defendants.

The appeal was allowed.

J. B. Coyne, for the plaintiff.
P. A. Macdonald, for the defendants.

CURRAN, J.:—This matter came before me in Chambers, on April 17th instant, by way of appeal from an order of the learned local Judge of this Court at Brandon, dated April 4, 1913, setting aside an interlocutory judgment signed against the defendants herein on March 3, 1913, and reinstating the statement of defence previously filed by the defendants.

It will be necessary to give a short resume of the facts to properly apprehend the situation in which the parties now find themselves.

The statement of claim was issued on November 8, 1912; statement of defence thereto was delivered on November 25, 1912. The plaintiff delivered interrogatories, 31 in number, on January 17, 1913. The defendants not having answered these interrogatories, the plaintiff moved before the said local Judge to strike out the statement of defence for failure to answer such interrogatories. This motion was first returnable on February 1, 1913, and at the defendants' request, was adjourned until February 10, following, to enable the defendants to cure their default. On February 10, 1913, when the motion again came before the local Judge, it appears that the defendants had answered certain of the interrogatories, but refused to answer 12 of such interrogatories, upon which the motion was further adjourned at the defendants' request until February 14, 1913, to enable them to shew cause why answers should not be given to those interrogatories which the defendants had refused to answer. On February 14, 1913, when the matter again came up before the local Judge, the defendants expressed their willingness to answer certain of the interrogatories which they had previously refused to answer. The local Judge then ordered that the defendants should file better answers, and, in particular, should give answers to Nos. 1, 2, 3, 8, 9, 12, 17, 24 and 26 of the interrogatories. The motion was again enlarged until February 21, and upon its coming on for hearing on that date, it appeared that the defendants still continued to refuse to answer interrogatories Nos. 17 and 26, notwithstanding the previous order or direction of the learned local Judge that they should do so. In view of such refusal, the motion was again enlarged until February 24, 1913, to give the defendants still further opportunity to answer these two interrogatories.

From the affidavit of Mr. Kilgour, filed and made on April 7, 1913, it appears that the learned local Judge, when the matter came before him on February 21, stated that unless such answers were given by February 24, to which date the motion was finally enlarged, the order would go, "dismissing the action," an ob-

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vious error, but by which doubtless was meant striking out the statement of defence.

Finally, on February 24, 1913, when the motion again came before the local Judge, the defendants' counsel appeared and stated that the defendants refused to answer these two interrogatories, whereupon an order striking out the defendants' statement of defence was made. This order was duly taken out on February 24, signed by the learned local Judge, and interlocutory judgment was signed against the defendants in the action on March 3, the statement of defence having been struck out in pursuance of this order.

It is not contended that this order was wrong or that the interrogatories directed to be answered were improper, and should not be answered. As a matter of fact, the defendants finally decided to answer these two interrogatories and delivered answers thereto on March 1, 1913, and applied by letter, dated March 3, 1913, to the plaintiff's solicitors for a consent to file a new statement of defence. To this the plaintiff's solicitor replied by letter of the same date refusing his consent to reopen the matter.

The defendants then moved before the said local Judge to set aside the interlocutory judgment, and for leave to file a new statement of defence. This motion was heard before the learned local Judge on April 4, 1913, and was contested by the plaintiff. However, an order was made setting aside the interlocutory judgment and reinstating the statement of defence already filed. From this order the plaintiff appeals.

The reasons which moved the learned local Judge to make this order are apparent from this language, used in his considered judgment:—

> To prevent the defendants having the merits tried would, in my opinion, be out of all proportion to the gravity of their fault. If it were the case of a plaintiff, who might have, or be given, the right to bring another action, it would be different.

If the learned Judge had jurisdiction to make the order in question, it is outside of my province, as a Judge sitting in appeal, to question the propriety of the order.

There are, practically, two objections taken to this order by the plaintiff, one going to its propriety, and the other to the jurisdiction of the local Judge. I will confine myself to the latter entirely, for, as I said before, if I am of opinion that the learned local Judge had jurisdiction, I would not question the manner in which he has exercised his discretion.

A local Judge of this Court has, by rule 34, concurrent jurisdiction with, and the same power and authority as, the Referee in Chambers in all proceedings in the Court. The powers of the Referee in Chambers, generally, are defined by rules 27 and

29, and seem to be co-extensive with those of a Judge sitting in Chambers, except as to the matters defined in the sub-sections of rule 27.

Sub-section 6 of this rule excepts appeals and applications in the nature of appeals, and applications concerning the hearing of appeals and applications to vary or rescind an order made by a Judge.

I am of opinion that the learned local Judge had no power to make the order appealed from. His doing so was, in effect, if not in terms, setting aside the former order. So long as that order stood unimpeached, it seems to me that what had been lawfully done under it could not be disturbed or set aside. The second order amounted to nothing less, in my opinion, than a reversal of what the learned Judge had directed by the first order. I think there was clearly an absence of jurisdiction in the local Judge to do this.

What was the position? The statement of defence had been struck out pursuant to the first order and re-instated by authority of the second order; both orders being made by the same authority. I cannot view the matter in any other light than that the second order was a reversal or rescission of the first, and that the second application was one in the nature of an appeal from the first order, and within the meaning of the prohibition of sub-section (6) of rule 27.

I refer to *Preston Banking Co.* v. *Allsup*, [1895] 1 Ch.D. 141; *Re St. Nazaire Co.*, 12 Ch.D. 88; *Walker* v. *Robinson*, 15 Man. L.R. 445, and *Munroe* v. *Heubach*, 18 Man. L.R. 547.

I express no opinion as to the merits of the case and rest my decision purely upon the question of law arising out of the objection taken to the jurisdiction of the local Judge, which objection, being strongly pressed upon me, I must decide.

I allow the appeal, and the order of the local Judge appealed from will be set aside with costs to the plaintiff of this appeal, payable forthwith after taxation.

Appeal allowed.

MINCHIN v. SAMIS.

Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Walsh, JJ. June 18, 1913.

1. LIBEL AND SLANDER (§ II D—40)—SLANDER—WORDS ACTIONABLE PER SE—CHARGING ALDERMAN WITH WANT OF INTEGRITY.

Without proof of special damage an action for slander will lie for words spoken of a city alderman imputing to him want of integrity not merely in principle and inclination, but in the exercise of his office, irrespective of whether he could be ousted from office if the truth of the slander were established.

APPEAL, in an action of slander, for an appellate declaration Statement

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as to the effect in law of certain words, imputing against a city alderman serious misconduct in the discharge of his official duties, accusing him of being the electoral choice of and representing a certain class of "undesirable voters," and involving his official integrity.

A new trial was ordered.

James Muir, K.C., for plaintiff.
James Short, K.C., for defendant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—There can be no doubt that the words alleged to have been used by the defendant of and concerning the plaintiff are slanderous. The words are:—

I do not blame Alderman Minchin for representing his constituents; it is a well-known fact that Alderman Minchin had Johnny Reid carting all the whores, pimps and undesirable voters in the city to vote for him and that was how he was elected.

One of the innuendoes placed upon these words is:—

The plaintiff although it was his duty as such alderman to represent the ratepayers of the city of Calgary in general, had been elected by and represented all the whores, pimps and undesirable voters in the said city and in disregard of his said duty as such alderman he discharged his said office for the benefit and in the interest of said last mentioned persons for unlawful purposes.

The words attributed to the defendant are as a matter of law, it seems to me, quite capable of bearing the meaning attributed to them; whether they did in fact bear this meaning under the circumstances proved was for the jury. The law of slander is very artificial. The law is I think, correctly summarized as follows in Encyc. Laws of Eng., 2nd ed., Tit. "Defamation," p. 467:—

Words which injure the plaintiff in his office, profession or trade are actionable without proof of any special damage. The distinction between an office of profit and an office which is purely honorary must be carefully observed. If the office holder be paid . . . an action lies without proof of special damage for any words which impute to him,

(i) Serious misconduct in the discharge of his official duties;

(ii) Any misconduct which, if proved against him, would be ground for depriving him of his office, whether such misconduct occur in the course of his official duties or not;

(iii) General unfitness or incapacity for his office, such as want of the necessary ability or lack of the necessary knowledge or education: *Booth* v. *Arnold* (1895), 1 Q.B. 571.

But if the office be honorary . . . then an action lies without proof of special damage in the cases (i) and (ii) but not in the third case: *Alexander* v. *Jenkins* (1892), 1 Q.B. 797.

In my opinion the present case falls in effect under case (i) —that is, the words used impute serious misconduct in the dis-

charge of the plaintiff's official duties. In *Alexander* v. *Jenkins* (*supra*), the words spoken of the plaintiff, a town councillor, an office not of profit, attributed to him habitual drunkenness and unfitness for the office. It was held that in the absence of special damage the action did not lie.

It was clearly a case in which mere unfitness was attributed not as a want of integrity or a disposition of mind or the holding of principles of conduct which apart from want of ability or capacity would in any way endanger the interests of the electors generally to the office.

Lord Herschell expressly recognizes the law as laid down in *How* v. *Prinn*, 2 Salk. 694; Holt 652; affirmed, 7 Mod. 107, 1 Bro. P.C. 64. It was there held as follows: "In offices of profit, words that impute either defect of understanding, of ability or integrity are actionable" i.e., *per se*, "but in those of credit" (that is honorary) "words that impute want only of ability" (or understanding) "are not actionable, as of a justice of the peace: 'He a justice of the peace? He is an ass, and a beetle-headed justice:' *ratio est*, because a man cannot help his want of ability" (? or understanding) "as he may his want of honesty; otherwise" (that is the words are actionable *per se*) "where words impute dishonesty or corruption; as in this case, where the office is an office of credit and the party charged with inclinations and principles which shew him unfit and that he ought to be removed which is a disgrace."

The Court had already held:—

As to his not being charged with any act, inclination and principle are sufficient without an act.

In *Booth* v. *Arnold* (1895), 1 Q.B. 571, Lord Esher, M.R., says:—

Upon consideration I think that the question of a motion (that is, whether or not there was power to remove the plaintiff from office by reason of the alleged misconduct) which was discussed in *Alexander* v. *Jenkins* (1892), 1 Q.B. 797, is under the circumstances of this case, absolutely immaterial and consequently this case must be determined as if *Alexander* v. *Jenkins* never had been decided at all.

See also per Rigby, L.J.

Lopes, L.J., says:—

In my judgment words imputing want of integrity, dishonesty or malversation to any one holding a public office of confidence or trust, whether an office of profit or not are actionable *per se*. On the other hand when the words merely impute unsuitableness for the office, incompetency, or want of ability, without ascribing any misconduct touching the office, then according to *Alexander* v. *Jenkins*, no action lies, where the office is honorary without proof of special damage.

The distinction between want of ability or capacity from any cause on the one hand and want of integrity whether in act or principle or inclination is fully recognized.

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My opinion is that the words in question here attribute want of integrity not merely in principle or inclination; but in the exercise of his office; that it is unimportant whether if the truth of the slander were established the plaintiff could be ousted from office; and that the action lies without proof of special damage.

I think, therefore, there should be a new trial; that the defendant should pay the costs of the appeal and that the costs of the first trial should abide the event of the second.

New trial ordered.

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June 16.

Re COLEMAN and McCALLUM.

(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ. June 16, 1913.

1. BUILDINGS (§ I A—9a)—MUNICIPAL RESTRICTIONS — APARTMENT OR TENEMENT HOUSE.

Where it appears from the plans and specifications filed with the city architect and superintendent of buildings that the applicant sought to erect a building with three or more sets of rooms for separate occupancy by one or more persons, it is within the prohibition of by-law No. 6061 of the city of Toronto forbidding the erection of apartment or tenement houses within certain districts, notwithstanding the applicant called the building a hotel, and notwithstanding provision made for a dining room in which all meals would be served to the tenants by the landlord.

[*Re Coleman and McCallum*, 11 D.L.R. 138, 4 O.W.N. 1127, reversed.]

Statement

APPEAL by Robert McCallum and the Corporation of the City of Toronto from the order of Lennox, J., in Chambers, 11 D.L.R. 138, 4 O.W.N. 1127.

Irving S. Fairty, for the appellants.

J. T. White, for Alfred B. Coleman, the respondent.

Sutherland, J.

The judgment of the Court was delivered by SUTHERLAND, J.:—The applicant is the owner of land situated at the corner of Sherbourne and Rachael streets in the city of Toronto, and desires to erect a building thereon. He had plans and specifications prepared by an architect originally for an apartment house, and applied to the respondents for a permit to erect it. The respondent McCallum is the City Architect and Superintendent of Buildings for the respondent corporation. The application was refused. Alterations were made in the plans, and further applications made and refused. Thereupon a motion was launched on the 20th March, 1913, "for an order of peremptory mandamus directing the respondents to forthwith approve and stamp the plans and specifications submitted by the applicant . . . and to issue a permit for the erection thereof."

The motion was heard before Lennox, J., and on the 19th April, 1913, he made an order to the following effect: "The applicant, for himself and his heirs and representatives in estate, now undertaking to amend the plans on file in the City Architect's Department of the City of Toronto, so as to provide that each of the bed-rooms in the apartment house which he proposes to build on the south-west corner of Sherbourne and Rachael streets in the city of Toronto, shall have a clear floor area of one hundred square feet at least, and the applicant by his counsel now undertaking that the said building shall not at any time, without the consent of the respondents or of this Court, be diverted from the uses and purposes or occupied or used in a manner inconsistent with the uses and purposes now declared by the applicant, and that upon a sale of the property due notice of this undertaking and of this order shall be given to the purchaser, and that he will in and by the conveyance bind the purchaser, his heirs and assigns, to observe and abide by the conditions hereinbefore set out and such order as a Court of competent jurisdiction may make: it is peremptorily ordered that the respondents do forthwith approve of and stamp the plans and specifications submitted by the applicant for the erection of a building at the south-west corner of Sherbourne and Rachael streets in the city of Toronto, and do forthwith isue a permit for the erection thereof."

From this order the respondents now appeal.

The learned Judge who heard the motion says in his judgment: "After a very great deal of hesitation, I have come to the conclusion that perhaps the proposed building may be legitimately described as a 'Temperance Hotel.' Hotels, of course, are not prohibited. I prefer, however, not to rest my decision wholly or mainly upon this view of the question."

He also holds that the building proposed to be erected in conformity with the amended plans and specifications is a "lodging house," within the meaning of the definition of that term contained in by-law No. 4861 of the respondent corporation, which he states to have been in force at the time the notice of motion was served.

The appellants are relying upon an amendment to the Municipal Act contained in 2 Geo. V. ch. 40, sec. 10, and a by-law passed in pursuance thereof. The said sec. 10 is as follows:—

"Section 541*a* of the Consolidated Municipal Act, 1903, as enacted by section 19 of the Municipal Amendment Act, 1904, is amended by adding, after clause (*b*), the following clauses:—

"(*c*) In the case of cities having a population of not less than 100,000 to prohibit, regulate and control the location on certain streets to be named in the by-law of apartment or tenement houses and of garages to be used for hire or gain.

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"(*d*) For the purposes of this section an apartment or tenement house shall mean a building proposed to be erected or altered for the purpose of providing three or more separate suites or sets of rooms for separate occupation by one or more persons."

The said Act came in force on the 16th April, 1912, and on the 13th May of the same year the defendant corporation passed its by-law No. 6061, "to prohibit the erection of apartment or tenement houses or garages to be used for hire or gain on certain streets." The first recital in the said by-law shews the intention thereof to be to pass a by-law under the express authority of the said amending Act.

A second recital is as follows: "And whereas it is expedient that the location of apartment and tenement houses, and of garages to be used for hire or gain, should be prohibited on the streets hereinafter named."

Clause 1 of the by-law is: "No apartment or tenement house, and no garage to be used for hire or gain, shall be located upon the property fronting or abutting upon any of the following streets, viz.:" and included in the list of streets are Rachael street and Sherbourne street.

The judgment of Lennox, J., is in 11 D.L.R. 138, 4 O.W.N. 1127, and the facts are fully set out therein. With respect, I am unable to agree with him. The moment a by-law was passed by the municipal corporation under the authority of sec. 10 of the Act of 1912, I think that upon the streets named therein the municipality had the right to prohibit, regulate, and control the location of apartment or tenement houses which answered to the description contained in sub-sec. (*d*) of sec. 10 of the said amending Act.

It is plain, in my opinion, from an examination of the plans as altered, that the building proposed to be erected thereunder is an apartment or tenement house providing three or more sets of rooms for separate occupation by one or more persons.

I am of opinion that this by-law, No. 6061, was in force at the time the application was made by the applicant to the respondents for their approval of the plans and specifications now in question, and for a permit for the erection of the building, the refusal of which by the respondents led to this motion.

I think that the respondents were within their rights thereunder in refusing. This is quite apart from any objection to the form of the order or other matters urged in support of the appeal, which I do not, in the circumstances, think it necessary to deal with.

Appeal allowed with costs.

CANADA LAW BOOK CO. v. BUTTERWORTH.

(Decision No. 2.)

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April 25.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, and Cameron, JJ.A. April 25, 1913.

1. CONTRACTS (§ II A—128)—CONSTRUCTION—INTENTION OF PARTIES.

Though the offeree proposes a modification of the terms of the offeror and requests an acceptance or refusal by cable, and a cable message is sent by the offeror accepting the modification of the terms, but adding the word "writing" to such acceptance in the message, the informal contract between the parties will be spelled out by reference not only to the previous correspondence between the parties, but also to a subsequent letter purporting to state its terms where nothing was done by the offeree in the interim and where he, through inadvertence, failed to repudiate the interpretation placed by the offeror on a material term of the contract contained in such subsequent letter.

[*Canada Law Book Company* v. *Butterworth*, 9 D.L.R. 321, reversed.]

2. EVIDENCE (§ VI E—535)—INTENTION — AMBIGUITY IN WRITING.

Where the terms of a modified offer made by a plaintiff are left ambiguous and may equally refer to one interpretation or to another, the burden is upon the plaintiff to establish that his interpretation of the terms is the correct one.

[*Falck* v. *Williams*, [1900] A.C. 176, referred to; *Canada Law Book Company* v. *Butterworth*, 9 D.L.R. 321, reversed.]

Statement

APPEAL from decision of Metcalfe, J., 9 D.L.R. 321.

A. B. Hudson, and *H. E. Swift*, for the plaintiffs.

C. P. Fullerton, K.C., and *C. S. Tupper*, for defendants.

The judgment of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—The plaintiff is an incorporated company and deals in law books in Canada and elsewhere. Butterworth & Co. is a firm of law publishers with its chief place of business in London, England. Butterworth & Co. (Canada), Ltd. is a joint stock company incorporated in England in November, 1912, but having its head office in London, and carrying on business there and in Canada. Mr. S. S. Bond controls both the firm and the defendant company. The transactions in question in this suit took place between the plaintiffs and the firm of Butterworth & Co., the other defendant not then being in existence.

Butterworth & Co., in or about the year 1906, undertook the publication of the work known as "Halsbury's Laws of England." This work was to be published in consecutive volumes, issued from time to time, and it was expected that it would take several years to complete the series. The plaintiffs opened a correspondence with Butterworth & Co., with a view to securing the exclusive agency or right to sell the work in Canada and the United States. In furtherance of the negotiations, one Robinson, representing the plaintiffs, called upon Bond in Lon-

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don, and the latter gave to Robinson a written memorandum containing a proposal of the terms upon which the agency requested would be given to the plaintiffs. This memorandum is unsigned and is as follows:—

1. Order to be accepted by the company.

2. Sets not to be returned to England.

3. We to do our best to prevent sale to Canada.

4. Sole agency to Canada and U.S.A. for five years from publication of volume I., or for one year after publication of the last volume of the set, whichever shall be the longest period.

5. Sole agency after the above-mentioned period shall be obtained by their taking fifty sets for the first year and forty sets for the next year and so by a sliding scale to ten sets for the fifth year.

6. Five hundred sets at 7s. 6d. in quires to be taken within two years, ordinary account.

7. We to hand over the orders from above territory received before this date, and to receive a bonus of 3s. per volume for the same; also to refer future orders and enquiries while this agreement lasts to the Canada Law Book Co.

8. B. & Co. to take back up to 100 sets at same price as charged, at completion of the expiry of the sole agency.

After receiving the above proposal the plaintiffs wrote the following letter:—

May 21, 1907.

S. S. Bond, Esq.,
c/o Messrs. Butterworth & Co.,
12 Bell Yard, Temple Bar,
London, England.

Dear Mr. Bond,—Referring further to Halsbury's Laws of England, Mr. Robinson has just handed me the proposition you made to him. Let me say, in reference to the statement, that we are paying Green 7s. 6d. per volume. This is a mistake, we are paying 7s. only. As to the guarantee of fourteen volumes, the additional volumes, of course will be free. We were to take 300 sets inside of five years from September last. It seems to me your proposition is a pretty stiff one. Doubtless, you think you have given us full sale in the United States. We have sold but thirty sets of the Encyclopædia of the Laws in the United States.

Green and Sweet and Maxwell handed over to us all orders that they had in the United States and Canada without any reserve or cost to us. I do not exactly know what is in your mind about the sale in this part of the world, but I have often made many statements to you, most of which have turned out to be true. I think I can tell you now, if you handle the sale yourself, you will meet with a dismal failure, for there is only one means of selling law books in Canada. It is that which we have adopted, and it is expensive.

We would like very much to handle the sale of Halsbury's Laws, and would be able to give you much better satisfaction than you could get through any other channel, but the terms are too stiff. If you want the assurance of an annual sale of this work, you may rest assured that if the sale can be made, we can do it, and if the agency is handed over to us it

will receive proper attention from us. If you wish, we will meet you half way and pay 7s. 6d. per volume, we to agree to take 400 sets within two years, for the sole agency for Canada and the United States for five years, from the date of publication. We will waive the right to return any copies, of all which will be purchased outright. You will hand over to us any orders you have in Canada and the United States, without any cost to us. We will agree to supply them at the special price. I think you will agree if you will look on it, it is unreasonable for us to pay any extra 3s. per volume. Doubtless many of the persons who have given orders are undesirable. These parties are ever ready to order. The above offer is a most reasonable one, and a fair one considering we have only seven million people in the country.

You are also mistaken regarding the probable sale in the United States. I have decided and proved this in the last six months, and know whereof I am speaking.

On receipt of this letter, you might wire me acceptance or refusal. We to have the right to purchase additional sets at the price.

Yours very truly,

CANADA LAW BOOK COMPANY, LIMITED.

On receipt of this letter, Butterworth & Co., on 13th June, 1907, cabled as follows:—

Cromarty, Toronto.

Halsbury's Laws. Agree your modified terms; writing.

The name "Cromarty" in the above, referred to Mr. Cromarty, the president of the plaintiff company. The cablegram was not signed.

On the 14th June, 1907, the following letter was written by Butterworth & Co.:—

London, W.C., 14th June, 1907.

The Canada Law Book Company, Ltd.,
32-34 Toronto Street, Toronto.

Dear Sirs:

"THE LAWS OF ENGLAND."

By the Earl of Halsbury and a Distinguished Body of Lawyers.

We are in receipt of your letter of May 21st, with reference to the above. Although we think that you should not have had any difficulty in falling in with our proposal, yet we will agree to accept your modification of our terms. The terms between us are now as set out overleaf. We cabled as requested as follows:—

"Cromarty, Toronto. Halsbury's Laws. Agree your modified terms; writing."

If you would not mind turning up your letter of December 27th, 1906, and also your letter of March 7th, 1907, you will see that you state the price is 7s. 6d. in the one, and 7s. in the other; hence the misunderstanding as to price.

We are taking most extraordinary care over the production of this work, and although the first volume is much delayed the future volumes will come along fairly quickly. We are obtaining the finest writers for each topic.

Yours faithfully,

BUTTERWORTH & Co.

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The terms referred to in the latter as "set out overleaf" were on a separate sheet which was enclosed with the letter. The following is a copy:—

Arrangements with The Canada Law Book Company, Ltd., for . . . Halsbury's Laws of England.

. . . . . .

1. This arrangement to be between the company, if we decide to make one for this undertaking.

2. Sets not to be returned to England.

3 Butterworth & Co. to do their best to prevent sale to Canada.

4. Canada Law Book Co. to take (400) four hundred sets within two years in return for the sole agency to Canada and the U.S.A. for five years from date of publication of volume I. During the said sole agency they to have the right of purchasing additional sets at the same price.

5. Butterworth & Co. to hand over any orders from above territory that they have received.

June 14th, 1907.

No reply was made by the plaintiff to the above letter of June 14, 1907. The parties then proceeded to do business on the basis of these terms as if they had been settled and agreed upon. The plaintiffs purchased the sets of the work they agreed to take, and carried out the other terms contained in their proposal.

Butterworth & Co., on their part, gave the sole agency to the plaintiff company, and fulfilled the other terms to be performed by them.

The whole dispute between the parties is in regard to the date from which the five years' sole agency was to run. The plaintiffs claim that their agency has not yet expired and ask an injunction to restrain the defendants from selling the work in Canada or the United States. The plaintiffs, in their letter of May 21, 1907, say: "We to agree to take 400 sets within two years, for the sole agency for Canada and the United States for five years, from the date of publication." They contend that this means, from the date of publication of the complete series. The first proposal made by Bond, which I shall call the Robinson terms, was explicit upon this point. By the fourth of these terms the agency was to continue for five years from the publication of the first volume or for one year after publication of the last volume of the set, whichever should be the longest period. When Butterworth & Co. wrote the letter of June 14, 1907, accepting the plaintiffs' proposal, they took the precaution of setting out the terms to which they were prepared to agree. These terms were practically the same as those proposed by the plaintiffs, but the date from which the five years' period was to run was definitely fixed as that of the publication of volume I. The first volume was published on November 14, 1907, and under the terms of the Butterworth letter of June 14, the five years would expire on November 14, 1912. The complete work has not yet been published.

Butterworth & Co.'s letter of June 14, and the "overleaf" enclosed, setting out the terms, was duly received by the plaintiffs, and no objection was taken or reply made. Mr. Cromarty, it appears, was absent when the letter arrived. Instead of the letter being filed, under the heading "contracts," it was, he says, filed amongst the general correspondence and not seen by him until the spring of 1912. This affords no excuse for the plaintiffs' conduct. The plaintiffs received the letter, which clearly shewed Butterworth & Co.'s understanding of what was meant by the words, "from date of publication." If the plaintiffs meant something different from Butterworth & Co.'s interpretation of the words, they should have written and so informed the other party before proceeding to act. The plaintiffs must be held to have had knowledge of the contents of the letter. They acquiesced in Butterworth & Co.'s statement of the terms, or, at all events, raised no objection to them, and proceeded to carry out the transaction. This must be construed as an acceptance of Butterworth & Co.'s terms. If there was no acceptance in fact of the "overleaf terms" by the plaintiffs, then there was no *consensus* between the parties. The plaintiffs must prove the contract on which they rely. They must establish that the construction they put upon the terms is the true one and prove that Butterworth & Company agreed to them.

It may be urged that there is no conclusive reason why the words "date of publication" should refer to that of the last volume rather than to that of the first. Both are referred to in the Robinson terms. If the plaintiff's proposal is left ambiguous and may refer equally as well to one date as the other, they must fail in the action: *Falck* v. *Williams*, [1900] A.C. 176.

It is urged by the plaintiffs that the cablegram was an unqualified acceptance of their offer. The cablegram was not signed. In accordance with leave given at the trial, a paragraph has been added to the defence, setting up the fourth section of the Statute of Frauds. I do not think it is necessary to discuss the question whether the statute affords a good defence or not. The cablegram concludes with the word "writing." This informed the plaintiffs that a letter was being sent to them in regard to the acceptance of the terms and was an intimation that Butterworth & Co. desired to communicate with them upon the subject more fully than was done in the necessarily abbreviated form of a cable despatch. It is not pretended that anything was done, or that the plaintiffs' position was altered in any respect, by reason of the cablegram, between its receipt and the receipt of the letter. When the letter was received the plaintiffs became fixed with knowledge of the terms to which Butterworth & Co. were giving their assent.

The obvious meaning of the word "writing" contained in

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the cablegram was that a letter was being prepared and that it would be sent to the plaintiffs in the ordinary way. The letter should, therefore, be read along with the cablegram to ascertain Butterworth & Co.'s intention. When the letter was received, the plaintiffs were informed what the terms were to which Butterworth & Co. assented, and the understanding upon which they had cabled acceptance.

The transactions that have taken place between the parties must, no doubt, stand, in so far as these transactions have been completed. The plaintiffs have had the sole agency for five years from the publication of volume I. They have ordered from the defendants a very large number of sets of the legal publication in question. The defendants' counsel admit that they are bound to furnish the sets that have been ordered, complete to the end of the work, at the price mentioned in the plaintiffs' proposal. The plaintiffs have had all the benefits they sought to obtain under their proposed terms, save only the extended period of the agency which they claim, under their interpretation of the words made use of in their proposal. The onus is upon them to establish a contract which would entitle them to such extended period, and this they have failed to do.

The appeal should be allowed with costs, the injunction dissolved, and the plaintiffs' action should be dismissed with costs. Only one set of costs to be allowed to the defendants.

Appeal allowed.

[N.B.—An appeal was taken by plaintiffs to the Judicial Committee of the Privy Council and such appeal is pending.]

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June 17.

OAKSHOTT v. POWELL.

Alberta Supreme Court, Harvey, C.J., Scott, Simmons, and Walsh, JJ. June 17, 1913.

1. AUTOMOBILES (§ III B—264)—NEGLIGENT OPERATION — EMERGENCY — SWERVING AUTO.

The driver of an automobile is not relieved from liability for running into the plaintiff by reason of the fact that, in order to avoid striking children who suddenly ran into the street, he was compelled to change the course of his automobile, and in doing so struck the plaintiff who was about to board a street car, where the defendant's own negligence had placed him in a situation where the swerving of the automobile became a necessity.

Statement

APPEAL from the verdict of the jury in favour of the defendant, the action being one for damages which the plaintiff sustained by reason of his being struck by the defendant's automobile. The appeal was allowed and a new trial granted.

R. D. Tighe, for plaintiff.

Frank Ford, K.C., and *O. M. Biggar*, K.C., for defendant.

SCOTT, J.:—The evidence shews that at the time of the accident the defendant's sister was driving his automobile along one of the main streets of Edmonton, he being seated at her side, that a street car proceeding in the opposite direction had stopped at an intersecting street, that his sister driving at the rate of at least six or seven miles per hour attempted to pass between it and the sidewalk on the side of the street car at which passengers got on and off and that, while being so driven, the automobile struck and injured the plaintiff who at that time had one foot on the car steps in the act of mounting to the car. The defendant states that as they were about to pass the street car two children ran out from the sidewalk towards it and that in order to avoid them, he caught hold of the steering wheel and caused the automobile to swerve towards the street car and thereby struck the plaintiff.

The learned trial Judge in his charge to the jury stated that a duty rests upon every one to exercise reasonable care and prudence as every reasonable man ought to exercise in order to avoid doing damage to those with whom he comes in contact and that, if through an omission to exercise that reasonable care, he causes damage he is liable therefor. Later on in his charge, however, he states as follows:—

> Of course it strikes me—I don't know how it will strike you, and you are the judges—it strikes me the necessity for taking that swerve, although it was of course a very proper thing to do once that emergency arose, should not be absolutely conclusive in the defendant's favour if the necessity for making that swerve originally arose from some negligent act of theirs. If the defendant had got into a position through his own negligence, of doing something that a reasonably prudent man should not do, which necessitated that swerve in order to avoid him, the fact of his acting in that way to avoid the accident to the children, should not, it seems to me, although it is for you to say, absolutely excuse him, if originally he got into the position by some negligent procedure.

I think it may be assumed that, if the defendant by his negligence or want of reasonable care, had placed himself in the position that it became necessary for him to change the course of his automobile in order to avoid the children and thus injure the plaintiff, he would be liable to him for the injuries he sustained. In my view the effect of that portion of the learned trial Judge's charge which I have quoted is that he left it open to the jury to determine that, notwithstanding the fact that there may have been such negligence or want of care on the part of the defendant in placing himself in that position, the fact that he was obliged to swerve in order to avoid the children would excuse him. In my view that is the reasonable construction to be placed upon the language of the learned trial Judge and, from it, I think the jury might reasonably infer that they might find for the

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defendant notwithstanding that there may have been negligence on his part which would render him liable to the plaintiff. It is true that no objection to the charge was taken by plaintiff's counsel at the trial, but notwithstanding this a new trial may be ordered. See *Wason* v. *Douglas*, 21 C.L.T. 521.

I am, therefore, of opinion that there should be a new trial and that the plaintiff should have the costs of this appeal and that the costs of the first trial should abide the event of the new trial.

Simmons, J.

SIMMONS, J., dubitante.

Harvey, C.J.
Walsh, J.

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

New trial ordered.

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May 6.

Re ALBERTA RAILWAY ACT.

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. May 6, 1913.

1. CONSTITUTIONAL LAW (§ II A 3—208)—PROVINCIAL LEGISLATION—INTERFERENCE WITH DOMINION RAILWAYS.

It is not competent to the Legislature of the Province of Alberta to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or operation of railways subject to the jurisdiction of the Federal Parliament.

Statement

REFERENCE in the matter of certain legislation of the Province of Alberta respecting railways, by His Royal Highness the Governor-General in Council of questions for hearing and consideration as to the validity of certain legislation by the Legislature of the Province of Alberta respecting the construction and operation of railways.

The questions referred to the Supreme Court of Canada pursuant to the authority of section 60 of the Supreme Court Act are as follows:—

1. Is section 7 of chapter 15 of the Acts of the Legislature of Alberta of 1912, intituled "An Act to amend the Railway Act" *intra vires* of the provincial legislature in its application to railway companies authorized by the Parliament of Canada to construct or operate railways?

2. If the said section be *ultra vires* of the provincial legislature in its application to such Dominion railway companies, would the section be *intra vires* if amended by striking out the word "unreasonably"?

Would the said section be *intra vires* if amended to read as follows: "(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as such lands do not form part of the right-of-way, tracks, terminals, stations, station grounds or lands required for the

construction or operation of any railway within the legislative jurisdiction of the Parliament of Canada"?

Statement

Section 82 of chapter 8 of the statutes of the Province of Alberta, 1907, intituled "The Railway Act," is as follows:—

82. The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of any other railway company and have and exercise full right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor-in-council first obtained or to any order or direction which the Lieutenant-Governor-in-council may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

(2) Such approval may be given upon application and notice and after hearing the Lieutenant-Governor-in-council may make such order, give such directions and impose such conditions or duties upon either party as to the said Lieutenant-Governor-in-council may appear just or desirable, having due regard for the public and all proper interests and all provisions of the law at any time applicable to the taking of land and their valuation and the compensation therefor and appeals from awards thereon shall apply to such lands and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so in addition to otherwise complying with this section.

By section 7 of chapter 15 of the statutes of Alberta, 1912, intituled, "An Act to amend the Railway Act," the Railway Act of Alberta, 1907, is amended by adding thereto the following:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct, or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority.

Argument

Newcombe, K.C., Deputy-Minister of Justice, for the Attorney-General for Canada:—The enactment in question may be construed to empower any company or person authorized to construct a railway by the Legislature of Alberta to take possession of, use or occupy any lands belonging to any railway company within the legislative authority of the Parliament of Canada; to use and enjoy the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of such Dominion railway, and to have and exercise full right and powers to run and operate trains over and upon any portion or portions of the Dominion railway, subject to the approval of the Lieutenant-Governor-in-council. It will be observed also that sub-section 2, of section 82, of the Alberta Railway Act, contemplates that notice of the application for approval may be

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given to the Dominion company, and that the Lieutenant-Governor-in-council, after the hearing, may make such order and give such directions and impose such conditions and duties upon the Dominion company as to him appears just or desirable, having due regard for the public and other interests. It may be observed, moreover, that the provisions of sub-section 3 apply only in so far as the taking of the lands does not unreasonably interfere with the construction and operation of the Dominion railway.

It is urged on behalf of the Attorney-General for Canada that sub-section 3 is *ultra vires*, and that it would remain *ultra vires* even if its application were still further limited by striking out the word "unreasonably." The subject-matter of the legislation is Dominion railways which fall within the exclusive authority of the Parliament of Canada under section 91 of the British North America Act, 1867. This field of legislation is wholly withdrawn from the local legislatures. It is not referable to any class of subjects enumerated in section 92.

Reference is made to the following cases decided by the Judicial Committee of the Privy Council: *Canadian Pacific Railway Co.* v. *The Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *Madden* v. *Nelson and Fort Sheppard Railway Co.*, [1899] A.C. 626; *City of Toronto* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52; *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*, [1906] A.C. 204, at p. 210; *L'Union St. Jacques de Montréal* v. *Bélisle*, L.R. 6 P.C. 31, at p. 37; *Grand Trunk Railway Co.* v. *Attorney-General of Canada*, [1907] A.C. 65; *La Compagnie Hydraulique de St. François* v. *Continental Heat, Light and Power Co.*, [1909] A.C. 194.

It is submitted that it is, upon the authorities, abundantly plain that the railway lands of a Dominion railway company cannot be expropriated by provincial authority or encumbered by works or operations not sanctioned by Parliament. Moreover, the rights completely acquired by companies incorporated by Parliament in the execution of its enumerated powers may be enjoyed unaffected by the operation of any local statute intended to modify or subordinate these rights. The local legislature cannot have the power to take away what Parliament gives. Local powers of expropriation, such as they are, are subordinate to the paramount powers of Parliament.

S. B. Woods, K.C., and *O. M. Biggar*, for the Attorney-General for Alberta:—It will be observed that the qualifying words at the end of sub-clause (2) of section 82, of the Alberta Railway Act, emphasizes the necessity of the local railway company (by which is meant a railway company incorporated by or under the legislative authority of the Province of Alberta)

obtaining the approval of the Board of Railway Commissioners for Canada whenever it is by law required to obtain such approval, in addition to taking the necessary steps under the local Act (by which is meant the Alberta Railway Act and amendments) to entitle it to acquire such lands or interests in lands as it finds necessary in order to carry out its undertaking.

The word "land" or "lands" in the local Act is defined as including "all real estate, messuages, lands, tenements and hereditaments of any tenure."

It is submitted that the amendment in question is *intra vires* of the Legislature of Alberta under section 92, sub-section 10, of the British North America Act, 1867.

A railway to be constructed from one point in the province to any other point in the same province and not going outside of the provincial boundaries is a local work, and undertaking, and may be authorized to be constructed by a provincial legislature: *City of Montreal* v. *Montreal Street Railway Co.*, 43 Can. S.C.R. 197; on appeal 1 D.L.R. 681, [1912] A.C. 333. The power of legislation to authorize the construction of a certain work, necessarily carries with it the power to enact such legislation as may be required to prevent the purpose of the grant of such power being defeated, even though, in so legislating, the provincial legislature may interfere with or affect a work authorized to be constructed by the Dominion Parliament. The converse of this principle, namely, that Dominion legislative jurisdiction necessarily extends to such ancillary provisions as may be required to prevent the scheme of a Dominion Act from being defeated, even where such ancillary provisions deal with or encroach upon matters assigned to the provincial legislatures under section 92, has been affirmed by the Privy Council in *Cushing* v. *Dupuy*, 5 App. Cas. 409; *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348, at 360; *Attorney-General of Ontario* v. *Attorney-General for Canada*, [1894] A.C. 189, at 200. The Privy Council have also held in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, at 586, that where a power falls within the legitimate meaning of any class of subjects reserved to the local legislatures by section 92, the control of these bodies is as exclusive, full and absolute as is that of the Dominion Parliament over matters within its jurisdiction. Upon this subject the following appears in Todd's Parliamentary Government in the British Colonies (2 ed.), p. 436, in discussing the principle above mentioned with regard to Dominion legislation: "The converse of this principle has also been maintained by the Courts in respect to local legislation upon assigned topics which may appear to trench upon prescribed Dominion jurisdiction."

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In *Bennett* v. *The Pharmaceutical Association of the Province of Quebec*, 1 Dor. Q.B. 336, at 340, Chief Justice Dorion states that the Court considered it a proper rule of interpretation that the powers given to Parliament or the provincial legislature to legislate on certain subjects included "all the incidental subjects of legislation which are necessary to carry on the object which the British North America Act declared should be carried on by that legislature." See also *Ex p. Leveillé*, 2 Cartwright 349; *Reg.* v. *Mohr*, 7 Q.L.R. 183, at 191; *In re Prohibitory Liquor Laws*, 24 Can. S.C.R. 170, at 258; *In re De Veber*, 21 N.B.R. 401, at 425; *Jones* v. *The Canada Central Railway Co.*, 46 U.C.Q.B. 250, at 260, *per* Osler, J., and *per* Haggerty, C.J., in *Reg.* v. *Wason*, 17 Ont. App. R. 221, at p. 232, after referring to *Cushing* v. *Dupuy*, 5 App. Cas. 409.

This principle has been followed to support the provisions of provincial laws dealing with procedure to enforce the penal provisions of provincial acts in a number of decided cases and it is submitted is applicable to the present case. The power of the province to legislate in respect of this subject-matter is not to be restricted or its existence denied, because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament: *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, at p. 586; *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A.C. 437, at pp. 441-3.

It is further submitted that the fact that the Dominion Parliament has power to legislate in respect of Dominion railways in a way analogous to the legislation the subject-matter of this reference, in no way interferes with the competence of the provincial legislature to enact the law in question. Both legislatures are equally supreme within their respective jurisdictions. It is, therefore, submitted, that as, under the terms of the British North America Act, the right of a province to authorize the construction of a railway line that lies wholly within that province is exclusively within the legislative powers of that province (excepting always the right of the Dominion to authorize the construction of such a work under the provisions of section 92, sub-section 10c, by declaring the same to be for the general advantage of Canada or for the advantage of two or more of the provinces) it follows, that there is necessarily involved in this right the right to so legislate that the work so authorized to be constructed can be carried to completion, and for this purpose to give a railway company authorized by the province to build such a line, the power to acquire either the land or such interests in the land of a Dominion railway company (and whether such land lies between the right-of-way fences of the Dominion railway company or is land owned by it as a land

grant or otherwise) as will enable the provincial railway to complete its authorized works.

It must necessarily follow that the provincial legislature has power to give to its creature the right to interfere to some extent with a railway brought into existence by the Parliament of Canada because the taking of such land or interests in land under such legislation by the provincial railway must of necessity interfere to some extent with the Dominion railway. So long as such interference is not unreasonable or undue and is only such as is necessarily involved in the acquiring of such land or interests in land (including therein a right-of-way or easement over the land or through the land) the giving of such rights is within the competence of the provincial legislature. Whether the boundary line of provincial power has been exceeded must be determined by the Courts in each case where such question is raised, and if upon the determination of such fact it be found that the rights purported to be given under the provisions of the provincial Act do interfere to such an extent with the construction and operation of the Dominion railway as to be unreasonable or undue, then such authority given by provincial legislation will not be effective and will confer no rights upon the recipient of it. The province cannot use its authority to authorize the construction of railways within its boundaries in such a way as to prevent the construction and operation of Dominion railways, nor, conversely, can the Dominion use its authority to authorize the construction and operation of railways so as to prevent the construction and operation of a provincial railway, but each legislative jurisdiction can interfere with the operation of other railways in so far as it may be reasonably necessary to carry out its authority to construct or authorize the construction of a railway within its jurisdiction. Such right or power is, by implication, reserved to each legislative body by the terms of the British North America Act.

The provision in the local Act, the subject of this reference, is not and cannot be covered by Dominion legislation, and it necessarily follows that unless the legislation that is here attacked is within the competence of the province, a Dominion railway can at any time prevent the construction of a provincial railway, and conversely a provincial railway can prevent the construction of a Dominion railway by merely refusing to negotiate for the right to pass through its properties.

There are certain provisions of the Dominion Railway Act purporting to regulate traffic at the point of crossing of a Dominion and provincial railway. R.S.C. 1906, ch. 37, sec. 8 (*a*); 151 (*e*) 176 and 227. But even they do not purport to give a Dominion railway company the power to acquire the land of or running rights over the land of a provincial railway company

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or *vice versa*: see *Preston and Berlin Street Railway Co.* v. *Grand Trunk Railway Co.*, 6 Can. Ry. Cas. 142 (May, 1906); but have, apparently, been supported on the ground of public safety and convenience: *Re Portage Extension of Red River Valley Railway*, Cass. Dig. (2nd ed.) 487; Cout. Dig. 1226; *Canadian Pacific Railway Co.* v. *Northern Pacific and Manitoba Railway Co.*, 5 Man. L.R. 301; *Credit Valley Railway Co.* v. *Great Western Railway Co.*, 25 Gr. 507; *Niagara, St. Catharines and Toronto Railway Co.* v. *Grand Trunk Railway Co.; Stanford Junction Case*, 3 Can. Ry. Cas. 256; *City of Toronto* v. *Grand Trunk R. Co.; York Street Bridge Case*, 4 Can. Ry. Cas. 62. In *City of Montreal* v. *Montreal Street Railway Co.*, 1 D.L.R. 681, [1912] A.C. 333, it was held by the Privy Council that the right of Parliament to enact section 8 of the Railway Act, so far as it applied to provincial railways, could not be supported under the general power to legislate regarding the peace, order and good government of Canada insomuch as it trenched upon the provincial power of legislation under sub-section 10 of section 92 of the British North America Act, and was *ultra vires* of the Parliament of Canada. It would appear from this that section 227, so far as it affects provincial railways, is also *ultra vires*.

The effect of striking out the word "unreasonably" in the section in question would be to confine the operation of the provincial statute to the land of Dominion railway companies outside of and other than the land included in the right-of-way fences of the Dominion railway. The legislation of the province is *intra vires* in this regard. The considerations above referred to apply to the answer to this second question. The lands of Dominion railway companies, outside of the right-of-way fences, are subject to the local law just as much as the lands of any other companies or individuals and there would appear to be no good reason why they should not be subject to this law as well as to such law, for instance, as the provincial Land Titles Act. The taking of such land, or interests therein, does not in any way interfere with the construction or operation of Dominion railways and it could be only upon this ground that the Act would be beyond the competence of the province.

It is, therefore, submitted that the answers should be in the affirmative.

Davies, J.

DAVIES, J.:—I would answer both questions in the negative, and in doing so would explain that I adopt the construction put by counsel at the argument upon the questions. As I understood counsel, it was agreed that the words "lands of the company" in the section we are asked to determine the validity of, meant the right-of-way and the stations and terminals in con-

nection therewith of a railway built under the authority of the Dominion Parliament, and were not intended to refer to or include lands granted by way of subsidy merely and not included in such right-of-way, stations and terminals. The real question, counsel agreed, we were desired to answer was whether the provincial Parliament could so legislate as to force a crossing of a provincial railway over and across a Dominion railway.

Now, as I read and understand section 82, of chapter 8, of the Act of the Legislature of Alberta, 1907, it was only intended to have application to railways authorized to be constructed by the provincial legislature, and not to railways constructed under authority of the Dominion Parliament. It would seem that the latter sentence of sub-section 3 of section 82 making the approval of the Dominion Board of Railway Commissioners essential in addition to that of the Lieutenant-Governor-in-council "where it was necessary to obtain the approval of such Board," was inconsistent with this construction. I accept, however, the explanation of Mr. Woods, counsel for Alberta, that the words in question were inserted in the section by inadvertence or mistake and never should have been there.

Then we have the legislation of 1912 amending the provincial Railway Act of 1907 by adding the section respecting the power of the legislature to pass which we are asked. It reads as follows:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority.

It refers to railways the construction of which is authorized by the Dominion Parliament and attempts to apply the provisions of the railway legislation of 1907 to such Dominion railways so as to authorize the crossing of such railways by provincial railways.

I do not think such legislation *intra vires* of the local legislatures. The exclusive power to legislate with respect to Dominion railways is, by the 29th sub-section of section 91 of the British North America Act, conferred upon the Dominion Parliament. It is a "matter coming within one of the classes of subjects enumerated in section 91," and being such is

not to be deemed to come within those classes of subjects assigned exclusively by that Act to the provincial legislatures.

The provincial legislature while having full power to authorize the construction of a local or provincial railway, cannot in so doing either override, interfere with or control

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or affect the crossing or right of crossing of a Dominion railway by a provincial railway. Legislation respecting the crossing of Dominion railways by provincial railways is exclusively vested in the Dominion Parliament, and being so vested by virtue of one of the enumerated classes of subjects of section 91, is explicitly withdrawn from the jurisdiction of the local legislature.

The clause in question would give rise to endless difficulties. As it now stands, it is open to the fatal objection that it would refer to the ordinary Courts of the land the determination of the question whether the crossing of a Dominion railway by a provincial railway was an "unreasonable interference" with the Dominion railway's operations. This is a question which the Dominion Board of Railway Commissioners alone is authorized to deal with and its decision is final.

But the omission of the word "unreasonably" would not make the legislation *intra vires*, as the subject-matter was not one within the jurisdiction of the local legislatures at all, being as I have said, withdrawn from them by the latter part of section 91.

It was contended strongly by counsel for the province that not only had the legislature of the province power to authorize the crossing of Dominion railways by provincial ones, but that they had power to authorize the crossing of navigable streams or marine hospital lands or lands reserved for military camps or forts or defence. The argument was logical enough, granting the premises assumed, namely, that the exclusive power to build local railways necessarily involved the power to cross these streams, lands, defence works and Dominion railways. But it omits to take cognizance of the rule so often and necessarily applied by the Judicial Committee in the construction of the British North America Act, that the enumerated subject-matters of legislation assigned to the Dominion Parliament are not deemed to come within the matters assigned exclusively to the provincial legislatures though *primâ facie* they may appear to do so, and the further rule of construction that if there is a common field of legislative action within which Parliament and the legislatures are alike competent to legislate, when Parliament occupies the field and legislates, as it has done with respect to the subject-matter under discussion, under one of the enumerated clauses of section 91, its legislation is supreme and overrides that of the local legislatures.

Idington, J.

IDINGTON, J.:—We are asked whether or not the Alberta legislature can amend the Railway Act of that province, adding to section 82 thereof the following:—

(3) The provisions of this section shall extend and apply to the lands

of every railway company or person having authority to construct, or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority,

and if not will striking out the word "unreasonably" therein render the clause *intra vires*? Any legislative enactment under our federal system, which partitions the entire legislative authority, ought to be approached in the spirit of assuming that the legislature did not intend to exceed its powers; and if an interpretation can reasonably be reached which will bring it within the power assigned the legislature in question, and given operative effect, then that meaning ought to be given it.

Of course, if the plain language is such that to give it operative effect must necessarily involve doing that which is beyond the power assigned the legislature then the Act must be declared null. Again, the language used is sometimes capable of a double meaning according to the respective surrounding circumstances to which it may be sought to be applied. In such case the Court on the one hand must refuse to give such effect to the language as will maintain anything *ultra vires* the legislature, and on the other give such effect to it as will within the purpose and power of the legislature render it effective.

Then, again, the subject dealt with may be of that complex character that concurrent legislation on the part of a provincial legislature and Parliament is absolutely needed to effectuate satisfactorily the purpose had in view. To the man accustomed to deal only with the legal product of a single legislature possessing paramount legislative authority over all matters that can be legislatively dealt with, this latter situation seems almost incomprehensible. The situation often exists, must be reckoned with and dealt with accordingly.

We must not too readily knock aside a provincial enactment. It may be not only susceptible of use, but be actually needed to give operative effect to the authority of Parliament which in a sense may be paramount in authority and power in relation to what the legislature may be attempting yet not possessed of the entire field. The recent case of the *City of Montreal* v. *Montreal Street Railway Co.*, 1 D.L.R. 681, [1912] A.C. 333, relative to the question of through traffic furnishes an illustration of how co-operative legislation by a province might have rendered that of Parliament more effectual, or far-reaching in its results.

When we add to these complexities an ambiguity of expression, too often found in statutes, the task of answering such questions as are now submitted becomes increasingly difficult. And when we add thereto the need not only of considering a

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few concrete facts such as a single case involves, but also the whole range of possible human activities, in the indefinite field thus submitted for us to pass upon, our native humility and modesty are startled and we are tempted to say we do not know.

However, though I have not by any means exhausted the definition or classification of legislative products likely to arise under our federal system, I have indicated some of the manifold considerations that have to be borne in mind in determining whether or not the above section is worthless or may be made use of either in its present shape or when modified in the way suggested. The subject-matters presented and arguments thereon seem to require I should do so and thus guard or qualify the results to be stated in any answers that can be given to the questions submitted.

One difficulty suggested is whether or not the questions should be looked at in light of the fact that the Canadian Pacific Railway Co., clearly a Dominion legislative product, subsidised by a land grant partly situated in Alberta, might be affected by the legislation in another way than is involved in the merely crossing of its track by a local railway. Counsel seemed to agree that that complicated question ought to be eliminated from the problems before us. But I am not quite sure that they were agreed on any substituted form of question if indeed it was competent for them so to agree. Counsel arguing for the Attorney-General for the Dominion, on whose advice the submission is made, and who is the minister in charge of such a reference, and I incline to think must be treated as if *dominus litis* in such references as those requiring an advisory opinion, has relieved us so far as he can from answering in a way to touch upon questions relative to lands in said subsidy.

I am not sure that his waiver would help much were it a reference of a concrete case involving some right as between the Dominion and a province. It is here, however, merely a question wherein it is desired by the government to be advised before vetoing or refraining from vetoing the legislation. It has also been throughout the argument painfully obvious to my mind that if the legislation is *ultra vires* then it can hurt no one, not even the Canadian Pacific Railway Co., and if it is clearly *intra vires* it would in such case at least so far as relating to said lands, hardly concern any one else than the Legislature of Alberta.

It seemed finally in argument to be, as between parties arguing before us, a question of the right of a provincial railway to cross a Dominion railway by virtue solely of the provincial legislative authority. I have not and never had supposed any one else could have had any doubt upon such a point.

The Dominion Parliament having by virtue of its exclusive powers over the enumerated subjects in section 91 of the British North America Act, created a corporate power and thereby conferred on one or more persons the power to construct or cause to be constructed a railway, that railway cannot be crossed by any other railway company which with its work is only the product of the somewhat analogous powers given by section 92 to provincial legislatures over "local works and undertakings." I have considered the elaborate argument addressed to us to the contrary and hope I understand it. As to that parallel drawn between the incidental or necessarily implied powers which have been held to be part and parcel of the power conferred by the powers given the Dominion over the enumerated subjects of section 91 and the supposed need to give vitality to the powers of the provinces over local works and undertakings by means of implying similar incidental and necessarily implied powers in anything to be enacted in order to the carrying into execution of any such provincial powers, I have just this to say.

I agree the analogy holds good until the attempt to give operative effect of it runs against the exclusive precedent power and its products.

The British North America Act expressly assigns to the Dominion Parliament in and for the purposes of the executing of the powers over the enumerated subjects in section 91 and the exception in section 92, sub-section 10, such exclusive and paramount authority over the subject-matters therein mentioned that when we have regard to the matters of the business in hand as when a railway crossing of a Dominion railway by a provincial railway has to be constructed it is clear that it must be affected either by virtue of concurrent legislative provisions covering all that is necessary to provide for executing such a purpose with due security for the safety of all those concerned in the construction and use of the physical product called a crossing, or by virtue of the power having the exclusive and paramount authority referred to exercising the full power necessary to determine the means of executing such a purpose.

Having regard to the nature of the business in hand and the clear language of the British North America Act, I think the full effect I suggest must be given the predominant or paramount powers I have mentioned. After these powers have been exercised all that the provincial legislature is given must be read as subject thereto.

The argument for the proposition that the powers assigned the province must be given such full effect as to enable the local road to accomplish a crossing without relying upon the authority of the Dominion, was attempted to be supported by the

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recent decision in the *Marriage Laws Case*, 6 D.L.R. 588, 46 Can. S.C.R. 132, on appeal 7 D.L.R. 629, [1912] A.C. 880, 11 East. L.R.,255. I am disposed to think the point well taken as mere matter of argument put forward for consideration. It is to be observed, however, that the opinion therein was merely advisory and decides nothing and is of no consequence in relation to the interpretation and construction of the British North America Act, save so far as the reasoning upon which it proceeded when applied to said Act commends itself to those having to deal therewith.

Then having due regard thereto I am, with great respect, quite unable to understand how any express and exclusive dominating power such as given by the Act to the Dominion despite the so-called exclusive authority subject thereto given the provinces, is ever in any case to be minimized, much less deleted from the Act because of some apparently inconsistent power given the provinces. If need be to discard either, it is the subsequent and subordinate power that must be deleted, as it were, in order to give the precedent and paramount power its full effective operation.

The use of the adverb "exclusively" in section 92, and adjective "exclusive" in section 91, unfortunately leads those not examining the whole, to assume each must have the same effect. But the language used when analyzed as it has been so often renders it clear that the general purpose was to subordinate the powers of the legislatures, no matter how it might affect them, to those of Parliament, over the said enumerated subjects.

The attempt has been made in many cases to give the subordinate provincial powers such operative effect as the language defining them at first blush might warrant, notwithstanding the precedent dominating power given over the enumerated subjects in the sub-sections of section 91 to the Dominion had not been exercised or at least exhausted or because they had been exercised later than the provincial powers apparently bearing on the same subject.

These attempts always failed in the Courts of last resort until the *Marriage Laws Case*, 46 Can. S.C.R. 132, on appeal, 7 D.L.R. 629, [1912] A.C. 880, 11 East. L.R. 255. The trend of authority in many cases including some of those cited to us, had run so strongly the other way as to become the subject of adverse criticism on the ground that the powers claimed by the Dominion had been carried further than in fact necessary for the due execution of the particular power involved, and thus needlessly invaded the field assigned the provinces.

There is a mass of authority of this kind in the way of decisions in concrete cases, which, having binding authority, we

must observe, despite later merely advisory opinions, even if apparently conflicting, though possibly not.

Then it is said, pursuing same line of argument relative to the power claimed by the enactment now in question, that the Dominion has not by express enactment taken possession of the field and, therefore, the province has authority to enact, and a line of cases is cited to us which it is urged give expression to such a doctrine. When examined these cases do not support the alleged doctrine. In most of them there is nothing more than that a province may have in the exercise of its power over property and civil rights enacted a law which perhaps has been superseded *pro tanto* by an enactment of Parliament in the exercise of its exclusive legislative authority over the enumerated subjects in section 91. This has been sometimes expressed as a taking possession by the Dominion of the same field or part of the same field or as overlapping, as it were, in the same field by concurrent legislation. A more accurate mode of expression is that "subjects which in one aspect and for one purpose fall within section 92 may, in another aspect and for another purpose fall within section 91" (Clement's Canadian Constitution, 2nd ed., page 172, quoting from the judgment of the Judicial Committee of the Privy Council in the case of *Hodge* v. *The Queen*, 9 App. Cas. 117, at page 130).

With great respect I think the metaphor of a supposed field, as it has sometimes been expressed, is not quite accurate, and in other cases the true limits of the respective powers have been, as result of its misapplication, misapprehended. For example: When by virtue of its authority over property and civil rights a legislature has enacted something giving a right of property, and later the Dominion Parliament has in the due exercise of its exclusive powers over bankruptcy enacted something else which of necessity invaded that right of property, it may, in doing so, disturb apparently existent rights of property and other civil rights. But such rights of property always were held subject to such disturbing power.

That part of the field of property and civil rights which Parliament may thus have taken possession of, never had existed in the province. It had only exercised its undoubted power over property and civil rights so far as competent for it to do so, but had never occupied the same field as the expression "taking possession of the field" so often implies. The bank or Dominion railway company, for example, operate by virtue of the exclusive authority of Parliament. These corporate bodies rest such operations in the field of property and civil rights sometimes solely upon the authority of Parliament in ways that the legislature of a province with all its power over property could not enable, and at other times upon the authority of both Parliament and legislature.

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The purposes and objects to be attained by each legislative power are the measure by which their respective legislative fields are constituted and they never can be the same field though the physical appearance as result of obedience to the law either may enact, may produce often a semblance that seems to justify the expression.

Great confusion of thought often exists because people do not stop to think and discriminate between these exclusive powers of Parliament and the residual power which Parliament has for the "peace, order and good government of Canada," but which in its turn is subordinate to the so-called exclusive powers given in section 92 to the provincial legislatures.

The gravest error is likely to grow out of this confusion by accustoming the legislative and judicial mind, if I may say so, to look upon the Dominion as possessing a general supervision or superior power over identically the same thing as the province is entitled to deal with, but which it has not save by the indirect means of the veto power over provincial enactments. The notion sometimes prevails that, as of course, the legislation of a province must bend before that of Parliament. It must before the paramount exclusive legislative authority given over specified subjects, but not before what Parliament asserts merely by virtue only of this residual power.

In the case of the matter in hand I think there are two answers to the contentions founded on the theory put forward. The Dominion Parliament has, I incline to think, taken possession of the field which I will call the subject of crossing of railways, of which one or more may happen to be a Dominion railway, and has dealt in detail with all the immediate acts involved in carrying out such a purpose, so that in a proper case there should not be a legal difficulty in accomplishing a crossing of such railway as in question.

But even if it has not gone quite so far I think its enactment under which one of the railways within its exclusive control has been constructed and is being operated, has in itself such force and effect that a provincial legislature cannot interfere to force by its own unaided act a crossing thereof by one of its own creations.

Is there then any purpose which the said section submitted herein can subserve? Is there anything on which it can so rest as to be possibly *intra vires* the legislature?

It is quite clear that Parliament has no power to add to a provincial corporation a capacity not already given it. If such a railway company has not been given directly or impliedly the capacity to cross another railway, Parliament cannot give it that capacity except by declaring it a work for the benefit of Canada. In like manner, if as is contended, Parliament has

not so dealt with the subject of crossing and there is nothing enabling it and the Dominion railway charter expressly or impliedly disables it from being done, then I conceive it is quite competent for a legislature to pass some such Act as the section in question to be conditional in its operation upon corresponding legislation being duly enacted by Parliament. It does not seem to me that such an enactment need be in very exact terms conditional if it is capable of such use or application. It certainly ought to be held that a legislature is competent to make a tender of such legislative assistance if we are to work out our federal system in all its bearings.

I must not, however, conceal the fact that I made such a suggestion in the *Marriage Laws Case*, 6 D.L.R. 589, 46 Can. S.C.R. 132, on appeal, 7 D.L.R. 629, [1912] A.C. 880, and expressed the view that it was quite competent for Parliament to so act upon or by virtue of its powers therein involved, but in view of the result of that case in the Judicial Committee of the Privy Council there is room to argue that such a doctrine as I here enunciate and have often laid down has no foundation.

Parliament certainly has the power to aid thus the treating and dealing with other countries. No one ever questioned it in known instances, and surely it is quite competent for it to so deal with the provinces. In fact it has heretofore and until the *Marriage Case*, 6 D.L.R. 589, 46 Can. S.C.R. 132, on appeal, 7 D.L.R. 629, [1912] A.C. 880, so dealt with them. I have no serious difficulty in this case in so holding if the section can be read, as if conditional, for example, upon due leave being got from the Board of Railway Commissioners to render it operative. So far as that may, if possible, be implied, the section may be *intra vires*. As at present advised I do not think the proviso relative to Railway Commissioners at the end of the sub-section which precedes this amending sub-section, is effective for such purpose, or can be imported into this new legislation as if part thereof.

But the purpose of the submission as indicated by the possible amendment to the section as proposed and the withdrawal of the possible bearing of the enactment upon the Canadian Pacific Railway lands assigned by virtue of its subsidy, seems to be tentative and, therefore, the liberty extended to us instead of a single affirmative or negative answer, to answer in such a way as to deal with the value of the enactment as giving a right to cross a Dominion railway without the leave of the Board of Railway Commissioners for Canada, or other means given or to be given by authority of Parliament.

My answer, therefore, is that the section as it stands or would stand after striking out the word "unreasonably" would not, without the authority of Parliament or some person or body

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duly delegated its power in the premises, be effective as giving the right to any provincial railway company to cross a Dominion railway.

DUFF, J.:—Section 82 (2) of chapter 8 of the Alberta statutes of 1907 contains these words:—

> And in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so in addition to otherwise complying with this section,

and in view of that clause it may be doubted whether the power conferred upon provincial railway companies by the first subsection ought not to be held to be exercisable in respect of the "lands" of Dominion railways only after the Board of Railway Commissioners for Canada has pursuant to its lawful powers in that behalf given its approval to the proposed action of the provincial railway company.

It may further be doubted whether on the true construction of section 7 of chapter 15 of the Act of 1912 the amendment effected by that enactment is not limited to authorizing the provincial railways with the approval of the Lieutenant-Governor-in-council as well as that of the Board of Railway Commissioners for Canada to "take possession of, use or occupy" *lands* of any Dominion railway company as contra-distinguished from "right-of-way tracks, terminal stations or station grounds."

If such be the effect of these enactments they are obviously unobjectionable from a constitutional point of view.

Both parties, however, desire us to deal with the question whether provincial legislation can or cannot validly confer upon a provincial railway company compulsory powers for the purpose of enabling it to construct its line across the line of a Dominion railway by way of level crossing and to run its trains over the line when constructed. I think the question must be answered in the negative. It is, of course, impossible to construct a railway across another existing railway in such a way as to form a level crossing without altering in some degree the physical structure of the works of the existing railway.

Legislation authorizing such action on the part of a provincial railway company and requiring the Dominion railway company to submit to such alteration of the structure of its works, and to the passing of the trains of the provincial railways across its line, in so far as it is merely permissive or facultative, is legislation strictly relating to the provincial railway, and if it stopped there, would, as such, be within the powers of a provincial legislature. But in so far as it affects to confer authority upon or compulsory powers as against the Dominion company it is legislation relating to a Dominion railway as such. In that respect it is legislation of a character that the Dominion alone

has power to enact. Some of the powers of the Dominion in respect of Dominion railways are (it could hardly be disputed) exclusive powers. In *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, at page 372, Lord Watson said:—

> The British North America Act, whilst it gives the legislative control of the appellants' railway *quâ* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the Provincial Parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867, that the "railway legislation," strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament. It, therefore, appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers.

Legislation, therefore, authorizing the altering for railway purposes of the structure of the works of a Dominion railway, and the running of trains over the works as altered is legislation upon a subject which as subject-matter for legislation *necessarily* falls within the field exclusively assigned to the Dominion.

The works dealt with by section 92 (10) are, as Lord Atkinson observed in the judgment in *City of Montreal* v. *Montreal Street Railway Co.*, 1 D.L.R. 681, [1912] A.C. 333, "things not services." Some of them at all events (railways and telegraph lines, for example), are things of such a character that for many purposes they must be treated as entireties. The observations of his Lordship in the judgment just mentioned suggest that as far as possible they should be so regarded when considered as subject-matter of legislation. In that view it seems to follow that when you have an existing Dominion railway all matters relating to the physical interference with the works of that railway or the management of the railway should be regarded as wholly withdrawn from provincial authority: *Fisheries Case*, [1898] A.C. 700, at page 715; *Madden* v. *Nelson and Fort Sheppard Railway Co.*, [1899] A.C. 626, at page 628. Questions of a similar character may arise when a projected Dominion railway is to cross a provincial railway. What compulsory powers the Dominion is entitled to exercise in such a case over the provincial railway in respect of the crossing and

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matters incidental thereto without assuming complete jurisdiction over the provincial railway by declaring it to be "a work for the general advantage of Canada," is a subject which does not require discussion here.

There are two further observations:—

1. In the view I have just expressed (namely, that legislation such as that under consideration conferring authority upon a provincial railway to alter for railway purposes the physical structure of the works of a Dominion railway without the consent of the Dominion railway company or the sanction of the Dominion Parliament and all legislation relating to the management of such a railway is legislation upon a subject which, since it necessarily falls within the subject of Dominion railways can only be enacted by the Dominion) no question of the so-called doctrines of "overlapping powers" and "necessarily incidental powers" can arise; and the points raised during the able discussion of those subjects by counsel of Alberta do not require consideration.

2. As is shewn by Lord Watson's judgment in *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 (and, indeed, it must be obvious when we consider the numerous cases in which jurisdiction over the railway of a provincial company has been assumed by the Dominion by declaring the railway to be a work for the general advantage of Canada after the company had received a large land subsidy from the province), the fact that exclusive jurisdiction in relation to a Dominion railway, as railway, is vested in the Dominion is not incompatible with the possession by the province of some authority over the Dominion railway company as land owner; how far in legislating for a provincial railway the province has authority to confer compulsory powers as against a Dominion railway company as land owner is a question upon which I express no opinion.

Anglin, J.

ANGLIN, J., agreed with DAVIES, J.

Brodeur, J. (dissenting)

BRODEUR, J. (dissenting):—We are asked by this reference to declare whether section 7 of chapter 15 of the Act of the Legislature of Alberta of 1912 is *intra vires*.

The Legislature of Alberta passed in 1907 a Railway Act, and section 82 of that Act provided:—

> The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of any other railway company and have and exercise full right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor-in-council first obtained or to any order or direction

which the Lieutenant-Governor-in-council may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

(2) Such approval may be given upon application and notice and after hearing the Lieutenant-Governor-in-council may make such order, give such directions and impose such conditions and duties upon either party as to the said Lieutenant-Governor-in-council may appear just or desirable, having due regard for the public and all proper interests and all provisions of the law at any time applicable to the taking of lands and their valuation and the compensation therefor and appeals from awards thereon shall apply to such lands and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so in addition to otherwise complying with this section.

It seems to me that the legislation had in view not only the crossing of provincial railways, but also of federal railways because of the reference therein to the Board of Railway Commissioners for Canada. But the definition in the Act of the word "company" made it somewhat doubtful whether the above quoted provisions would apply to federal railways and a new sub-section was added in 1912 by chapter 15, section 7, which reads as follows:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such legislative authority.

By the British North America Act sub-section 10 of section 92, the provincial legislature may exclusively make laws in regard to local works and undertakings. A railway built within the boundaries of a province is subject to the legislative control of that province.

The corporate powers of such a railway company, its rights and obligations are essentially under such legislative control. Its power to build a line from one point to another is granted by the provincial legislature and the provincial legislature alone can give such authority. If in its course the railway comes in contact with federal works it may be subject to some federal regulations, but the enabling power to cross those federal undertakings rests essentially with the province. A provincial railway may have to cross a navigable river. Navigation is under the legislative authority of the federal Parliament and laws have been passed by that Parliament as to the manner in which bridges could be put on those rivers (R.S.C. 1906, ch. 115). In such a case the provincial railway will be required to follow the federal regulations, but the right to build a bridge shall have to be granted to the company by the local legislature. The legis-

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lation, the constitutionality of which is contested, deals with the crossing of railways.

In the case of two provincial railways the executive authority of the province is empowered to deal with the matter, to give its approval and impose such conditions as it may appear just or desirable having due regard for the public interests. In the case of the crossing of a federal railway the provincial railway is still bound to obtain the approval of the provincial government; but, as I read the statute, that provincial railway will also require the approval of the Board of Railway Commissioners for Canada which is the federal authority having executive and judicial control over federal railways. The power conferred by the legislation upon the provincial railway to cross a provincial or federal railway is such an enabling power as was within the legislative authority of a provincial legislature.

The claim that the federal Parliament is the only authority that could give such enabling power is unfounded, because the provincial railway company could not construct its line through or over or below a federal railway, unless the federal authorities would be willing to pass the necessary legislation. The powers then granted by sub-section 10 of section 92 of British North America Act would become illusory. The enabling power rests with the provincial authority and a regulative power recognized by the provincial legislation may be exercised by the federal authorities.

The crossing of railways is of constant occurrence. The provincial legislature in creating local railway companies have the power to confer upon them as an incident of their legislative authority in the matter the right to cross any other railway, local or federal. But that must be done, of course, without interfering unreasonably with the construction or operation of the other railway. It is precisely what the legislation has provided for in this case.

But there is more. The legislature far from encroaching upon the federal legislative or executive authority has enacted that where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so. There is in the Railway Act a legislation regarding the crossing of provincial railways by federal railways. It may be doubtful whether such legislation was within the power of the federal authority, but then concurrent legislation was advisable and it is what was done. The Act in question provides for enabling and concurrent legislation that was within the legislative authority of the Province of Alberta.

For those reasons I would answer that section 7 of chapter 15 of the Act of the Legislature of Alberta, in 1912, is *intra vires*.

Answer accordingly.

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Saskatchewan Supreme Court, Brown, J. May 10, 1913.

1. MUNICIPAL CORPORATIONS (§II D—142)—TOWNS—PROMISSORY NOTE—POWER TO MAKE—ULTRA VIRES CONTRACT.

A town has no authority to execute promissory notes even though in payment for services rendered, and, though they are sealed and signed by the mayor and secretary-treasurer of the town in its behalf.

2. CONTRACTS (§IV D—364a)—CONDITION—CERTIFICATE OF PERFORMANCE—FORMAL CERTIFICATE, WAIVER OF.

Where a town, under a construction contract, treats an inspector's informal certificate as if it were in fact a final one, although not in the exact form contemplated by the contract, the necessity of a formal certificate is waived, and a recovery may be had on such informal certificate.

3. PLEADING (§ I N—114)—AMENDMENT OF STATEMENT OF CLAIM ON TRIAL.

Where a formal inspector's certificate of completion of a construction contract is waived by the defendant by treating an informal certificate as sufficient, an amendment of the plaintiff's pleading will be permitted at the trial so as to allege such waiver.

Statement

TRIAL of an action against a municipal corporation for money alleged to be due under a construction contract and upon certain "notes" given in respect thereof.

O. M. Biggar, K.C., and *A. M. Panton*, for plaintiffs.
Frank Ford, K.C., and *W. W. Livingston*, for defendants.

Brown, J.

BROWN, J.:—I am satisfied that the defendants had no authority to execute the notes sued on herein, and moreover, even though they had such authority, they never authorised the issue or execution of the notes. The mere fact that they were sealed and signed by the mayor and secretary-treasurer on behalf of the defendants is not sufficient: see 2 Halsbury 491; *Stephens* v. *North Battleford School District*, 9 W.L.R. 501. This portion of the plaintiffs' claim will therefore have to be disallowed.

As to the portion of the claim which is sought to be recovered under the contract, we find that the inspector (Storer) signs exhibit D as containing a "list of work necessary to be done before *final certificate* granted." Joseph M. Pigott states in his evidence that this work was done with the exception of a few things that were dealt with in the final certificate as being out of the plaintiffs' control. Storer subsequently issues a certificate, exhibit F; and it is clear that when he issued this document he intended it, together with exhibit G, which was attached thereto, as a final certificate within the meaning of the contract. It is also clear that the defendants accepted and dealt with this document as if it were a final certificate. Even though it may not be in the exact form contemplated by the contract, I am of opinion that the defendants by their actions have waived the necessity of it being in such form. It is true that the plaintiffs have not pleaded waiver, but I do not hesitate to allow them even now to do so.

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It appears from exhibit G that the plaintiffs' total claim was $29,597.65, and by virtue of exhibit F there was deducted therefrom $1,173.90, leaving a balance of $28,423.75. There had been paid, before the issue of these documents, on the contract $22,674.41, thus leaving a net balance to be paid, according to Storer's certificate, of $5,749.34. The defendants, however, dispute some of the items which have thus been allowed by Storer, and under the agreement such items would not be recoverable in this action, but only by way of arbitration. The amount which the defendants admitted as being payable is $5,082.70. The manner by which this amount is arrived at is clearly indicated by the certificate of Kitson, the engineer, being exhibit K. I am of opinion, therefore, that the plaintiffs should have judgment for the amount of $5,082.70, together with their costs of action, except such costs as may be exclusively applicable to that part of their claim which deals with the notes. This judgment is given without prejudice to the plaintiffs' right to recover under the contract for the amount for which such notes were given, and without prejudice to any rights which they may have under the contract to proceed by way of arbitration for the recovery of all items in dispute between the parties. The judgment is also without prejudice to the rights of the defendants to proceed under their counterclaim, the hearing of which is postponed until the next regular sittings of the Court.

Judgment for plaintiffs.

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GILL v. YORKSHIRE INSURANCE CO., Ltd.

Manitoba King's Bench, Galt, J. May 28, 1913.

1. INSURANCE (§ VI A—248)—ARBITRATION—WAIVER AS TO INSURED—EXTENSION TO COUNTERCLAIM AGAINST INSURER, MADE BY JOINT DEFENDANT.

An express waiver by an insurance company as to the plaintiff in an action on a policy, of a condition for arbitration of loss, is available to one who purchased an insured chattel before loss, so as to extend to a counterclaim made by him against the company, with whom he was joined as a defendant in the action.

2. INSURANCE (§ II A—30)—INSURABLE INTEREST IN CHATTEL—REDUCTION BY SALE FOR LESS THAN INSURANCE—RETENTION OF LIEN—EFFECT OF.

Where an insurance policy for $3,000 insurance on a horse stipulated that in the event of death but two-thirds of the actual value of the animal should be paid, upon a subsequent sale of the horse for $1,500, the insured taking notes, with a lien on the horse, for the deferred payments, his insurable interest was reduced to two-thirds of the amount of the notes, and the accruing interest thereon.

3. EVIDENCE (§ IV I—450)—CORPORATION — PRIVATE BOOKS OF AGENTS' RULES—ADMISSIBILITY AGAINST STRANGER.

An agents' guide book marked "private and confidential" issued by an insurance company exclusively for the guidance of its agents, is not admissible against or binding on an insured person in an action on a policy issued by the company.

4. INSURANCE (§ VI A—246)—NOTICE OF LOSS—SUFFICIENCY OF—CONDITION AS TO—SERVICE ON AGENT OF FOREIGN COMPANY.

Notice of the illness and death of an insured animal given in Manitoba to an agent appointed to represent a company according to the Manitoba Insurance Act, who gave immediate telegraphic notice to the head office in Montreal, is a sufficient compliance with a condition of a policy of insurance that notice of the illness or death of an insured animal should be given direct to the company, where notice, if given by the insured direct to the head office of the company, either in person or by letter, would not have arrived in advance of the notice given by the agent.

5. INSURANCE (§ III E—75c)—CONDITIONS—REASONABLENESS—NOTICE OF ILLNESS OF INSURED ANIMAL—TIME FOR GIVING.

A condition of a contract of insurance on an animal that notice of its illness should be given an insurance company within 24 hours, as applied to persons living in the country, is unreasonable, if the time for giving notice is stipulated to run from the moment the animal actually became ill, and not from the actual discovery of its illness.

6. INSURANCE (§ VI A—245)—PROOF OF LOSS—ON BLANKS FURNISHED BY INSURER—WAIVER OF CONDITION.

A provision of an insurance policy that full particulars of loss should be supplied the company on forms furnished by it, is waived by the company's instructions to its general agent to the effect that it did not think it desirable to furnish the insured persons with such forms, as it preferred to have separate statements from them.

7. INSURANCE (§ VI F—405)—LOSS — PAYMENT AFTER SALE OF INSURED CHATTELS—SUBROGATION OF INSURER TO LIEN NOTES—DIFFERENCE BETWEEN LOSS AND VALUE OF NOTES.

Where lien notes were taken on the sale of an insured animal for the deferred payments, on paying a loss under its policy the insurance company becomes subrogated to the insurer's rights on the lien notes to the amount paid him.

[MacGillivray on Insurance 733 specially referred to.]

8. BILLS AND NOTES (§ VI A—150)—MATURITY—ACCELERATION—PROVISION FOR—EXERCISE—STRICT COMPLIANCE NECESSARY.

A condition of a lien note that the payee might, should he consider the amount thereof insecure, declared it due and payable and bring action thereon, does not become operative by a mere demand for the payment of the note; since a strict compliance with such condition by declaration that he was insecure, was necessary in order to render it effective.

9. INSURANCE (§ IV A—160)—ASSIGNMENT—SALE OF INSURED CHATTEL—BENEFIT OF INSURANCE—RIGHT OF PURCHASER—CONTINUANCE OF INSURANCE—CONSENT OF COMPANY—SUFFICIENCY.

The consent of an insurance company to the continuance of a contract of insurance for $3,000 on a horse after its sale for $1,500, for the full amount of the policy, which provided that, on a loss, only two-thirds of the animal's actual value would be paid, is not shewn by a letter from the general agent of the company to the purchaser to the effect that the latter's interest in the insurance was being held fully covered, subject to one-third deduction from the market value of the animal; where the agent supposed that the purchaser intended taking out a new policy for the sum properly insurable.

10. INSURANCE (§ IV A—161)—ASSIGNMENT OF POLICY TO PURCHASER OF INSURED CHATTEL—VALIDITY.

The purchaser of an insured chattel acquires no rights against the insurance company, under an assignment to him by his vendor without the consent of the insurance company, of the contract of insurance thereon before the happening of the loss.

[*Lynch* v. *Dalzell*, [1729] 4 Bro. P.C. 431; and *Sadler's Company* v. *Babcock*, [1743] 2 Atk. 554, referred to.]

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ACTION by the plaintiffs, as executors of Thomas Newton, deceased, for payment by the insurance company of certain insurance moneys arising out of an insurance of a stallion, and against their co-defendants Kitching and Kenway for payment of two lien notes given by them on the purchase of the stallion shortly before its death.

J. L. M. Thomson, for plaintiffs.

R. M. Dennistoun, K.C., for Yorkshire Insurance Co.

J. F. Davidson, for Kitching and Kenway.

Galt, J.

GALT, J.:—The circumstances out of which the action and counterclaim by Kitching and Kenway arise are as follows:—

In July, 1911, Thomas Newton signed an application for insurance on the stallion "Salwick Hero," stating its market value to be $5,000, and asking for $3,000 insurance. On July 19, 1911, the defendant insurance company issued a policy in favour of Thomas Newton for $3,000 for one year. The policy contained the following provisions:—

Now this policy witnesseth that if after receipt hereof and payment by the insured to the company of the undernoted premiums for an insurance up to noon on the date of the expiry of this policy any animal described in the schedule below shall die from any accident or disease hereby insured against as after-mentioned, and occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the company shall be liable to pay to the insured, after receipt of proof satisfactory to the directors, two-thirds of the loss which the said insured shall so suffer, but not exceeding the amount for which said animal is insured.

Under the heading "Definition of tables and risks covered," the policy insures "Stallions against death from accident or disease."

It also contains the following provision:—

Now, be it hereby known that the capital, stock, or funds of the company shall alone be liable to pay or make good to the insured, or to the representatives of the insured, being successors in interest, all such loss not exceeding in amount the respective sums of money hereinbefore mentioned.

Provided that this insurance shall, at all times, and under all circumstances, be subject to the conditions endorsed hereon and which are to be taken as part of this policy.

Amongst the conditions are the following:—

6. The insured shall give notice direct to the company within 24 hours of foaling, premature or otherwise, operation performed, *illness*, lameness, or any accident or injury to any animal hereby insured, and shall comply with all such directions as the company may give, etc.

8. On the death of any animal hereby insured, the insured shall within 24 hours give notice thereof in writing direct to the company and shall, if required by the company at his own expense have a post mortem examination made by a qualified veterinary surgeon, and shall not remove or part

with the carcase until after the expiration of 24 hours. The insured shall within 21 days thereof furnish to the company particulars of the claim on their printed form together with all such information, veterinary certificates, and satisfactory proof as to the death, identity, and market value of the animal, as the directors may require, and shall, if so requested, furnish a statutory declaration in connection with any claim.

10. Setting forth a condition that if any difference of any kind whatsoever should arise between the company and the insured, or his representatives in respect of the policy, the same should be referred to arbitration as therein provided, and it was thereby expressly stipulated and declared that it should be a condition precedent to any right of action or suit upon the policy that the award of such arbitrator, arbitrators or umpire of the amount of the claim if disputed should be first obtained.

Newton borrowed from the Bank of Hamilton moneys to enable him to pay the premium, $210, and in order to secure the bank, it was arranged that the policy should express the loss, if any, to be payable to the Bank of Hamilton. Newton died on November 11, 1911, and plaintiffs were appointed his executors. The claim of the Bank of Hamilton was paid off by the executors, and, in March, 1912, they employed Nelson Wilson, an auctioneer, to sell the stallion. Advertisements of sale were published in Winnipeg papers and also at Treherne, and by posters throughout the district.

The defendants Kitching and Kenway having seen the advertisement in one of the Winnipeg papers, made inquiries as to whether the stallion was insured, and having ascertained that he was insured by the defendant company, the defendant Kenway called at the office of Oldfield, Kirby & Gardner, agents for the insurance company, and ascertained particulars of the insurance which had been effected. Apparently Kenway's conversation was with Edwin S. Craig, chief clerk of the live stock department. The sale took place on March 27, when 150 or more farmers and others attended, and the stallion was purchased by Kitching and Kenway for $1,500. The auctioneer stated at the sale that all the documents connected with the horse would be delivered to the purchaser. It appeared that certain certificates of pedigree and transfer were then in the possession of the executors or of the auctioneer, but nothing whatever was said about insurance.

The terms of sale were $500 cash and the balance to be secured by two lien notes of $500 each, one payable on April 1, 1913, and the other, April 1, 1914, with interest at 7 per cent. per annum, and the defendants further agreed to pay interest at 10 per cent. per annum after maturity of each note until paid.

The stallion was delivered to the purchasers. On Saturday, April 13, the horse took sick, at Rathwell, Manitoba, of which the defendant Kitching was aware on that date. The defendant Kenway was at the time himself sick in bed in Winnipeg.

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Kenway's evidence as to when he first heard of the horse being sick varies. In one portion of his evidence he states that Kitching telephoned him on Saturday night, and in another portion of his evidence he says he did not get the telephone message until Monday. None of the executors heard of the horse's sickness until Monday the 15th.

On that day Charles Wilson, one of the executors, heard that the horse was sick and went to see him. Wilson then got the executors together with a view to arranging about the insurance, which seemed likely to fall in. Kitching was there at the time, and as a result, the executors executed, under seal, an assignment to Kitching and Kenway of the policy and all benefit to be derived thereon, save and except the sum of $1,000 and interest thereon from March 27, 1912, the said sum of $1,000 being the balance owing on the purchase price of the stallion.

Kenway says that on Tuesday, April 16, he telephoned about ten o'clock in the forenoon to Oldfield, Kirby & Gardner notifying them of the sickness of the horse, and subsequently he personally went to their office and notified them. At about two o'clock in the afternoon on that day Kenway was informed by telephone that the horse was dead. He then went again to the office of Oldfield, Kirby & Gardner, and notified them.

On the same date Frank McMurray, one of the partners in the Oldfield, Kirby & Gardner firm, who had charge of the live stock department, notified the head office of the Yorkshire Insurance Company, at Montreal, of the death of the horse by wire as follows:—

> Policy seventy-six thousand seven hundred and two; Newton stallion died to-day at Rathwell, Manitoba; sold three weeks ago to Kitching and Kenway, who advised us of sale pending signature to assignment not yet received; stallion attended by Dr. Lipsett whom Dr. Torrance says thoroughly capable and reliable; wire instructions.

A large amount of documentary evidence of correspondence between the defendant company and their Winnipeg agents was put in.

Mr. Craig states in his evidence that Kenway rang him up by telephone and said that as he was not in charge of the horse he would like to be put at ease with regard to the insurance; but that Kenway said nothing about the horse being sick. As a result of this request, Craig wrote a letter on Tuesday, 16th April, to Kenway as follows:—

> "Dear Sir:
>
> *Re Policy 76702—Insurance of stallion, "Salwick Hero."*
>
> Referring to your telephone message to-day we beg to advise you that we are holding your interest in this insurance fully covered, but subject to the veterinary surgeon's report on the stallion, and also subject

to one-third reduction from the veterinary surgeon's quotation of the present market value of the said stallion.

We await policy at your earliest convenience.

Yours truly,
OLDFIELD, KIRBY & GARDNER.
Per Edwin Craig.

Kenway denies that he had requested Craig to send him any such letter as above.

On May 22, 1912, Messrs. Bonnar, Trueman & Co., solicitors, wrote to Oldfield, Kirby & Gardner on behalf of the executors, with a view to payment of the insurance, and on May 29th the solicitors wrote on behalf of Messrs. Kenway and Kitching also. Messrs. Bonnar, Trueman & Co., also took up the question of arbitration under the policy with Messrs. Oldfield, Kirby & Gardner, and as a result the defendant company waived a reference to arbitration. This waiver nominally was given in favour of the plaintiff executors and the defendant company now seek to rely upon this condition as against Kenway and Kitching's counterclaim.

I think that having waived arbitration so far as the plaintiffs were concerned, and the defendants Kitching and Kenway having been made parties defendant with the consequent right of counterclaiming if they so desired, the defendant company is not now in a position to insist on an arbitration of their co-defendants' counterclaim.

Dealing now with the various claims set up by the plaintiffs and defendants respectively, the first question to decide is as to the plaintiffs' claim against the Yorkshire Insurance Company, Limited.

When the plaintiffs sold the stallion on March 27, for $1,500 and received $500 in cash, their insurable interest was reduced to $1,000 and accruing interest, and under the terms of the policy the plaintiffs, unless debarred by one or more conditions of the policy, are entitled to two-thirds of the $1,000 and interest.

The defendant company pleads that, under condition 6 of the policy the insured was bound to give notice direct to the company within 24 hours of the illness of the animal insured, and also under condition 8 that upon the death of the stallion the insured was bound within 24 hours to give notice thereof in writing direct to the company, and within 21 days thereafter to furnish the company with particulars of the claim on their printed form, together with all such information, veterinary certificates and satisfactory proof as to the death, identity and market value of the animal as the directors might require, and to furnish, if so requested, a statutory declaration in connection with any claim.

The defendant company has its head office for Canada in

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the city of Montreal. Documents were put in by the plaintiffs shewing that Walter T. Kirby (a member of the firm of Oldfield, Kirby & Gardner) was in 1907 appointed, pursuant to the Manitoba Insurance Act, agent of the company in the Province of Manitoba, and that the chief agency of the company within the said province was at the office of said Walter T. Kirby.

Mr. Dennistoun, on behalf of the defendant company, also filed, subject to objection, a book of instructions given by the company to all their agents, and argued that the limitations of authority contained in these instructions must be recognized by the Court in adjudicating upon the verbal and written communications which the plaintiffs and the defendants Kenway and Kitching had with Oldfield, Kirby & Gardner. The book is styled, "Agents' Guide Book—Private and Confidential." I do not think that any such private instructions communicated by a principal to its agent at a general agency can bind parties dealing with the agent. I think that for all practical purposes the dealings of Messrs. Oldfield, Kirby & Gardner may be looked upon as having been done by the company itself.

In construing the conditions printed by the defendant company, it must be borne in mind these conditions are framed with every care to the company's interests, and that they should not be so construed as to furnish a trap to farmers and others throughout the country who might have been induced to insure their live stock with the company.

None of the executors were aware of the illness of the stallion until Monday, April 15, the day on which they assigned the policy; and they left it to the purchasers to notify the company so far as might be necessary. Within 24 hours thereafter, Kenway notified Oldfield, Kirby & Gardner, and they, the same day, notified the head office by wire.

If the stipulated 24 hours commence to run at the first moment when an animal is affected by illness I should think it probable, or certainly possible, that the illness would not be discovered, even by the man in charge of the animal, until the time limit had almost or quite expired. The condition, when applied to parties residing out in the country, is certainly most unreasonable.

Counsel for the defendant company pointed out that notice is to be given direct to the company (meaning at the head office in Montreal), and that if the plaintiffs relied upon Kitching and Kenway to give all requisite notices, the defendant Kitching was well aware of the stallion's illness on Saturday, April 13th, and should have given notice accordingly.

Condition 6 does not specify whether the notice of illness is to be verbal or in writing. If verbal, and if Kitching had himself taken the first train for Montreal to give it, he could

not have reached the head office during business hours before Tuesday on which day the notice was in fact received. If in writing, a letter could not have reached Montreal any earlier. There is nothing in the condition requiring a telegram. I think, therefore, that Condition 6 was sufficiently complied with.

For the same reasons, I think that the notice in writing of the death of the animal within 24 hours was given and received by the company in compliance with Condition No. 8.

With regard to the obligation cast upon the insured of furnishing particulars of the claim on the company's printed form within 21 days after the death of the animal, I find that the defendant company instructed their agents on April 17, that they did not think it advisable to furnish either the assured or Messrs. Kitching and Kenway with the company's printed claim forms, preferring that their statements should be embodied under a separate declaration, and thereupon the solicitors for the various claimants supplied the company with all necessary information as to their claim. See, amongst others, exhibits 14, 15 and 27.

In the result I find the defendant company liable to the plaintiffs for two-thirds of $1,000 and interest at 7 per cent. (stipulated for on the face of the lien notes) together with the costs of this action.

The defendant company, however, claimed in their defence that, in the event of being found liable to the plaintiffs they should be subrogated to the rights of the plaintiffs against the defendants Kitching and Kenway on the two lien notes. The insurers' right of subrogation arises whenever he pays the claim and it arises upon payment of a partial as well as upon payment of a total loss, and although the insurers are not entitled to the benefit of what is recovered until the assured has received a full indemnity. See MacGillivray on Insurance Law, p. 733, and cases cited.

But, inasmuch as the two notes represent $1,000 and interest at 7 per cent. from March 27, 1912, and the defendant company is only liable under their policy for two-thirds of the insured's loss the defendant company must either pay to the plaintiffs the other two-thirds of the loss now, or so soon as they have collected it from Kitching and Kenway. The insurer upon making payment does not require to make any express reservation of or claim to the assured's rights. In the absence of anything to the contrary, the right of subrogation follows without any assignment or condition. See MacGillivray, p. 734.

The next claim to be dealt with is that of the plaintiffs against the defendants Kitching and Kenway on the lien notes. The two lien notes for $500 each were dated March 27, 1912, and were payable respectively on the 1st day of April, 1913,

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and the 1st day of April, 1914. Each contains the following stipulation:—

I further agree to furnish security satisfactory to them (*i.e.*, the executors) at any time if required, and if I fail to furnish such security when demanded or if default in payment is made, or should I sell or dispose, or mortgage or attempt to sell the under-mentioned land which I own, or if for any reason executors should consider this note or any renewal or renewals thereof insecure, they have full power to declare it and all other notes made by me in their favour due and payable at any time and suit therefor may be entered, tried and finally disposed of in any Court having jurisdiction.

On August 8, 1912, Mr. Thomson, solicitor for the plaintiffs, wrote to the defendant Kenway:—

On behalf of the executors, and exercising their rights under the lien notes signed by you herein, I hereby demand payment of the amount of said notes, $1,000 and interest from March 27, 1912, at 7 per cent.

And on August 26th, Mr. Thomson wrote to Kenway:—

Since the death of the horse the notes are not good security, and on behalf of the executors I hereby again demand payment of said notes or satisfactory security for the payment of said moneys. If the required security or said moneys be not delivered to me within four days from date I shall enter action against you for the full amount of the notes. Please take this as final notice.

The provision in the said notes for accelerating their payment is very stringent and should be construed strictly. Assuming that circumstances had arisen justifying the plaintiffs in acting upon the provision it is necessary for them to "declare" the notes due and payable. This they did not do, as the letter above referred to merely demands payment of notes which had not become due. For this reason I am of opinion that the plaintiffs have not brought themselves within the provision in question and have sued the defendants Kitching and Kenway prematurely.

The action as against the latter defendants must be dismissed with costs.

I proceed now to consider the counterclaim of Kitching and Kenway against both the plaintiffs and the Yorkshire Insurance Co., Limited. They claim $3,000. I find upon the evidence that when the horse was sold by the plaintiffs to the defendants Kitching and Kenway no mention was made of any insurance, and it was not part of the contract of sale that said defendants should have the benefit of the existing insurance upon the horse. Prior to the sale the defendant Kenway had interviewed Mr. Craig, chief clerk under Mr. McMurray in the live stock insurance department of Oldfield, Kirby & Gardner, and I gather from the evidence that Kenway ascertained the facts relating to the existing insurance and the terms on which he himself could insure the animal. After the sale on March 27th the Insurance

Company were duly notified of it and raised no objection. The evidence of Kenway, McMurray and Craig as to certain interviews between them is very conflicting, Kenway asserting that he was endeavouring to get the benefit of the existing insurance, and McMurray and Craig respectively stating that the conversations were with reference to the right of Kenway and Kitching to re-insure the animal.

The general rule is that the buyer of goods is not entitled to claim from the seller the benefit of the seller's insurance unless the seller has contracted to give him such benefit. See *Martineau* v. *Kitching*, L.R. 7 Q.B. 436.

In the present case, as I have found, there was no such contract on the part of the plaintiffs. On the other hand, when the horse took sick and was *in extremis* on April 15, 1912, the plaintiffs executed an assignment of the policy and all the benefit to be derived thereon, save and except the sum of $1,000 and interest thereon from March 27, 1912. The policy in question here is so expressed as to be a contract of indemnity and in this respect is similar to an ordinary contract of fire insurance.

MacGillivray, at p. 766, gives the following as a result of the authorities:—

> The policy promises to indemnify A. against loss by fire, for instance A. can assign his right of action against the company to B. so that if A. suffers a loss B. may recover in respect of it, but he cannot, without the company's consent, convert their promise to indemnify A. into a promise to indemnify B., because that would not be an assignment but an attempted novation.

Probably few propositions of insurance law are based upon older authority than the above, which was laid down in *Lynch* v. *Dalzell* (1729), 4 Bro. P.C. 431, and *Sadler's Co.* v. *Babcock* (1743), 2 Atk. 554.

I feel quite satisfied that the versions given by McMurray and Craig as to their interviews with Kenway should be accepted rather than Kenway's. Of course, it is quite possible for an insurance company to depart from ordinary business principles and grant or continue an insurance for double the amount of an animal's value. The question is whether the defendant company has in this case done so. In answer to an inquiry put by myself, Mr. Davidson, counsel for Kitching and Kenway, admitted that the strongest evidence he could point to on behalf of his clients was the letter sent by Craig in the name of Oldfield, Kirby & Gardner to Kenway on the morning of April 16th. Assuming in favour of Kitching and Kenway (but not deciding) that this letter is binding upon the defendant company, I think it entirely fails to establish the defendants' counterclaim. It informs Kenway that the agents

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are holding your interest in this insurance fully covered, but subject to the veterinary surgeon's report on the stallion and also subject to one-third reduction from the veterinary surgeon's quotation of the present market value of the said stallion.

It appears to me that this letter entirely confirms the testimony of McMurray and Craig that they were expecting an application by Kitching and Kenway for re-insurance of the stallion. On that day the stallion died, so that the market value of it was absolutely nil. It is absurd to suppose that any re-insurance could have been effected.

In my opinion Kitching and Kenway took nothing by the assignment of April 15, and they never afterwards acquired any rights against the defendant company. Having reached a decision adverse to the counterclaim on the merits, I think it unnecessary to deal with certain formal objections raised by the parties during the argument.

Judgment will accordingly be entered as follows:—

(*a*) In favour of the plaintiffs as against the defendant company for two-thirds of $1,000 and interest thereon from March 27, 1912, with costs.

(*b*) Upon payment of said amount the defendant company are entitled to be subrogated to the plaintiffs' rights against the defendants Kitching and Kenway on the lien notes to the extent of the amount paid.

(*c*) The plaintiffs' action against Kitching and Kenway on the lien notes is dismissed with costs.

(*d*) The counterclaim of Kitching and Kenway against the plaintiffs and the defendant company is dismissed with costs.

Judgment accordingly.

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WEST v. CORBETT et al.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. May 6, 1913.

1. LIMITATION OF ACTIONS (§ III F—130)—TORTS—NEGLIGENCE—FIRE SET BY CONTRACTOR IN CONSTRUCTION OF RAILWAY.

Fire started on the land of a person by sparks from a locomotive owned by persons building a railway under a contract with the National Transcontinental Railway Commissioners, is an injury sustained "by reason of the construction" of the railway for which action must be brought within one year, the period of prescription fixed by sec. 306 of the Dominion Railway Act, R.S.C. ch. 37.

2. LIMITATION OF ACTIONS (§ III F—130)—TORTS—FIRE SET BY CONTRACTOR IN CONSTRUCTING RAILWAY—DOMINION RAILWAY ACT—APPLICATION OF.

The limitation prescribed by sec. 306 of the Dominion Railway Act, R.S.C. ch. 37, for bringing action against railway companies for damages, extends, by virtue of sec. 15 of 3 Edw. VII. ch. 71, to the National Transcontinental Railway Commission, since that body is required by law to let the work of construction by contract, such limitation includes actions against a person constructing a portion of the National Transcontinental Railway under contract with such board, for a fire negligently started by a locomotive owned by the former.

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Statement

APPEAL from a decision of the Supreme Court of New Brunswick reversing the judgment at the trial in favour of the plaintiff and dismissing the action.

The appeal was dismissed.

The plaintiff, West, had a license from the Government to cut timber on Crown lands in New Brunswick. The defendants had been awarded by the Transcontinental Railway Commissioners a contract to build a portion of the Eastern division of the Grand Trunk Pacific Railway, and in course of their work a construction engine set fire to the plaintiff's timber. To the plaintiff's action for damages defendants pleaded that the action was not brought within a year as provided by sec. 306 of the Railway Act. Plaintiff obtained a verdict at the trial which the full Court set aside, giving effect to the plea of prescription.

Argument

F. R. Taylor, for the appellant:—Eminent judges in Ontario have held that sec. 306 is *ultra vires*. See *McArthur* v. *Northern and Pacific Junction R. Co.*, 17 Ont. App. R. 86; *Anderson* v. *Canadian Pacific R. Co.*, 17 Ont. App. R. 480. It is, at all events, *ultra vires* as respects all persons except Federal railway companies. The authority of Parliament to pass this section only exists by virtue of its legislative jurisdiction as to railways and its legislation must be essential to the purposes of the Railway Act. A contractor, *qua* contractor, is not subject to the legislative authority of Parliament, and nowhere in the Railway Act is such authority expressly exercised and nowhere impliedly exercised unless it be in this section. The limitation of the right of action in statute must be clear and express; it will never be implied: Maxwell on Statutes, 5th ed., p. 463; *Canadian Northern R. Co.* v. *Robinson*, 43 Can. S.C.R. 387; *Canadian Northern R. Co.* v. *Anderson*, 45 Can. S.C.R. 355, *per* Fitzpatrick, C.J., at 360. The contractor does not stand in such relation to the company as would extend the latter's privilege to him by implication. He is not the company's employee: *Kearney* v. *Oakes*, 18 Can. S.C.R. 148; nor their agent or servant. The provision in sec. 306 as to prescription cannot apply to the Commissioners, as no action such as is prescribed could be brought against them. As a consequence it cannot apply to the defendants, who only claim through the Commissioners.

Teed, K.C., for the respondents:—The Commissioners are obliged to construct the railway through contractors, and the latter are merely their instruments and under no greater liability than they themselves would be. The defendants were "persons authorised to construct a railway" under the interpretation section of the Railway Act. In *Hendrie* v. *Onderdonk*, 34 C.L.J. 414, and *Lumsden* v. *Temiskaming and Northern Ontario R. Commission*, 15 O.L.R. 469, contractors were held entitled to plead the prescription provided for in a similar section of the Ontario Railway Act.

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FITZPATRICK, C.J. (dissenting):—I agree with Mr. Justice Idington.

DAVIES, J.:—This was an action brought by the plaintiffs as licensees of certain timber limits in the Province of New Brunswick for damages for loss by fire of many trees upon such limits caused by sparks emitted from a railway locomotive engaged in the work of constructing a part of the National Transcontinental Railway. The defendants, in the statement of claim, were alleged to be "contractors engaged in certain work in the construction of the National Transcontinental Railway adjacent to and near the plaintiff's limits, and in such construction used a locomotive engine."

The claim was that the defendants were negligent in the operation of the engine, and that in consequence of their negligence the sparks from the engine escaped and set fire to plaintiff's limits. The statement of claim was also based upon an alleged liability of the defendants for the damages caused by the sparks escaping from the engine, whether there was negligence on the defendants' part or not. This last claim was based upon the 298th section of the Railway Act, R.S.C. ch. 37, providing in certain cases for the absolute liability of "the company" making use of the locomotive causing the fire whether guilty of negligence or not.

In the case at bar, however, the jury found, and no question was raised before us on the finding, that the damages were caused by the negligence of the defendants in not having the engine equipped with modern and efficient appliances for preventing the escape of sparks, and on that finding the verdict was entered.

The claim, therefore, for a right to recover under the 298th section of the statute for statutory damages, irrespective of negligence, does not arise here.

The important facts that the defendants were contractors for the construction of a part of the National Transcontinental Railway, and that while engaged in such construction they so negligently used and ran one of their locomotive engines as to cause the damages complained of, were conceded at the argument.

The only point upon which the defendants claimed to set aside the judgment was that the action was brought against them too late, and was barred by the 306th section of the Railway Act.

The single question we have to determine is whether that section can only be invoked by a railway company authorised by Parliament to construct a railway, or whether contractors under the National Transcontinental Railway Commissioners for the construction of the whole or of part of such railway, can also invoke it.

Now, the railway in question was the Eastern branch of the National Transcontinental, and was being constructed pursuant

to the powers contained in the statute 3 Edw. VII. ch. 71, and conferred upon three Commissioners appointed by the Governor-in-council, who were declared to be a body corporate.

These Commissioners had all the necessary powers vested in them to carry out the work of constructing the Eastern section of the road and operating it until completion. They had, by sec. 15, in addition to the special powers conferred upon them, all the rights, powers, remedies and immunities conferred upon a railway company under the Railway Act, and such Railway Act, so far as applicable, was declared to be taken and held as incorporated in the Act 3 Edw. VII. ch. 71. The Commissioners, by sec. 16, were obliged to let the work of constructing the Eastern division by tender and contract as specified. The defendants in this case were contractors for the construction of part of this Eastern division of the railway, and in the carrying out of such contract negligently caused the damages complained of.

The 306th section of the Railway Act provides that

> all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, etc., and not afterwards.

Sub-section 2 provides that in any such action

> the defendants may plead the general issue and give this Act and the special Act in evidence, and prove that the damages were done "in pursuance of and by the authority of this Act or of the special Act."

Sub-section 3 provides that nothing in the section shall apply to actions against "the company" upon any breach of contract relating to the carriage of traffic or for damages respecting tolls.

This limitation upon actions for damages, though in form somewhat different, was contained in the general railway Acts for many years before that of 1903. In the Act consolidated that year, the clause making the railway liable for damages caused by fires from locomotives irrespective of negligence, was first introduced, and the language of the limitation clause was changed from damages sustained "by reason of the railway," to its present form, "by reason of the construction or operation of the railway," and the time limit extended from six to twelve months.

The first two clauses of the sec. 306 are as broad and general apparently as language could make them respecting damages sustained by reason of the construction or operation of the railway, and no words are used shewing any intention to confine their application to "companies" only.

In my opinion they refer to damages the result of negligence in the exercise of statutory powers given for the construction and operation of railways. For damages resulting from the exercise of such statutory powers without negligence no action at all would lie: *Canadian Pacific R. Co.* v. *Roy*, [1902] A.C. 220.

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Are they confined to "the company" authorised to construct and operate a railway, or do they extend to a contractor under such company who does such work of construction? In the case of the Eastern branch of the National Transcontinental the Commissioners were not authorised to do the work of construction themselves or by their employees. They were obliged by sec. 16 to let the work of construction by tender and contract, and the defendants in this case were contractors under the Commissioners for the construction of part of the road.

I cannot see why a construction should be put upon the broad general language of the section in question excluding the contractors from the benefit of it. It must be remembered that the Eastern division could only be built by contractors. If the section does not apply to contractors then it would not be applicable at all to any one constructing such Eastern division, for I do not see how the Commissioners could be held liable for such damages as were recovered in this action. If this was an action to recover the statutory damages, liability for which was created by sec. 298, then it would seem the question would have to be determined whether "the company" declared in that section to be liable for the damages included a contractor under the company, and that would probably be solved by the construction put upon the words of sub-sec. 4 of sec. 2, the interpretation clause, which declares that company means "a railway company and includes any person having authority to construct or operate a railway."

Do those words include persons having contractual authority to construct or operate, or are they confined to those who have legislative authority to do so?

In this case it is not necessary that we should decide upon the point, because the action does not involve any question of statutory damages, but damages for negligence only, and the limitation clause does not use the word "company" at all either in the first section or in its second sub-section, but speaks of the persons sued as defendants.

I am of opinion that these damages sued for in this action were damages sustained by reason of the negligent construction of the railway, and are, therefore, within the Act. In the absence of any language restraining the privilege or benefit of the section to the company only and excluding contractors, I think the contractor who, in this case, alone could construct the railway has the right to invoke the benefit of the section.

In sub-sec. 3 certain actions against "the company" upon any breach of contract or respecting tolls are excepted out of the section, but this is the only reference direct to "the company." While, therefore, the section doubtless includes a "company" which builds the road itself, it also includes a contractor who alone, under the Act for the construction of the Eastern branch of the National Transcontinental Railway, was authorised to do the work of construction.

For these reasons I think the appeal must be dismissed with costs.

IDINGTON, J. (dissenting):—The broad question raised by this appeal is whether or not contractors engaged in the construction of part of the National Transcontinental Railway, pursuant to the contract said to have been let by the Commissioners appointed under 3 Edw. VII. ch. 71, are entitled to plead sec. 306 of the Railway Act in bar to an action for damages resulting from the contractors' own negligence in course of their execution of the work so let to them.

The respondents, as such contractors, had in their service a railway locomotive so defective that fire spreading therefrom burned appellant's timber.

The 15th section of the said 3 Edw. VII. ch. 71, is as follows:—

> 15. The Commissioners shall have in respect to the Eastern Division, in addition to all the rights and powers conferred by this Act, all the rights, powers, remedies and immunities conferred upon a railway company under the Railway Act and amendments thereto, or under any general railway Act for the time being in force, and the said Act and amendments thereto, or such general railway Act, in so far as they are applicable to the said railway, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act.

In order to comprehend accurately the bearing of this section in relation to the matters respecting which sec. 306 of the Railway Act provides for a limited immunity, we must see who or what these Commissioners are and what acts they are authorised to do in respect of which such immunity may possibly serve them. They are created a corporation. So are other public officers occasionally. It is here as in such other cases a convenient method of creating and providing a continuity of official life and action which need not depend upon or be interfered with by the accidents of death, removal or resignation of any of its members.

So far as the commission or its members may be enabled by the Act creating, or providing for its creation to do anything that in the ordinary course of events might give rise to an action against it or them or any of them, I will assume for the present this section may entitle it or them to plead this limitation.

But when we find that neither the commission nor any of its members are given power to construct a foot of the railway in question or do anything bearing on such a question except the mere getting of tenders and letting to the lowest tenderer a contract and reporting upon tenders for the work (for the large contracts like this one were let only, I believe, by the Crown, which is not liable, or by the sanction of the Governor-in-Council), and supervising the officers, such as engineers or others employed in the work of making the contractors live up to their contracts and similar service of supervision, and reporting upon the progress and financial matters connected therewith to the Government of the

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day as it may require, it seems difficult to imag ne how this statutory limitation in said sec. 306 could serve the commission or its members in relation to a fire caused by the negligence of some one over whom neither had control in relation thereto.

The letting of a contract could involve no such responsibility as in question herein. The sec. 306 in question is as follows in its first two sub-sections relied upon:—

306. All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards.

2. In any such action or suit the defendants may plead the general issue, and may give this Act and the special Act and the special matter in evidence at the trial, and may prove that the said damages or injury alleged were done in pursuance of and by the authority of this Act or of the special Act.

How can the Commissioners under their limited powers relative to construction ever fall within these provisions by means of any act they may have done as regards construction? The second sub-section clearly indicates by its language that the thing had in view which is to be barred is something done "in pursuance of and by the authority of this Act or of the special Act."

Statutory limitations are personal and confined to the person or body acting, and cannot as a matter of course be extended to some one else. Indeed they may be applicable in one forum yet not in another in such peculiar cases as *The Metropolitan Water Board* v. *Bunn*, [1913] 1 Q.B. 134. The matter seems so clear I need not pursue it. The commission has in certain cases been enabled when the Government should see fit to operate the road or part of it, and then the second part of sub-sec. 1 of sec. 306 might become in such cases operative and applicable. The difficulty in this case seems to have arisen from the statement of claim being partly founded on sec. 298 relative to fires from locomotives. The appellant in that regard, I think, misconceived his right of action. If it had rested on sec. 298 alone it ought to have been dismissed, for the obvious purpose of this section was to provide for the cases of operating a railway It was first enacted in 1903 after the decision of *Canadian Pacific R. Co.* v. *Roy*, [1902] A.C. 220, as a mode of solving a well-known grievance. It never was intended to apply to contractors for mere construction work.

I think the possibility of applying this statutory provision to the facts here is much more remote than it was to the facts respectively presented in the cases of *Canadian Northern R. Co.* v. *Robinson*, 43 Can. S.C.R. 387, [1911] A.C. 739; and *Canadian Northern R. Co.* v. *Anderson*, 45 Can. S.C.R. 355. In the latter case leave to appeal was refused by the Privy Council. The

former presented a case of operation, it was claimed. The latter it was suggested fell under construction.

The appeal should be allowed with costs here and in the Court below, and the judgment of the learned trial judge be restored.

DUFF, J.:—The only point requiring specific mention, in my judgment, is whether the first sub-section of sec. 306 of the Railway Act applies.

I think that by force of sec. 15 of the National Transcontinental Railway Act that enactment is pleadable by the respondents in defence of this action.

Anglin, J.

ANGLIN, J.:—The appeal in this case is taken upon three grounds, two of which involve the construction of sec. 306 of the Dominion Railway Act, R.S.C. ch. 37. For the appellant it is contended (*a*) that sec. 306 does not apply to actions for damages for injuries such as that which is the subject of this action; (*b*) that it does not apply to the National Transcontinental Railway; (*c*) that, if applicable to that railway, it protects only the Commissioners and not contractors for construction under them.

The plaintiff sues to recover damages for injuries caused to his timber limits by fire which originated from sparks emitted from a locomotive in use by the defendants in the course of constructing a section of the Transcontinental Railway. The defendant contractors were employed by the Transcontinental Railway Commissioners, but contracted with the Government of Canada for the construction of a portion of the railway.

The jury found, and the present appeal proceeded on the basis, that the locomotive was defectively equipped, and that the sparks that caused the fire which injured the plaintiff's premises were emitted owing to such defective equipment.

(*a*) Assuming that sec. 306 applies to the National Transcontinental Railway and that the defendants are entitled to the benefit of it, I think the injury sued for was "sustained by reason of the construction of the railway." I am of the opinion that, applying the principles which underlie the decisions in such cases as *Poulsum* v. *Thirst*, L.R. 2 C.P. 449, and *Newton* v. *Ellis*, 5 E. & B. 115, injury caused by negligence in carrying out the work of construction is within the purview of the section. "There was no evidence of a want of *bona fides*, that is to say, of any indirect motive for the defendants' conduct." Their work was being done under the powers conferred by the National Transcontinental Railway Act. "The action is brought for an improper mode of performing the work"—for "doing unlawfully what might be done lawfully."

(*b*) By sec. 15 of the National Transcontinental Railway Act (3 Edw. VII. ch. 71), it is provided that,

> the Railway Act and amendments thereto . . . in so far as they are applicable to the said (National Transcontinental) railway and in so

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far as they are not inconsistent with or contrary to the provisions of this Act shall be taken and held to be incorporated in this Act.

I find nothing in sub-sec. 1 of sec. 306 of the Railway Act "inconsistent with or contrary to" any of the provisions of the National Transcontinental Railway Act. I, therefore, think that by virtue of sec. 15 of the latter statute, sec. 306 of the Railway Act, so far as applicable, is incorporated in the National Transcontinental Railway Act.

(c) The remaining question has occasioned me rather more difficulty. Upon an examination of sec. 306 of the Railway Act, a feature of it which immediately strikes one is that sub-secs. 1 and 2 are general in their terms, while sub-secs. 3 and 4 are restricted in their application to railway companies themselves. This difference in language indicates an intention on the part of Parliament that the application of the two earlier sub-sections should not be confined to actions in which the railway company itself is defendant. We are asked by counsel for the appellant to read into sub-sec. 1 after the word "suits," the words "against the company." I see no justification for doing so. On the contrary, I think that to insert these words would be to place upon the operation of sub-sec. 1 a restriction which Parliament obviously did not intend. When the purpose was to confine the application of certain provisions of the Act to railway companies, Parliament has expressed its intention to do so by using the word "company." The reason for giving to railway companies the benefit of such protection as sub-secs. 1 and 2 of sec. 306 afford applies with equal force to the case of contractors engaged in railway construction authorised by Parliament. We cannot ignore the fact that probably nine-tenths of the entire railway construction work of Canada is done not by railway companies themselves, but by independent contractors to whom it has been let. If sub-secs. 1 and 2 of sec. 306 apply only where a railway company itself undertakes the work of construction the great bulk of railway construction work in this country would not come within them. That contractors constructing a railway under contract from a railway company were entitled to the benefit of the similar provision in the Ontario Railway Act was held by a strong Divisional Court (Armour, C.J., Falconbridge, J., and Street, J.), in *Hendrie* v. *Onderdonk*, 34 C.L.J. 414. I have seen a copy of the judgment delivered in that case by Street, J., and while the applicability of the limitation provision to the contractors, who were there defendants, appears rather to have been taken for granted, it is scarcely conceivable that the question now under consideration escaped the notice of these distinguished Judges.

Having regard to the provisions of sec. 16 of the National Transcontinental Railway Act, which oblige the National Transcontinental Railway Commissioners to "let the work of constructing the Eastern division by tender and contract," contractors

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under that Commission certainly do not occupy in regard to sec. 306 of the Railway Act a less favourable position than that of contractors under companies constructing railways under the Railway Act. The principle underlying the decision in *Michigan Central R. Co.* v. *Wealleans*, 24 Can. S.C.R. 309, may be applied in this case.

The constitutionality of sec. 306 of the Railway Act was not questioned in the pleadings, or factums, or at bar.

For the foregoing reasons I am of opinion that the defendants are entitled to the benefit of the limitation conferred by sec. 306 of the Railway Act.

It follows that this appeal fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J., agreed with Davies, J.

Appeal dismissed.

SAUERMANN v. E.M.F. CO.

ONT.

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June 25.

Ontario Supreme Court (Appellate Division), Clute, Riddell, Sutherland, and Leitch, JJ. June 25, 1913.

1. SALE (§ II E—44)—WARRANTY—TEST AND DEMONSTRATION—APPROVAL OF THIRD PARTY.

Where the defendant agreed to return the price of an automobile sold the plaintiff, which proved defective, if it were not pronounced satisfactory by a designated person by a certain day, the money must be refunded where the car did not work to the latter's satisfaction at that time; the vendor has no right to demand that it be returned for further repair and to have a further submission and test of same on a subsequent day by the person designated.

[*Sauermann* v. *E.M.F. Co.*, 4 O.W.N. 1137, affirmed.]

Statement

APPEAL by the defendants from the judgment of Middleton, J., *Saucrmann* v. *E.M.F. Co.*, 4 O.W.N. 1137.

W. A. Logie, for the defendants.

J. L. Counsell, for the plaintiff.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts):—I think it clear that all that took place before the 30th October may be left out of consideration, and the case treated as though that day had been appointed by Mr. Russell and agreed to by all parties as the day upon which he was to "pronounce."*

From an examination of the "consent minutes," I think the intention of all parties was, that the defendants, admitting that the car was not all it should be, were given an opportunity to

*By the terms of settlement of a former action, the motor-car in question was to be put in order by the defendants to the satisfaction of Russell.

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put the car in complete repair; that, when they considered it was in such repair, Russell was to be called in as referee and final referee to decide whether they had succeeded; it, his judgment, they had, the plaintiff took the car; and, if not, she was to get her money back. While there might not be any objection to Mr. Russell having been consulted by the defendants as to what would be required to be done in order that the car should be in perfect repair, either before the work was begun or when it was actually going on—on that I express no opinion—I think that the parties contemplated that, when the defendants had done what they could "to put the car in complete repair in every respect . . . to the satisfaction of Russell," he was to be called upon to "pronounce." I do not think that he could do anything else than "pronounce"—his duty was to act as judge, referee, arbitrator, on the particular car, as then submitted to him as "ready for inspection by the said Russell." I do not say that he might not then reserve his decision, but the decision was to be on the "car ready for inspection"—not the car as it might be some days after, when further repairs had been made.

The 30th October was, by the conduct of the parties, fixed as the day for inspection; and it was the car, as on that day, upon which the referee was to exercise his judgment and "pronounce." It may well be that Russell had the right and power to reserve his decision for a day or two, and for experiment upon other cars of the defendants' make, as seems to have been his first intention —but that decision must be upon the car as it was on that day.

The defendants, by their conduct, prevented him from giving such decision so as to be effective to enable the plaintiff to have the car upon which such decision should have been given—it is rendered impossible, by their changing the engine, for them to say that a car aproved by Russell on the 30th October, or as of the 30th October, is at the plaintiff's disposal. So that, even if what was done by Russell on and as of the 30th October is not a "pronouncing" by him in favour of the plaintiff (and I am inclined to think that it is), they have prevented a more formal "pronouncing" by their own conduct. They cannot set up, as against this plaintiff, as a condition precedent, the want of all effective "pronouncing" which they have themselves prevented: *Thomas* v. *Fredericks* (1847), 10 Q.B. 775; *Hotham* v. *East India Co.* (1787), 1 T.R. 638; *Coombe* v. *Greene* (1843), 11 M. & W. 480; *Re Northumberland Avenue Hotel Co.* (1887), 56 L.T.R. 833; and similar cases.

Appeal dismissed with costs.

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REID v. MOORE.

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June 11.

Saskatchewan Supreme Court. Trial before Johnstone, J. June 11, 1913.

1. SALE (§ I B—5)—PASSING OF TITLE—NEW COMPANY TO TAKE OVER BUSINESS.

Title to farm machinery purchased by the plaintiff and his associates never vested in a subsequently incorporated company, which was to take over their business, where the plaintiff, after the incorporation of the company, on being compelled to pay for the machinery received an assignment from his associates and the seller of the machinery of all their interest therein, and nothing was ever done to transfer title to the company; and the plaintiff may recover the machinery from one claiming title through the company.

Statement

ACTION of detinue to recover possession of goods and chattels belonging to the plaintiff.

Judgment was given for the plaintiff.

W. H. B. Spotton, for plaintiffs.

A. W. Rutledge, for defendant.

Johnstone, J.

JOHNSTONE, J.:—This is an action of detinue to recover from the defendant possession of one Reeves 32 h.p. cross compound engine with attachments and other goods and chattels, or the value, $5,000, together with $1,000 damages. The defendant Moore, the Greensburg National Bank of Indiana, H. E. R. Rogers and John T. Hunter, both of the city of Winnipeg, in the Province of Manitoba, then being the equitable owners of 10,000 acres of land near Elbow, in the Province of Saskatchewan, on September 2, 1909, entered into an agreement with one R. E. Stevenson, an attorney, of Muncie, Indiana (acting on behalf of himself, his father-in-law, one Edward F. Pulver, and his brother, Arthur Stevenson), to sell to these parties the said lands. The defendant Moore was the chief factor in bringing about this deal. The company, the Elbow Agricultural Company mentioned in the contract of sale of these lands to the Stevensons and Pulver, had yet to be incorporated. Through the representations of R. E. Stevenson, made to the plaintiffs, the plaintiffs about September 15 were induced to come into this venture, and to assist in financing and carrying out the said intended purchase. With this end in view, and relying on the representation of Stevenson that the said contract between the defendant and Stevenson and Pulver was a good and valid contract, the plaintiffs, by a verbal arrangement entered into between themselves and Stevenson, and which was afterwards reduced to writing by agreement dated September 22, 1909, agreed to contribute the sum of $36,000 to complete the purchase of the lands referred to, and also to advance a further sum of $10,000 to purchase the ploughing outfit in the said first contract mentioned. The plaintiffs accordingly, with R. E. Stevenson and E. F.

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Pulver, signed an order to Reeves and Company to deliver to them the said machinery at Elbow, in the Province of Saskatchewan, the price to be $4,800. This order contained a provision that the title to the property in the machinery, etc., should not vest in the vendees until payment of the purchase price, but should remain in the vendors. This is the property in question in this suit. The engine attachments and other goods and chattels were subsequently delivered by Reeves and Company at Elbow to one of the purchasers thereof, Edward F. Pulver, for use upon the lands purchased from Moore, the defendant and others. About this time the plaintiffs signed and delivered to R. E. Stevenson their promissory note in the sum of $5,000, payable on or about the 1st January, 1910. This note was in due course discounted by Stevenson, and the proceeds, something like $5,000, placed to Stevenson's credit in a bank in Muncie. This money was used in the purchase of machinery, farm implements, utensils and supplies for working the lands, also to cover the expense of incorporation of the proposed company and in payment of travelling and other expenses. $2,400 or thereabouts was forwarded to Pulver and paid by him to Reeves and Company on delivery of the machinery at Elbow. The contemplated company was incorporated under the name of the Elbow Agricultural Company, with the head office at Muncie, Indiana, the incorporators being R. E. Stevenson, Pulver and Arthur Stevenson, and the expense of incorporation paid out of the proceeds of the said note. As regards the shareholders of this company, as far as the records of the company shew, they were limited to the Stevenson family circle. Any meetings that were ever held, if any, were also confined to this circle. There never was a dollar contributed to the undertaking except that contributed by the plaintiffs through the giving of the said promissory note and the discounting thereof by Stevenson. Although Stevenson states these shares were allotted to the plaintiffs, there is no record of this; in fact, no records whatever of the doings of the company were produced on the examination of Stevenson under commission or produced at the trial; and I cannot bring myself to the conclusion that any meetings were ever held, notwithstanding R. E. Stevenson's statement to the contrary. After the purchase of the machinery, etc., Hunter, of Winnipeg, one of the parties to the contract of the 2nd September, repudiated it, claiming that Rogers, who had signed on his behalf, had no authority to do so; and Stevenson, without consulting the plaintiffs, or anyone else, for that matter, entered into a new and substituted contract dated December 10, 1909. The provisions of this substituted contract were so far-reaching in their nature as to change the whole aspect of the contract to purchase, and to render the undertaking a most un-

desirable one to the plaintiffs, who concluded to have nothing further to do with the transaction. Because of these changes in the position, the plaintiffs repudiated their said contract with the Stevensons and Pulver and refused to proceed further with the undertaking. The contract of the 2nd September was cancelled by the vendors. The note given by the plaintiffs fell due in the bank, and had to be paid. There was no alternative for the plaintiffs but to pay it, which they did. They were also called upon to pay the balance due Reeves and Company, which they did. The property in the machinery and in the other chattels in question purchased from Reeves and Company on payment of the full purchase price by the plaintiffs through an assignment from Stevenson and Pulver to the plaintiffs of their right and title to the property, and another assignment from Reeves and Company to the plaintiffs, I find, vested the title and property in the machinery and goods in question in this action in the plaintiffs. The Elbow Agricultural Company, from whom the defendant claims to have purchased this machinery, in my opinion, never had any interest therein. The intention of vesting the property in this company through the giving of the promissory note by the company to the plaintiffs as previously arranged was never carried out; it was never even mooted by Stevenson, the plaintiffs, or by anyone else. In fact, there was no company. No stock had ever been issued to anyone, as far as I can see, not even to the Stevensons, who claim to have been entitled, by reason of the organization of the company, and carrying out the scheme to 749 shares without payment of a dollar. The defendant Moore was also to have received 100 shares, or $10,000 in stock, for his assistance in the formation of the company and in the carrying out of the sale by the owners of the lands in Saskatchewan to the Stevensons and Pulver. Moore knew that the Stevensons were not contributing a dollar towards the formation or carrying out of the undertaking. Moore, from his connection with Stevenson, knew the circumstances; he was fully conscious of the fraudulent and pretended sale of the property in question, that is the machinery, to himself by the company, that it was made with the object of defeating the plaintiffs. Stevenson with his accustomed effrontery admits that he practised deception with the plaintiffs in assigning his share of the interest and title to the property upon the payment of the purchase money to Reeves by the plaintiffs. He afterwards, to cover his fraudulent acts, had to state contrary to the fact that he knew at the time he signed this assignment, that he had no property in the machinery, nor had Pulver, who also signed, nor had the plaintiffs, but that it had all vested in the Elbow Company. Although not necessary to the result I also find that the pretended sale or the sale to Moore of

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the machinery in question was a fraudulent transaction concocted for the purpose of defeating and of defrauding the plaintiffs and for no other purpose out of the moneys contributed by them under the arrangement entered into on the 22nd September, otherwise Moore's presence at the Elbow, on lands, the sale of which had been cancelled, has not been accounted for.

The counterclaim pleaded by the defence was by consent withdrawn at the trial.

There will be judgment for the plaintiffs for a return of the machinery in question or its value, $5,000 less that portion of it which has been returned; and $100 damages.

Judgment for plaintiffs.

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June 18.

DOUGLAS BROTHERS, Ltd. v. AUTEN and SCHULTZ.

Alberta Supreme Court, Harvey, C.J., Simmons, and Walsh, JJ. June 18, 1913.

1. BILLS AND NOTES (§ I A—2)—PROMISSORY NOTE—WHAT IS—INSTRUMENT WITH CONDITIONS INCONSISTENT WITH NATURE OF NOTE.

The character of an instrument as a promissory note is destroyed by a condition to the effect that the payer waived all his statutory exemptions; and that title to the property for which the note was given should remain in the payee until it was paid for; and that, on the refusal of the payer to furnish satisfactory security at any time, or if he should make default in payments, or sell or encumber his land, or if the payee should consider the note, or any renewals thereof, to be insecure, the latter might declare the notes due and enter suit thereon, and also take possession of and hold the property purchased until the note, or renewal notes were paid, or sell it at public or private sale, and apply the proceeds on such indebtedness.

[*Dominion Bank* v. *Wiggins* 21 A.R. (Ont.) 275; *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495; *Frank* v. *Gazelle Live Stock Association*, 6 Terr L.R. 392, followed; *Yates* v. *Evans* (1892), 61 L.J. Q.B. 446; *Kirkwood* v. *Carroll*, [1903] 1 K.B. 532, distinguished.]

Statement

APPEAL from his Honour Judge Crawford in which the question to be determined is whether a certain document is a promissory note.

The document in question is set out below:—

Apr. 7th, 1909, $46.50.
$46.50 .....
Name, L. J. Auten
P.O. Namayo ....
Sec. ..Tp. ..Rg...
Owner of 320 acres
Renter of ..acres
Business Farmer..
When due Jan. 7,'10
Security.....
Walter Schultz ..

Edmonton, Alta. Apl. 7, 1910.

Nine months after date, for value received, I promise to pay A. E. Putnam, or order, the sum of forty-six..... 50/100 Dollars, at the Traders Bank of Canada, Edmonton, Alta., with interest at 8 per cent. per annum till due and 10 per cent. after due till paid.

Witness: (Sd.) L. J. Auten.
(Sd.) C. McLaughlin. (Sd.) Walter Schultz.
Given for Binder, Books, etc.

Owner of 320 acres
Renter of ..acres
.....
.....
Sale A. E. Putnam.

The title, ownership and right to the possession of the property for which this note is given shall remain at my own risk in A. E. Putnam until this note or any renewal or renewals thereof are fully paid with interest. I further agree to furnish satisfactory security at any time if requested. If I fail to furnish such security when demanded, or if I make default in payment of this or any other note in A. E. Putnam's favour, or should I sell or dispose of, or mortgage or attempt to sell or dispose of, or mortgage the land which I own and described on the margin hereof, or if A. E. Putnam should consider this note or any renewal or renewals insecure, of which he shall be the sole judge, he shall have full power to declare this and all other notes made by me in his favour due and payable forthwith, and suit therefor may be entered, tried and finally disposed of in any Court having jurisdiction and he may take possession of the said property and hold the same until this note or any renewal or renewals thereof are paid with interest, or sell the same at public or private auction, the proceeds thereof to be applied in reducing the amount unpaid thereon after deducting all expenses connected with such taking possession and selling, and the taking and selling of the said lands shall not be a release of my liability for the balance of the said principal, and he shall, thereafter, have the right to proceed against me to recover, and I hereby agree to pay the balance then found to be due hereon, and I hereby waive as to this debt all or any right to exemption from seizure and sale under the Exemption Ordinance being chapter 27 of the Consolidated Ordinances of the North-West Territories and any amendments thereto.

(Sd.) L. J. Auten.

(Sd.) C. McLaughlin,
Witness.

The appeal was dismissed.

C. H. Grant, for plaintiffs.

H. H. Parlee, for defendants.

SIMMONS, J.:—Counsel for the parties to the action admit for the purpose of this action all facts that are necessary to bring to an issue of law as to whether the instrument sued on is, or is not, negotiable by indorsement. Simmons, J.

The judgment appealed against is as follows:—

Following *The Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.) 275, decided by the Court of Appeal in Ontario, and the *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495, decided by the Court of Appeal in Manitoba, and *Frank* v. *Gazelle Live Stock Association*, 6 Terr. L.R. 392, decided in our own

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Courts, I give judgment to the defendant with costs, with leave to plaintiff to appeal or begin another action on the lien agreement.

(Sgd.) J. L. CRAWFORD,
D.C.J.

McLeod, Jan. 6th, 1913.

The judgments in *The Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.) 275; *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495, and *Frank* v. *Gazelle Live Stock Association*, 6 Terr. L.R. 392, all quote with approval *Kirkwood* v. *Smith*, [1896] 1 Q.B. 582.

Kirkwood v. *Smith* (*supra*) was specifically overruled in *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531; and *Yates* v. *Evans* (1892), 61 L.J.Q.B. 446, approved, and counsel for the appellants practically rest the ground of appeal on this.

It is then necessary to determine whether the objections raised to the document in question are of the same nature as those raised in *Kirkwood* v. *Smith* (*supra*), and *Kirkwood* v. *Carroll* (*supra*). If the instrument in question does not include features quite outside of and beyond those under consideration in the former two cases the appellants' ground of appeal would in the result be beyond question. I therefore find it convenient to set out in full the documents in question in the two former cases.

In *Kirkwood* v. *Smith* (*supra*) the document was as follows:—

£15.0.0. Brighton, 5th December, 1894. We jointly and severally promise to pay the Southern Counties Deposit Bank, Limited, or order, the sum of fifteen pounds for value received, by instalments, in manner following, that is to say, the sum of one pound on the fifth day of January next, and the sum of one pound on the fifth day in every succeeding month, until the whole of the said fifteen pounds shall be fully paid, and, in case default is made in payment of any one of the said instalments, the whole amount remaining unpaid shall become due and payable forthwith, together with interest at the rate of a halfpenny in the shilling per week from the date of such default, on the aggregate amount of the instalments then remaining unpaid, until the actual payment thereof. No time given to, or security taken from, or composition or arrangements entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party.

Payable at 69 Ship Street, Brighton.

Harrietta Ann Smith.
Clara Maude Smith, her daughter.

and the document in *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531, was as follows:—

£125.

We jointly and severally promise to pay Mr. John Kirkwood (carrying on business in the name or style of the Provincial Union Bank) or order the sum of £125 for value received by instalments in manner following, that is to say, the sum of £5 on Thursday, the 31st day of

January inst., the sum of £5 on the Thursday in every succeeding week until the whole of the said £125 shall be fully paid, and in case default is made in payment of any one of the said instalments the whole amount remaining unpaid shall become due and payable forthwith. No time given to, or security taken from, or composition or arrangement entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party.

In the former case, *Kirkwood* v. *Smith*, [1896] 1 Q.B. 582, Lord Russell of Killowen, C.J., says:—

The sole point is whether it is a document of a mercantile character so as to enable the plaintiff to avail himself of the summary mode of procedure provided by 18 and 19 Vict. ch. 67 . . . I think it is safer to take the provisions of sub-sec. 3 (by which a note is not invalid by reason only that it contains a pledge of collateral security with authority to sell or dispose thereof) as importing that if the document contains something more than is there referred to, it would not be valid as a promissory note.

Halsbury, L.C., in *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531, observes:—

The case of *Kirkwood* v. *Smith* (*supra*) was decided without any reference to the other sections of the Act and cannot any longer be regarded as an authority. The case of *Yates* v. *Evans*, 61 L.J.Q.B. 13, 446, was in my opinion quite rightly decided;

and further,

The addition to this promissory note does not qualify it, and I doubt whether the addition is in any sense operative.

In *Yates* v. *Evans* (*supra*) the stipulation under consideration was:—

Time may be given to either without the consent of the other and without prejudice to the rights of the holders to proceed against either party notwithstanding time may be given to another.

The note was joint and was payable by instalments with a proviso that in case of default in payment of any one of the instalments the whole amount remaining unpaid should become due. It was held that the clause was a mere consent or license that time may be given to the principal debtor and that if time be so given the surety will not avail himself of that as a defence.

Hawkins, J., in his judgment observes:—

If the memorandum in question is an agreement at all it is absolutely compatible with the terms of the note and amounts to this: that if time be given after the note is due to one of the promisers or makers, that time so given shall not operate as a defence. It amounts at most to a consent or license that time may be given, or in other words as an estoppel, that the maker of the note who is a surety will not in the event of time being given to the other maker, who is the principal debtor, set up that time so given as a defence.

Wills, J., held that it was not possible to construe the words of the memorandum as an agreement. He also adds that no

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consideration is necessary nor need such a consent on behalf of the surety be in writing to make it binding upon him.

This case is in my opinion of prime importance in determining the one now before us. The only inference I can come to from the remarks contained in the judgments is that if the memorandum in question contained terms incompatible with the terms of the note and was in effect a separate agreement enforceable by one of the parties the result would be that the document could not be treated as a promissory note transferable by endorsement.

I quite agree with the remarks of Killam, C.J., in *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495, in which he takes issue with the reasoning of Mr. Justice MacLennan in *The Dominion Bank* v. *Wiggins*, 21 A.R. (Ont.) 275. It is quite open to argument that in documents of the nature of the one then under consideration that the purchaser has waived unalterably his right to demand possession as a condition precedent to the payment of the purchase price. He has agreed to pay the full purchase price at a future date which may be accelerated at the option of the vendor and has agreed that the property sold shall in the meantime be held by him as a bailee of the vendor.

The instrument in question in the action now under consideration goes much farther than the documents which were the subject matter of *The Dominion Bank* v. *Wiggins* (*supra*); *The Bank of Hamilton* v. *Gillies* (*supra*); *Frank* v. *Gazelle Live Stock Association*, 6 Terr. L.R. 392, and the English cases above referred to.

It provides in effect that at the mere caprice of the vendor the property may be retaken by him. That the purchaser must furnish further security if required—that if he makes default under this instrument or on any other note in favour of the vendor—that if he should sell or dispose of or attempt to sell or mortgage the lands described in the margin of the instrument or if the vendor shall consider this note or any renewal thereof insecure of which the vendor shall be the sole judge, he may declare this note and all other notes payable by the purchaser in his favour, due and payable forthwith, etc., etc.

The second part of the document contains all the elements of a conditional sale and the fact that the first part of the instrument is on its face a promissory note does not deprive the second part of the instrument of this feature. It specifically states that the consideration for which the note is given is the property which is to be the subject of a conditional sale.

Sub-sec. 3 of sec. 176 of the Bills of Exchange Act provides that

a note is not invalid by reason only that it contains also a pledge of collateral security,

but sec. 10 of the same Act provides that

> The rules of the common law of England, including the law merchant, save in so far as they are not inconsistent with the express provisions of this Act, shall apply to bills of exchange, promissory notes and cheques.

The history of the law attaching to bills of exchange is of somewhat modern origin and essentially arises out of the tendency of the Courts to give effect to mercantile usage in respect to securities for money. In the case under consideration evidence of usage was excluded by agreement of counsel and we must take the document for what it expresses on the face of it.

Stroud's Judicial Dictionary, 2nd ed., vol. 3, part 9, p. 1496, defines a pledge as:—

> The contract of pledge or delivery of goods and chattels by one man to another to be held as security for the payment of a debt or the performance of some engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged or the engagement has been fulfilled. . . . The contract is to be distinguished from the contract of hypothecation by the transfer of the possession or the actual delivery of the thing intended to be charged to the creditor, and from the contract of mortgage by the absence of transfer of the ownership or right of property thereof to the pawnee during the continuance of the trust.

Without attaching to the word pledge its strictly technical meaning as above defined it does not seem reasonable to say the purchaser has pledged the property to the vendor, or that the property is a pledge of collateral security given by the purchaser to the vendor when the title, ownership and right to possession always remained in the vendor or payee of the note.

Furthermore ch. 44, Ordinances of the N.W.T., has attached to a contract of the character of the one under consideration certain statutory rights, providing for the registration of the same and legal consequence attaching to registration quite inconsistent with the passing of the rights of the maker or purchaser to a third party by indorsement. It imposes on the vendor limitations in regard to the conditions under which re-sale may be made.

If the instrument in question were held to be a promissory note, I do not know where the line could be drawn between an unconditional promise to pay and such a promise coupled with stipulations imposing upon the payee consequences arising out of his default. The document in question is essentially a conditional sale and this being the main purpose of the document necessarily implies its incompatibility with the character of promissory note. It has implanted upon the face of it the right of the payee to re-take possession at his own caprice and

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to sell, and this suggests a failure or partial failure of consideration which may be set up as a defence in case he exercises his right, and also to claim the balance due. I am of the opinion therefore that the instrument under consideration is quite distinguishable from those considered in *Yates* v. *Evans* (1892), 61 L.J.Q.B. 446, and *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531, and that neither of these cases support the view of appellants. I would, therefore, dismiss the appeal with costs.

HARVEY, C.J., and WALSH, J., concurred.

Appeal dismissed.

MAN.

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June 18.

SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNEELAND.

Manitoba King's Bench. Trial before Curran, J. June 18, 1913.

1. GUARANTY (§ II—12)—DISCHARGE OF GUARANTOR—OBTAINING SIGNATURE BY MISREPRESENTATION AS TO EXECUTION BY OTHERS.

One who was induced to execute a contract of guaranty on the strength of the representation of the guarantee that it would be signed by certain other persons as well, is relieved from liability by the guarantee's concealment of the fact that one of such persons had refused to sign the contract.

2. GUARANTY (§ II—12)—DISCHARGE OF GUARANTOR—FAILURE OF CONSIDERATION.

Where a guarantee agreed to make future advances to a principal debtor in consideration of a guaranty not under seal, of the payment of the former's existing indebtedness and of the advances to be made, which required a consideration to support it, the guarantee's refusal to make such advances amounts to a failure of consideration which will discharge the guarantor from liability.

3. CONFLICT OF LAWS (§ II—150)—REMEDIES—LEX FORI—ENFORCEMENT OF CONTRACT—PROCEDURE.

In an action brought in a Canadian province to enforce a contract of guaranty the laws of the forum will govern as to the discharge of a surety by reason of dealings to his detriment between the guarantee and a co-surety, such question being one pertaining to remedy and procedure only and not to the making of the contract.

[*Leroux* v. *Brown*, 12 C.B. 801, followed; *Green* v. *Lewis*, 26 U.C.Q.B. 618, distinguished.]

4. GUARANTY (§ II—12)—DISCHARGE OF GUARANTOR—DEALINGS BETWEEN GUARANTEE AND CO-SURETY—EFFECT OF MANITOBA KING'S BENCH ACT.

The discharge of a surety from liability on a contract of guaranty by reason of the release of a co-surety by the guarantee without the knowledge or consent of such surety, is not governed by sec. 39 (*r*) of the Manitoba King's Bench Act, R.S. 1902, ch. 40, providing that the giving of time to a principal debtor will not discharge a surety, but shall be a defence only in so far as it is shewn that the latter has been thereby prejudiced.

[*Blackwell* v. *Percival*, 14 Man. L.R. 216, distinguished.]

5. GUARANTY (§ II—12)—DISCHARGE OF SURETY—PAYMENT BY ONE SURETY TO EXTENT OF HIS LIABILITY—DELIVERY OF PART OF EVIDENCE OF INDEBTEDNESS SECURED—EFFECT ON LIABILITY OF CO-SURETY.

Where the plaintiff was liable as guarantor for the whole amount secured by his guaranty, all of which was evidenced by the principal

debtor's notes, the delivery, without the former's knowledge or consent, by the guarantee on payment to him by a co-surety of the amount for which he was individually liable, which was less than the amount of the whole debt secured, of a portion of such notes to the amount of his payment, will relieve the plaintiff, *pro tanto* at least, from liability; since the guarantee by parting with some of the notes, put it out of his power to turn over to the plaintiff all of the notes to which he would be entitled on payment of the amount for which he was liable.

6. GUARANTY (§ II—12)—DISCHARGE OF GUARANTOR—PAYMENT BY SURETY OF LESS THAN HIS LIABILITY—EFFECT ON CO-SURETY.

The release by a guarantee of one surety from liability on a contract of guaranty, on the payment of less than the amount for which he is liable, without the knowledge or consent of his co-surety, will release the latter from all liability on the contract.

Statement

ACTION by a bank against the defendant on a written guaranty of a bank's customer's account as well as the payments of future advances to be made him. The defence included failure of consideration for the guaranty and a change in the contract with a co-surety without the defendant's knowledge and consent.

The action was dismissed.

O. H. Clark, K.C., and *P. A. Macdonald*, for plaintiffs.

H. Phillipps and *C. S. A. Rogers*, for defendant.

Curran, J.

CURRAN, J.:—The plaintiff is a national bank, incorporated under the United States banking laws, doing a general banking business at the city of Minneapolis, in the State of Minnesota, one of the United States of America.

The defendant is manager of an elevator company and resides at the city of Winnipeg, and has so resided for the past six years.

The plaintiff, whom I will hereafter designate as the bank, sues the defendant upon a guarantee (exhibit 2) in writing given by the defendant and three others in respect of an indebtedness of the T. M. Roberts Co-operative Supply Company to the bank. This guarantee is in the words and figures following:—

Minneapolis, Minn., Sept. 27th, 1909.

In consideration of the T. M. Roberts Co-operative Supply Company having obtained credit with the Scandinavian American National Bank of Minneapolis, Minnesota, and is now indebted to said bank for money borrowed, and in consideration of said bank extending the time for payment of said money so borrowed and of giving additional credit to said company,

The undersigned do hereby guarantee, each one to the extent of the amount set opposite his signature below, the payment at maturity or at such time or date to which such payment may be by the bank extended (the bank to be at liberty to extend such time without the consent of the undersigned), of any and all sums of money now, or which may hereafter be owing to the said bank by said company.

This guarantee shall be binding on each of the undersigned until he shall revoke the same in writing.

Witness: Chas. J. Hedwall.	E. W. Kneeland.....$40,000
Witness: C. L. Grandin.	H. H. Berge 10,000
Witness: C. L. Grandin.	H. K. Richardson 65,000
	Chas. J. Hedwall..... 5,000

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The T. H. Roberts Co-operative Supply Co. was incorporated joint stock company doing business at the city of Minneapolis. All of the guarantors, except Hedwall, were stockholders in this company. Hedwall became connected with the company some time in August, 1909, but was never legally a shareholder in it. His interest consisted in holding, as collateral security only, some 50 shares which had been pledged to him by one Merritt. These shares were never transferred to him, and he held no other stock in the company. He acted temporarily as president at the request of Richardson, who was the actual manager and president; but it does not appear that he was ever legally elected to this office.

The bank's capital was $250,000 fully paid up, and by the laws of the United States a national bank is prohibited from loaning to any one customer more than ten per cent. of its paid-up capital. The company became customers of the bank in August, 1909, and in fact opened an account with the bank on the 7th of that month by discounting five certain promissory notes of $3,000 each made by the company and H. K. Richardson. These notes respectively became due October 21st, 28th and 30th and November 4th and 11th, all in the year 1909. On August 11th, 1909, further promissory notes of the company and H. K. Richardson for $2,000, maturing November 27th, 1909, and $3,000 maturing November 20th, 1909, were discounted by the bank; and again on August 16th, 1909, promissory notes of the company and H. K. Richardson for $1,500, maturing September 17th, 1909; $1,500 maturing September 16th, 1909, and $2,000 maturing September 18th, 1909—making in all, total advances by the bank to the company of $25,000. This liability was reduced by payment of one note for $2,000.

The bank held no security for these advances except the promissory notes mentioned, upon which H. K. Richardson was personally liable as a joint maker. When the guarantee was given only three of the last group of notes discounted had become due, amounting to $5,000 in all; and of this amount the $2,000 note had been paid, as before stated.

It appears from the evidence that the bank solicited the account of the company, and that Hedwall was deputed by Grandin, the vice-president and manager of the bank, to arrange for a transfer of the company's account from its then banker to the plaintiff. I do not think there is any doubt but that this transfer was effected in the well-founded expectation on the part of the company that it would receive better financial treatment from the plaintiffs than it had been able to obtain from its then banker. The evidence all seems to point to certain promises being made in this connection, that the company would receive accommodation to the extent of $50,000 when the bank was in a position

legally to make advances to this amount, if the account was transferred to it. This ought to be borne in mind in view of what is alleged by the defendant to have transpired when the guarantee (exhibit 2) was given.

Charles L. Grandin was, and is, the vice-president and manager of the plaintiff bank. Charles J. Hedwall was then a director, and a man named Werner appears to have been the president.

Not long after the company's account had been transferred to the plaintiff, and the advances before-mentioned made, Grandin appears to have become dissatisfied with the condition of the account, and as a result of such dissatisfaction says he made a demand on Hedwall for a guaranatee from those interested in the company. He thinks this demand was made two or three weeks before the guarantee was signed. He says the reason for his dissatisfaction was that the company were issuing cheques without having funds to meet them, and that had the bank paid these cheques there would have been an overdraft most of the time. This is a very general statement, and I do not place much reliance upon it. There is no doubt, however, that he was dissatisfied, and was anxious to obtain security for the advances which had been made to the company. Exhibit 3 is a copy of the company's current account taken from the bank's ledger, and covers the period between the opening of the account on August 7th, 1909, and the virtual closing of the account on January 12, 1910. It would appear from this statement that overdrafts occurred only in three instances: first, on August 18th, $1,287.53; August 18th, $3,278.53, and on December 8th, 1909, $235.08. The overdrafts in August were promptly covered on the 20th of that month, and from then on until December there appears to have been always a credit balance in this account. During the month of September, in which the guarantee was taken, the company's average credit balance would appear to be over $2,500. I am unable to say, under these circumstances, whether or not there was just ground for dissatisfaction; but it would seem to me that there was not. The evidence does not disclose that the company was unable to pay the two notes for $1,500 each which matured on the 16th and 17th of September, in addition to paying the $2,000 note which it did pay. What was done with these notes when they became due does not appear, as they were not renewed until after the guarantee was given.

Hedwall, upon receipt of the intimation from Grandin as to the bank's demand for security, telegraphed the defendant at Winnipeg to go down to Minneapolis. The defendant did so, arriving at Minneapolis on Sunday, September 26th. Richardson at this time was ill and confined to his house. It appears that the defendant called to see him and was told by him that the company was doing a good business but needed more money.

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On the forenoon of Monday, September 27th, a meeting was held at the company's place of business to discuss the advisability of giving the guarantee asked for by the bank. At this meeting Hedwall, H. H. Berge, Chas. L. Chase, Dr. McLean and the defendant were present. Richardson was not there. All of these parties were shareholders in the company except Hedwall. Chase held $1,300 worth of stock himself and his wife some $5,000 more.

It now becomes necessary to consider for whom Hedwall was acting in attending this meeting and soliciting the guarantee. Grandin says, as also does Hedwall himself, that the latter was so acting for the company and not for the bank. Let us consider what Hedwall's position really was. Admittedly he was a director of the bank, and it is proved that he was so much interested in the bank's affairs that he was instrumental in having the company's account transferred to it. He was not legally a shareholder of the company, but merely assumed to act temporarily as president at Richardson's request. Charles L. Chase speaks of his being elected president between the time of the change of the bank account and the giving of the guarantee; but there is no evidence to shew how he really was appointed, if any such appointment was in fact made. As he was not a stock-holder of the company I do not see how he could have been legally appointed its president. It is not proved that he was in any way authorized to act for or represent the company in the matter of giving the guarantee in question. In my opinion he was not so acting, but was in fact acting in the interests and on behalf of the bank.

I think Grandin had power to delegate to Hedwall the duty of obtaining this guarantee. It is a matter which surely fell within the scope of his ordinary duty and authority as manager, and I think that Grandin did in fact delegate this duty to Hedwall, and that the bank ought to be bound by what Hedwall did in fulfilment of this duty, and by the statements and representations he made to the guarantors to induce them to become such for the company's indebtedness to the bank.

I find that Hedwall, at the meeting in the company's store, represented to the parties there present that if they would sign a guarantee to the bank to secure the company's existing indebtedness, the bank would extend the time for payment of such indebtedness and would make further advances to the company to the extent of $50,000, when its capital had been increased to make such advances legally permissible, and that upon the faith of this representation the defendant, H. H. Berge, and Chas. L. Chase agreed to give the required guarantee.

The defendant wanted Hedwall's statements as to what the bank were prepared to do in return for the guarantee confirmed

by Grandin, and accordingly Hedwall and the defendant went to the bank, and there an interview with Grandin took place relative to the guarantee. I think, upon the whole, that the defendant's version of what took place at the bank on this occasion is more reasonable and likely to be true than the story told by Grandin, and I accept the defendant's statement upon this point.

The defendant swears he told Grandin what Hedwall had represented as an inducement for the giving of the guarantee, namely, the extension of time for repayment of the existing indebtedness and the further advances up to the amount of $50,000, and that Grandin replied that Hedwall was authorized to make these statements, and to get the guarantee for the bank; that the names mentioned to Grandin at the bank as guarantors were Richardson, Chase, Berge, Hedwall and defendant. The defendant says he told Grandin to arrange to have the guarantee drawn up and submitted to him and that he would return in the afternoon and sign it before leaving the city; that Grandin agreed to this, and promised to have the others sign in due course. The defendant says positively that the guarantee was not to become effective and binding upon him until all the named parties had executed it. Accordingly after lunch on the 27th September, the defendant returned to the bank, when Grandin had the guarantee (exhibit 2) already prepared and produced it to the defendant for signature. The defendant says he read it over carefully and again told Grandin that he was prepared to sign, and would sign, upon the condition that he would secure the other signatures, and also that he (Grandin) would see to it that the bank carried out its part. The defendant says that Grandin agreed to this, and he then signed the document in Hedwall's presence.

Hedwall was present during the whole of this conversation. He was called by the plaintiffs in rebuttal, and at the time I formed the conclusion that the witness's memory was not good, that he seemed to be honest, but that not much reliance could be placed on his specific contradiction of the defendant. He says in one place in his evidence that he had the guarantee in his possession for several days before it was signed. This was manifestly impossible, as the document was not drawn up until the 27th of September after the defendant had been at the bank in the forenoon. The date itself in the guarantee is strong physical evidence of this fact.

Under these circumstances it is clear to my mind that the bank agreed to do three things, extend the time for payment of the company's indebtedness, make further advances to the company when its capital had been increased, and obtain the execution of the guarantee by all of the parties named. And had these conditions not been agreed to, I do not think the defendant would have signed the guarantee at all.

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It is true that at one time during the course of the trial I was inclined to doubt the credibility of the defendant's evidence upon matters in which he seemed to be at conflict with Grandin, but upon reflection and careful consideration of the whole case, I have come to the conclusion that the defendant's story as to the conditions upon which the guarantee was given by him is more reasonable and credible than that told by Grandin, and I accept it rather than Grandin's evidence upon these points. There is, besides, the language of the guarantee itself to corroborate the defendant's story, and I think this is the strongest possible evidence as to what the bank agreed to do as the consideration for the giving of the personal covenants of the guarantors. The guarantee reads: "In consideration of the said bank extending the time for payment of said money so borrowed and *of giving additional credit to said company*, the undersigned do hereby guarantee, etc." The bank prepared this document, put it forward and rely upon it to establish liability against the defendant.

The consideration on the part of the bank to be performed was wholly executory. The document is not under seal, and it appears to me unquestionable that to entitle the bank to hold the defendant liable upon his promise to indemnify, it must on its part carry out what it agreed to do as the consideration for such promise having been given. Without this performance or an avowed willingness by the bank to perform, what consideration is there to support the defendant's promise?

There is again the significant fact that although the total liability at this time of the company was $23,000, yet the aggregate amount in which the guarantors collectively are pledged to the bank is $70,000. Why was there any necessity for extending the liability created by the guarantee beyond the amount of the present indebtedness or liability of the company, if it was not contemplated that the liability or indebtedness of the company to the bank would in the future be increased by further advances?

It must also be borne in mind that at the time the guarantee was given the company was only indebted to the bank in the sum of $3,000, on past due paper; none of the other notes which had been discounted were then due, and the bank was not in a position to demand security for them. The utmost it could then do was to insist on payment of the matured notes, amounting to $3,000, and there is no evidence to shew that the company was not in a position to pay these notes if payment was insisted upon. The condition of its bank account would indicate that it actually had sufficient funds in the bank's hands to pay these notes.

Also, it must not be forgotten that none of the guarantors except Richardson were in any way personally responsible to the bank for the company's then indebtedness. They were merely

stockholders who had paid for their stock, and there was no reason that I can see why as business men they should become personally liable to the bank for the company's debt except upon consideration of some present or future benefit to the company; in fact, just such a benefit as the guarantee expresses would accrue—the extension of time and the advancing of additional money.

Charles L. Chase says that Hedwall represented to the shareholders at the meeting at the company's premises, that the bank required the guarantee in order to enable it to make the additional advances desired which had been previously asked for to the extent of $50,000 in all. I cannot believe that Hedwall took upon himself, without authority from Grandin, to make this statement. He admits that he was authorized by Grandin to promise the extension of time, but denies the promise as to future advances. I believe he did make such promise and held that out as a substantial inducement to the guarantors to give the guarantee.

The bank's capital was increased on the 22nd November, 1909, and Grandin admits that after that date the bank could have made the additional advances which the defendant claims it agreed to make to this company. However, no further advances were in fact made, but were refused by the bank. And all it did in performance of its part of the consideration for the giving of the guarantee was to renew once the existing notes of the company, which was done by the several notes represented by exhibit 1. It is quite possible that had the additional advances been made, as I find the defendant believed they would be made, and as the bank agreed to make them, the company's financial condition might have been retrieved and the subsequent disaster which overtook it averted.

The company was adjudicated bankrupt in April, 1910, and this condition might have been brought about by the bank's failure to make the advances contemplated by the guarantee.

There is one more circumstance to which I desire to allude before dealing with the law affecting the case, and it is this: Chase had agreed to sign the guarantee for the amount of his own stock, some $1,300. On the way down to the bank Hedwall pressed him to sign in respect of his wife's stock, $5,000, as well. This Chase refused to do, and Hedwall then told him that he had better not go into the bank if he was not prepared to sign for his wife's stock. This fact was concealed from the defendant, and he was allowed to sign under the *bonâ fide* belief that Chase would sign also, and I think in this respect that he was deceived. Had the truth been disclosed as to Chase's refusal, there is no doubt in my mind that he would have refused to sign the guarantee at all. The defendant raises this as a ground of defence, and I think he has amply proved it.

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The guarantee was a conditional one, and Brandt on Suretyship, vol. 1, 2nd ed., sec. 450, lays it down:—

> If a surety sign the obligation upon the condition that another shall also sign it as surety before it shall be binding upon him, and this condition is agreed to by the creditor, or is known to him when he takes the obligation, the surety is not generally liable unless the condition is complied with.

This appears to be the law in the United States and is undoubtedly the law here and in England. See De Colyar on Guarantees, 3rd ed., p. 221; *Ward* v. *National Bank of New Zealand*, 8 A.C. 755.

I think the failure of consideration also affords a good ground of defence, and is proven. Nathan H. Chase, an expert, whose evidence was taken under commission, says that the law of Minnesota requires a consideration to support a promise contained in a simple executory contract, such as the guarantee in question.

Brandt on Suretyship, a standard text-book of American law, lays down the same proposition in sec. 22 in these words:—

> The contract of suretyship or guarantee, when not under seal, must, in order to render it valid, be supported by a sufficient consideration.

And again in sec. 26:—

> A guarantee of past or future advances made and to be made to a third person is good for the whole, and the consideration sufficient; but there must be an agreement on the part of the creditor to make the future advances or he must actually make them, or there will be no consideration for the agreement to pay for the past advances and it will be void.

In note 71 to paragraph 22, the same author says:—

> Want of consideration is not a defence to a bond under seal executed and delivered, but failure of consideration is.

If the failure of consideration is a good defence to a bond under seal, it would surely be a good defence to an executory simple contract.

I have held that there was an agreement on the part of the bank for both extension of time and for future advances, the latter conditional only. The consideration was, therefore, sufficient in the first instance to support the guarantors' promise. The bank has performed in part the first, but refused to perform the second. I think this clearly disentitles it to hold the defendant on his promise of indemnity. The promises are mutual and breach by the bank of its part of the compact precludes it from enforcing fulfilment against the defendant of his part. There has been such a failure of consideration as constitutes, in my opinion, a good defence to the action.

A further ground of defence is the giving of time to the guarantor Hedwall to pay his share of the liability created by the guarantee without the knowledge or consent of the defendant,

and, furthermore, the bank, in addition to giving time to the defendant Hedwall, made a new and substantive agreement with him in respect to his suretyship whereby the relative position of the co-sureties was prejudicially altered and affected, inasmuch as, in addition to giving time to Hedwall, some two years as the evidence discloses, the bank handed over to him notes of the company and Richardson to the extent of $5,000, thereby enabling Hedwall, when the company went into insolvency, to prove against its estate upon these notes, which in fact he did, and received a dividend from the assignee.

The defendant also says that the bank, without his knowledge or consent, absolutely released Berge from his liability under the guarantee, which was $10,000, for a present payment to the bank of $3,000 only. It is admitted that the bank did make a settlement with Berge as alleged, and gave him a release.

A good deal of argument was addressed to me upon the question which law should govern the determination of this case, the law of Minnesota or the law of Manitoba. I have carefully considered the numerous authorities cited to me by both parties, as well as a number of other authorities, and I think there can be no question but that the law of Minnesota must be looked to as determining all matters pertaining to the solemnities of the contract, or as Lord Halsbury expresses it "the proper law of the contract"; but that the law relating to the remedies upon the contract and the procedure to enforce such remedies is governed by the law of the place in which the contract is sought to be enforced, which here is the law of Manitoba.

The plaintiff attempts to justify the settlements made with Hedwall and Berge under a statute of the State of Minnesota, found in the Revised Laws of that State, 1905, section 4283, which reads as follows:—

> 4283. Discharge of Joint Debtor. A creditor who has a debt, demand or judgment against a co-partnership or several joint obligors, promisors or debtors may discharge one or more of such co-partners, obligors, promisors, or debtors without impairing his right to recover the residue of his debt or demand against the others, or preventing the enforcement of the proportionate share of any undischarged under such judgment. The discharge shall have the effect of a payment by the party discharged of his equal share of the debt, according to the number of debtors, aside from sureties: Provided, that such discharge shall not affect the liability of such co-partners, obligors, promisors, or debtors to each other. In an action by the creditor to recover against those not discharged, the complaint shall set forth that the contract was made with the defendants and the party discharged, and that such party has been discharged.

This section appears under that portion of the Revised Laws headed "Civil Actions," ch. 77. The plaintiffs contend that this section applies here. If this contention is correct, the defence relying upon the release of Hedwall and Berge, I think, must fail; if not, I must then consider the effect of our own statute,

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section 39, sub-sec. (*r*) of the King's Bench Act as affecting the defence upon these grounds.

I hold that the Minnesota statute is one affecting the remedy and procedure only and in no way purports to fix or determine what are the essentials of valid contract, and that it has no force or effect in this province.

In Story's Conflict of Laws, 8th ed., p. 290, I find this rule:—

> Another rule naturally flowing from, or rather, illustrative of, that already stated, respecting the validity of contracts, is that all the formalities, proofs and authentications of them which are required by the *lex loci* are indispensable to their validity everywhere else.

Again, in Burge's Commentaries on Colonial and Foreign Law, vol. 3, p. 758, I find this passage:—

> Jurists treat as the *solemnia* of the contract whatever formality or ceremony, either as to time, place or manner of making the contract, or as to its form, as whether by parol or in writing, its attestation or authentication and which the law renders essential to the perfection and validity of a contract, and requires to be observed as the condition on which it recognizes the existence of the contract. They concur in holding that the validity or invalidity of the contract, so far as it depends on the forms and solemnities, is governed by the law of the place in which the contract is made.

The case of *Leroux* v. *Brown*, 12 C.B. 801, decides that where the *lex loci contractus* and the *lex fori* differ as to the solemnities of the contract, the *lex loci* governs, but if to the procedure only, the *lex fori* governs.

The case of *Green* v. *Lewis*, 26 U.C.Q.B. 618, was cited by plaintiffs as a strong authority for their contention that the *lex loci* governs this case. I have carefully read and considered the judgment in this case, and think it rather an authority against them for the proposition that the Minnesota statute applies here. It was this: A contract for the sale of goods to the plaintiff at a certain price, payable in Toronto, was made by the defendant at Chicago through his agent there, the goods to be shipped by the Grand Trunk Railway from Toronto. The contract was valid according to the laws of the State of Illinois, but not so in Canada by reason of the 17th section of the Statute of Frauds not having been complied with. The question was which law was to govern, the Canadian law or that of Illinois? The Court held the plaintiff entitled to recover, and the reason is obvious from the concluding paragraphs of the judgment, found on page 627:—

> But we have seen no case in which if the parties had bound themselves by a contract lawful and obligatory in the place of making, its performance in another country would be refused because certain solemnities required by the law of the latter had not been observed in its original creation. If the parties have once bound themselves lawfully for any universally lawful purpose, such as here for the sale of goods at a fixed price, it appears to us

that our Courts must hold them bound here as they would be in the place of contract.

Here the objection taken by the defendant, namely, that the contract was void under the 17th section of the Statute of Frauds was manifestly one going to the solemnities of the contract and not to the procedure upon it, and the *lex loci contractus*, therefore, clearly decides the obligatory effect, which, according to the Illinois law, was absolute against the defendant.

The case of *Leroux* v. *Brown*, 12 C.B. 801, before referred to, seems to me a very clear exposition of the guiding principles in these cases. There an action had been brought in England for breach of an oral agreement made in Calais, France, between plaintiff and defendant, by which the defendant, who resided in England, contracted to employ the plaintiff, who was a British subject residing at Calais, at a salary of £100 per annum to render certain services, the employment to commence at a future date and to continue for one year certain. According to the law of France such an agreement was capable of being enforced, although not in writing. The defendant contended that when it was sought to enforce this contract in England, it must be dealt with according to English law, and being a contract not to be performed within a year, the 4th section of the Statute of Frauds required it to be in writing. It was held that although the contract was good in France it could not be enforced in England, because of the provisions of this section, which the Court held applied not to the validity of the contract, but only to the procedure. A distinction between the 4th section and the 17th section is clearly pointed out, and had the Court come to the conclusion that the 4th section applied to the validity or solemnities of the contract, as it was clearly of the opinion was the application of the 17th section, the result would have been different and the plaintiff would have succeeded.

I refer also to the following cases, though further authority scarcely seems necessary: *Fergusson* v. *Fyffe*, 8 Cl. & Fin. 121; *Ex parte Melbourn*, L.R. 6 Ch. 64, at p. 69, where it is laid down as follows: "In the construction of a contract the question whether there has been a contract made at all is to be governed by the law where the contract was made, but the remedy is to be according to the law here (England)"; also *Don* v. *Lippman*, 5 Cl. & Fin. 1; *De la Vega* v. *Vianna*, 1 B. & Ad. 284. In this case, at p. 288, Lord Tenterdon said: "A person suing in this country must take the law as he finds it, he cannot by virtue of any regulation of his own country enjoy greater advantages than other suitors here." In this case also, the following dictum of Heath, J., in *Mallin* v. *Duke de Fitzjames*, 1 Bos. & Pul. 138, at p. 142, was approved and followed in construing a contract:—

We must be governed by the laws of the country in which they are made

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for all contracts have a reference to such laws; but when we come to the remedies it is another thing, they must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made can only have reference to the nature of the contract and not to the mode of enforcing it.

See also *Cooper* v. *Waldegrave*, 2 Beav. 282.

I think then that the matters alleged in the 15th, 27th, 28th and 29th paragraphs of the defendant's statement of defence if proved, will constitute grounds of defence here, although not so in the State of Minnesota because of the statute referred to.

I must now consider the effect of our own King's Bench Act, section 39, sub-section (*r*), upon these defences in the light of the facts admitted or proved.

This section, so far as I can find, has only been directly under consideration in our Court in one case, that of *Blackwood* v. *Percival*, 14 Man. L.R. 216. When this case was decided this section was in force as sub-sec. 14 of sec. 39 of 58 & 59 Vict. ch. 6. It was there decided that a surety relying on the giving of time by the creditor to the principal debtor as a defence to an action for the debt must now, under the sub-section, shew that he has suffered pecuniary loss or damage as the reasonably direct and natural result of the creditor having given the extension of time. But that is not the situation in the case at bar. It is not complained that the bank gave time to the principal debtor of the company, but that it did, without defendant's consent or knowledge, release Hedwall and Berge, joint co-sureties with the defendant, upon payment of amounts less than each of them had jointly guaranteed with the defendant in derogation of the defendant's right of contribution and by which his rights of contribution were injured and affected.

The facts as proven are that Hedwall was liable on the guarantee for $5,000 and Berge for $10,000; that the bank on June 29, 1910, made an agreement (exhibit 8) with Hedwall whereby they accepted his promissory note for $5,000 in payment of his obligation as guarantor for the company, and undertook to renew it at half-yearly periods during two years on certain conditions, at the same time surrendering to him the promissory notes of the company and Richardson, No. 1957 for $2,000 and No. 2412 for $3,000; also that the bank made a settlement with Berge on January 11, 1911 (exhibit 9), whereby in consideration of payment of the sum of $3,000 in cash it released Berge from all liability upon the guarantee, but without subrogating Berge to any of the bank's rights or claims upon the assets of the company. The question is, does our Act apply to these two transactions? Are they a dealing with or altering the security by the principal creditor, as provided in that section?

I have considerable doubt as to what security is meant by this

sub-section, whether the guarantee or the security for the original debt given by the principal debtor to the creditor, and which subsequently the surety has guaranteed. Plaintiff's counsel contends that the security referred to is that given by the surety, in other words, the guarantee in this case. The defendant's counsel, on the contrary, argues that the security referred to was that given by the principal debtor to the creditor in the first instance, and I am inclined to agree with this construction.

This enactment changed the existing law, and it will be well to inquire what the existing law was before this enactment took effect. Formerly an agreement by the creditor to give time to the principal debtor without the surety's consent discharged the surety. In *Swire* v. *Redman*, 1 Q.B.D. 536, at pp. 541 and 542, this principle is thus laid down:—

> If the creditor bound himself not to sue the principal debtor for however short a time he does interfere with the surety's theoretical right to sue in his own name during such period, it has been settled by decisions that there is an equity to say that such an interference with the rights of the surety . . . in the immense majority of cases not damaging him to the extent even of a shilling, must operate to deprive his creditor of his right of recourse against the surety though it may be for thousands of pounds. But though this seems . . . consistent neither with justice nor common sense, it has been long so firmly established that it *can only be altered by the Legislature.*

Now, our legislature has made the law in this respect consistent both with justice and common sense, to use the language quoted above, by providing that the giving of time to the principal debtor shall not, of itself, discharge the surety, but shall constitute a defence for the surety only in so far as it shall be shewn that the surety has thereby been prejudiced.

Again, formerly an alteration of the original contract between the creditor and the principal debtor had the effect of absolutely releasing the surety: *Holme* v. *Brunskill*, 3 Q.B.D. 495; *Polak* v. *Everett*, 1 Q.B.D. 669. And I think it was to modify this law that the enactment in question was passed and not to change the law relating to dealings by the creditor with sureties whose rights *inter se* depended upon a different principle from that governing their remedies against the principal debtor. It seems to me the whole object of this section was to do away with the disastrous consequences to creditors through sureties being absolutely discharged because of agreements between the creditor and the principal debtor, which, though altering the original contract between the principal debtor and the creditor or some collateral security given directly by the principal debtor to the creditor, in no way prejudiced the surety, and in cases where it had that effect, and in such cases only, to give the surety a defence to the extent of his prejudice or injury, but not an absolute release.

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I think the legislature in enacting this section intended only to deal with matters between the principal debtor and the creditor and not with securities by way of bond or covenant of indemnity or guarantee given by third parties to the creditor on behalf of the principal debtor. And I think that the law still is that a release by the creditor of one or more joint and several sureties, or giving time to such surety without the consent of the co-sureties releases the others: *Mercantile Bank* v. *Taylor*, [1893] A.C. 317; *Oriental Finance Corporation* v. *Overend*, L.R. 7 Ch. App. 142, where it is said:—

> When the creditor by his own act renders unavailable part of the security to the benefit of which the surety was entitled the latter is held to be discharged, not absolutely, but *pro tanto*: *Taylor* v. *Bank of New South Wales*, 11 A.C. 596, at p. 603; *Peart* v. *Deacon*, 24 Beav. 186, affirmed 1 DeG. & J. 461.

Upon the best consideration, then, that I can give the matter, I think that our statute does not apply to the dealings with and releases given to Hedwall and Berge, and that the defendant is not bound to prove in any event that he has been prejudiced by such releases before he can set up such releases as a good defence to this action.

However, it is clear that the bank, by surrendering to Hedwall notes of the company and Richardson to the amount of $5,000, has put it out of its power to hand over to the defendant these notes, to which he would be entitled on payment of the guaranteed debt. It is true that the defendant got the benefit of the settlement made with Hedwall, and that Hedwall has paid all he was liable for under the guarantee; but, in my opinion, he was not entitled to delivery over of these securities unless he paid the whole debt. He could not, in view of his limited liability under the guarantee, be called upon to contribute more than the $5,000 which he paid the bank, but I think the defendant has a right to complain of the bank's action in surrendering these securities to Hedwall, and that he is released on this account, at all events *pro tanto*.

With regard to the release of Berge, the defendant's position is much stronger. Berge was liable for $10,000, and the bank released him for $3,000, without the defendant's knowledge or consent. I think this release operates to release the defendant also *in toto*. See *Mayhew* v. *Crickett*, 2 Swans. 185 at p. 192, where Lord Eldon said:—

> When one surety has been discharged the co-surety is entitled to say to the creditor asserting a claim against him, "You have discharged a surety from whom I might have compelled contribution either in my own name in equity or using your name at law."

See *Mercantile Bank of Sydney* v. *Taylor*, [1893] A.C. 317; *Ward* v. *National Bank of New Zealand*, 8 A.C. 755, where it is laid down that when the creditor re-

leases one or two or more sureties who have contracted jointly and severally the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each.

Upon the whole, I think the defendant has made out a good defence to this action on a number of grounds, and that the action must be dismissed.

There will be judgment dismissing the action with costs.

As this is a case of special importance and difficulty, I remove the statutory limit and allow full taxable costs, to include costs of examinations for discovery and commission evidence.

Action dismissed.

Re MODERN HOUSE MANUFACTURING CO.

DOUGHERTY AND GOUDY'S CASE.

Ontario Supreme Court, Middleton, J. February 25, 1913.

1. CORPORATIONS AND COMPANIES (§ V F 4—276)—LIABILITY OF SHAREHOLDER AS CONTRIBUTORY—CONTRACT TO PAY FOR SHARES IN PROPERTY.

In a winding-up proceeding a person cannot be held as a contributory in respect to shares allotted him in consideration of his agreement to convey land to the company although he had failed to make the conveyance but notwithstanding had acted as a shareholder, where there was no subscription calling for a cash payment for which the land might be taken in substitution; the procedure for settling who are to be contributories does not apply to such a case.

[*Waterhouse* v. *Jamieson*, L.R. 2 Sc. App. 29, and *In re Continental and Shipping Butter Co.*, [1875] W.N. 208, followed.]

Statement

APPEAL by L. M. Dougherty and R. J. Goudy from an order of the Master in Ordinary, upon a reference for the winding-up of the company, placing the appellants' names upon the list of contributories in respect of 1,500 shares of the capital stock of the company.

W. M. Douglas, K.C., for the appellants.
G. F. Shepley, K.C., for the liquidator.

Middleton, J.

February 25. MIDDLETON, J.:—The facts are set forth at some length in the Master's judgment. The appellants, whom, for convenience, I shall call the shareholders, agreed to sell certain property to the company for the price of $5,000 in cash and 6,500 fully paid-up shares, "to be allotted and issued . . . upon the vesting in the company of the title" to the property to be transferred.

The vendors failed to make title to the property, and afterwards a new arrangement was entered into, by which the shares were at once allotted, and a bond was taken in the penal sum

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of $5,000, conditioned upon the making of title. The shares in respect of which it is sought to hold the appellants liable are part of the 6,500 shares referred to.

The learned Master has taken the view that, inasmuch as the shareholders have never transferred the property, and as they have undoubtedly acted as shareholders of the company with respect to the stock in question, and are now estopped from denying that they are shareholders, they are liable to be placed upon the list of contributories for the face value of the stock. The appeal is based upon the ground that there was no contract to pay for the stock in cash, but a contract to pay in kind; and that the liability, if any, of the shareholders for the breach of this contract is in damages; and that, no matter how great the default, the shareholders are not liable to be placed upon the list of contributories.

After much consideration, I have come to the conclusion that the Master's judgment cannot be upheld. The question in this case, it seems to me, depends upon the contract. To borrow the language of Meredith, C.J., in *Re Wiarton Beet Sugar Co., Jarvis's Case* (1905), 5 O.W.R. 542, did it constitute the appellants shareholders *in præsenti* with a collateral agreement as to the mode in which they were to be permitted to pay for the shares for which they had subscribed?

If the promises on the part of the contracting parties are independent, and the shareholders agree to take and pay for the stock, and the company agrees to buy the property offered at an equivalent sum to be set off, then each contracting party must perform his part of the agreement; but, if there is only, as here, the one contract, by which the shareholders agree to transfer the property, in consideration of the issue of a certain amount of paid-up stock, then, on the breach by either party of its obligation, the defaulter is liable to the other in damages. In such case, where the shareholder has contracted to pay "in meal or malt" and not in money, if he makes default he is liable in damages for the value of the "meal or malt" that he contracted to deliver; but he cannot be made liable upon a contract which he never made—a contract to pay in cash.

In *Waterhouse* v. *Jamieson* (1870), L.R. 2 Sc. App. 29, this principle is stated thus: "The liability of a shareholder is to be measured by his contract. . . . The Court cannot expand the contract; nor will it fix upon a party any engagement larger or other than that into which he has entered."

This principle appears to me not only sound but fair. The shareholders agreed to take stock only on the terms set out in the document, in satisfaction of the price of certain property to be conveyed. The property may have been worth much or little; the only obligation assumed was to convey it; and dam-

ages based upon its value is the only liability for the breach. This may be as much as the nominal value of the stock; more probably it is much less, and approximates more nearly to the real value of the stock, which seems to have been much less than par.

This liability cannot be asserted in these proceedings; and this decision is confined to the one question, the shareholders' liability as contributories.

At one time I thought the situation might be different, because the original agreement contemplated the transfer of the property before the issue of the stock The change made later on, by which the stock was issued first, seems, on consideration, immaterial; and the rights of the parties upon the agreement as varied are as indicated.

This result is in accord with what is said by Sir George Jessel in *In re Continental and Shipping Butter Co.*, [1875] W.N. 208 (not reported elsewhere). There he states that *Hartley's Case* (1875), L.R. 10 Ch. 157, and *In re Western of Canada Oil Lands and Works Co., Carling, Hespeler, and Walsh's Cases* (1875), 1 Ch. D. 115, shew that the failure of the consideration for which stock was issued as paid-up "was no ground for treating the shares as not being paid-up;" and he refused to place the shareholders on the list of contributories.

While I allow the appeal, there is, I think, ample ground for refusing to give the shareholders costs. The liquidator was justified in his attempt to place the shareholders upon the list, and should be allowed his costs out of the estate.

Appeal allowed.

[An appeal from the foregoing judgment to the Appellate Division was, on the 2nd July, 1913, dismissed by reason of an equal division of opinion among the four Judges who heard it.]

ELLIS v. ELLIS.

Ontario Supreme Court, Boyd, C. June 18, 1913.

1. HUSBAND AND WIFE (§ II E—81)—SEPARATE ESTATE—TRUST OF CORPUS IN HUSBAND'S POSSESSION.

The husband claiming that there has been a gift from his wife to himself of any of the corpus of the wife's separate estate must make out the gift by clear and conclusive evidence or he will be held to be still a trustee for his wife of any of such corpus of which he has obtained possession.

2. HUSBAND AND WIFE (§ II D—72)—SEPARATE ESTATE—INCOME EXPENDED FOR JOINT BENEFIT—HUSBAND'S LIABILITY.

Where income of the wife's separate estate came to the hands of the husband and was expended for their joint purposes and advantages, the onus is upon the wife to shew by conclusive evidence that such income was dealt with by way of loan or under circumstances requiring him to repay.

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ACTION by wife against husband for the recovery of goods alleged to be detained by the husband and for an account of moneys of the wife received by the husband, and for other relief.

J. Rowe, for the plaintiff.

S. G. McKay, K.C., for the defendant.

BOYD, C.:—In the conflict of evidence which has arisen in the case between the parties themselves, I feel constrained to accept the recollection of the wife as more accurate than that of the husband. On various points of disagreement, she is so far corroborated by independent testimony that my best conclusion is to hold in the main that her version of affairs is correct.

Besides, as to the chief claim, the documentary evidence shewing the ownership of the money is in her favour. That she received considerable sums from her father's estate in Scotland after her marriage is not disputed: the contention is, how much? In the absence of other evidence to countervail, it must be taken that the face of the bank receipts shewing sums payable to her, expresses the fact that she was the depositor and owner of the moneys. I find on the facts that the husband handled these moneys, on her endorsement of the receipts, as her agent, and could not, against her will, apply any portion to his own use. She gave no consent to any such user as to the corpus or capital, but signed in order that the money might be more profitably invested.

From the marriage in 1888 till the 13th October, 1910, the parties lived together as man and wife and had children. On the 2nd November, 1910, an action for alimony was begun; and by the endorsement of the writ of summons the plaintiff also claimed "an account and payment of moneys received by the defendant on the sale of the plaintiff's lands and interest thereon." On the 8th December, 1910, a consent judgment was obtained by which an allowance of $400 a year was to be paid by the defendant to the plaintiff on account of alimony. In addition to this, an agreement of separation was entered into between the parties on the 21st November, 1910, reciting the consent to allow alimony (afterwards put into the form of judgment), and agreeing that, when the land of the husband (being part of lot 15 in a lot in the village of Norwich) was sold, he would pay the wife one-third of the proceeds, and, upon such payment, she was to release her dower.

The account asked by the endorsement of the writ was in respect of house and land standing in the wife's name, which had been sold by the husband, and the proceeds of sale paid to the wife, except about $500, which he retained for repairs and improvements, made out of his money, on the property and house. The husband says that it was agreed that this should be

deducted. The daughter says that the mother was apparently persuaded by the husband to let him keep this $500 when the house was sold in 1910.

I judge that this claim should not be entertained as things stand. The alimony suit, with its special claim for an account as to the sale of this house of the wife, was settled by the concession of alimony at the rate of $400 a year and a further concession of one third out and out of the proceeds to be derived from the sale of the husband's house when it was sold (which stands good for all the future); and that house is said to be worth at least $4,000. This term of the agreement was beyond her legal claim for dower: and, while technically it may be said that the matter is not res judicata, yet it must be considered that the claims and rights of both parties in respect to both houses were present in their minds when the quantum of alimony was settled. To put it strictly, it does not seem to be equitable now to disturb that settlement of 1910, unless the judgment for alimony is set aside, and the question of how much is to be paid is left open for inquiry and settlement, having regard to the altered condition of the defendant's estate.

I do not propose to have the amount of alimony reconsidered; and, for this reason, do not interfere in regard to this claim for $500.

But, on the other part of the case, as to the separate moneys of the wife, I think no obstacle arises based on the former action and the additional deed of separation.

That outstanding right of the wife to these moneys of her own taken by the husband was not alluded to or considered; though it must have been known to both parties. The delay of the wife is not explained, but such a delay does not bar her right if a trust existed in regard to this money. Such a trust, I hold, did exist as to all the moneys received from Scotland which appear in the deposit receipts—but not necessarily so as to the income or interest derivable from the principal sums. On the 15th May, 1896, the wife consented to $650 being drawn out of the capital for investment by the husband. And again on the 6th October, 1896, a further sum of $500 for a like purpose. Finally on the 12th January, 1897, she endorsed to her husband the whole of the two amounts then on deposit in her name: one receipt for $1,721 and one for $589. The husband claims these two sums as a gift out and out from the wife. I cannot, having regard to all the surroundings, accept this conclusion. The parties were not on equal terms: she had already discovered his unfaithfulness to her, and was greatly disturbed and nervously unstrung. The matter was kept quiet, but her condition was such that the physician advised a rest and a journey to the old country: but to that her husband would assent only on condition

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that she turned over all this money to him, as he said he might have occasion to use it or some of it during her absence. In her weak and disordered condition on the eve of her departure, it needed much less than coercion to induce her to endorse the receipts and give them to her husband. He cannot be allowed to take advantage of such a surrender. His position as husband was to protect her even from herself; and, taking the receipts as he did and as she gave them, he did not cease to be her trustee for those sums, i.e., $1,721 and $589. He is also to be charged with the two other principal sums withdrawn for a special purpose which he does not seem to have fulfilled, but rather to have pocketed or otherwise expended the money (i.e., $650 and $500.)

The interest or income from the capital sums stands on a different footing, which should exempt him from liability as a matter of fairness between man and wife living together in family and household relations. The presumption is in such cases that the income of the wife's separate property is expended for the joint benefit of husband and wife and their household. That is supported by many circumstances which need not be detailed; except to say that she returned to her home from the journey in December, 1897; and, though he claimed the money as his own, they lived together supported by the husband till she left the house in 1910. Even in the absence of these details, I would not (having regard to the whole course of litigation and the manner of life of the now disputants) charge the husband with interest and rests as claimed. Did I feel obliged to do so, I should certainly vacate the alimony judgment and let an amount be fixed afresh, in view of the changed financial condition of the defendant. But, in charging only the amounts actually received by him as indicated, I do not feel pressed to disturb the consent judgment.

The distinction as between the receipt of the corpus and the interest or income by the husband of the wife's separate estate, when they were living together for many years, is well defined. If the husband claims that there has been a gift of the corpus, that must be made out clearly and conclusively or he will be held to be a trustee for her. As to the income however, the burden of proof is the other way. She must establish with like clearness and conclusiveness that this yearly increment expended for their joint purposes and advantages was dealt with by her husband by way of loan, and for which he was to be held to account: *Rice* v. *Rice*, 31 O.R. 59, affirmed *Rice* v. *Rice*, 27 A.R. (Ont.) 121. The counsel for the wife stated in open Court that he only desired to charge against the husband that which was fair and just; and I think that my present ruling should satisfy him in this respect.

I find that the money of the wife was expended in the pur-

chase of the piano in the pleadings mentioned—and that the sum paid was $325. This is to be allowed to the husband as a proper payment, and the piano is declared to be the property of the plaintiff and to be forthwith delivered to her.

The other chattels claimed were to be ascertained and their identity determined by the intervention of the daughter, who was accepted by both sides as a suitable referee to adjust the adverse claims, and her decision I do not propose to disturb. The articles should be handed over to the plaintiff according to the determination of the daughter, and they need not be mentioned in the judgment.

I would fix the amount of liability thus:—

Deposit receipts endorsed over to the defendant at the time the plaintiff left for England	$1,721
He had also drawn out before	587
On the 15th May, 1896	650
And on the 6th October, 1896	500
	$3,458
Less paid to her at sale of house	1,170
	$2,288

As to the piano, it cost and he paid $325; he got $225 of this from the wife when in England, and also drew out on the 12th January, 1897, $100 from her money, which will square this account and leave the piano as paid for out of her money, and to be handed over to her.

Judgment should be for delivery of the piano and the other chattels as designated by the daughter, and the payment of $2,288, with interest to run from the date of separation in October, 1910.

The defendant should pay the costs.

Judgment accordingly.

ONTARIO ASPHALT BLOCK CO. v. MONTREUIL.

Ontario Supreme Court. Trial before Lennox, J. June 19, 1913.

1. TENDER § I—2)—SUFFICIENCY—TIME OF MAKING.

Payment on the day after the expiration of a tenancy is a sufficient compliance with an option contained in a lease giving the tenant the privilege of purchasing demised premises by making payment at the end of his term.

2. VENDOR AND PURCHASER (§ I D—20)—CONTRACT FOR SALE OF LAND — DEFICIENCY IN QUANTITY—ABATEMENT OF PRICE.

Where a person contracts to sell more land than that to which he is able to make a good title, the vendee is entitled to what the vendor actually has, with an abatement of the price in respect of that which cannot be conveyed.

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3. DAMAGES (§ III A 3—62)—BREACH OF CONTRACT TO CONVEY LAND — FAILURE OF VENDOR'S TITLE — PERMITTING VENDEE TO MAKE IMPROVEMENTS.

Substantial damages, where specific performance is impossible, will be awarded for the breach of an agreement to convey land to a tenant at the expiration of his lease where the tenant, in good faith and without knowledge of a defect in his landlord's title, of which the latter became aware during the term of the lease, made large expenditures of money to the knowledge of the landlord in improving the property in reliance on his option to purchase.

Statement

ACTION for specific performance of an agreement for the sale by the defendant to the plaintiffs of land and land covered by water, and for damages.

D. L. McCarthy, K.C., and *J. H. Rodd*, for the plaintiffs.
M. K. Cowan, K.C., for the defendant.

Lennox, J.

LENNOX, J.:—The contract arises out of an option contained in a lease of the lands in question from the defendant to the plaintiffs for ten years from the 2nd February, 1903, as follows: "It is agreed between the parties hereto that the lessee, its successors and assigns, shall have the right to purchase the demised premises, at the end of the demised term of ten years, for the cash sum of $22,000, provided it shall have given six months' previous notice in writing of its intention so to do."

In strict compliance with the terms of this option, the plaintiffs, on the 5th January, 1912, gave notice to the defendant of their intention to exercise the option and to purchase the demised lands; and the right of the plaintiffs to exercise this option and to have these lands conveyed to them was never disputed until or after the expiration of the term.

On Saturday the 1st February, 1913, and again on the following Monday, the 3rd February, the plaintiffs tendered to the defendant the $22,000 and a deed of the lands in question for execution. On both occasions the defendant refused to accept the money or to convey. The form of the conveyance has not been objected to.

The defendant sets up in his statement of defence that the lease was obtained by fraudulent representations as to the nature of the business to be carried on. There was no attempt made to prove this. The defendant also set up that the lease provided against the carrying on of any business that might be deemed a nuisance.

The defendant collected his rent for the whole term of ten years without complaint, and there is no evidence to shew or suggest that the plaintiffs ever carried on any business other than that for which the premises were expressly demised.

It is also set up by the defendant that the lease became forfeited by non-payment of taxes for a year and non-payment of

rent for three months. There was no evidence in proof of this plea. . .

The answers set up at the trial were:—

(a) That the tender on Saturday the 1st February was ineffective, because there was a quarter's rent then in arrear, and, this rent having been paid later on in the same day, that the tender made on Monday the 3rd February was too late.

(b) That the defendant thought he had the fee, but finds that he has only a life estate in the portion of the lands in question which belonged to his father, that is, in the high land, and that, as to the land covered by water, although he holds this by patent from the Crown in fee, the Crown should only have granted to him a life estate therein.

(c) That the plaintiffs, if they are entitled to anything, are entitled to damages only; and, the breach of contract arising through a bonâ fide mistake of title, these damages are confined to solicitor's charges and the like.

I am of opinion that the tender made on Monday was clearly in sufficient time. The right to purchase is to arise "at the end of the demised term of ten years;" that is, at the end of Saturday the 1st February. On the strictest interpretation, the plaintiffs would have the whole of the following day within which to act; and, this being a dies non, they would have Monday, the day on which the second tender was made.

But, in my view, they were not confined to Monday. The one thing that they had to be careful about was to give the full six months' notice. Without this, no contract to purchase or sell would arise. This notice being given, and there being no condition making time of the essence of the contract, a contract of sale binding upon both parties, and to be completed within a reasonable time, arose.

If the matter ended here, the plaintiffs would be entitled to judgment for specific performance.

If a plaintiff has contracted for the purchase of more land than the defendant is able to make a good title to, the purchaser is entitled to that which the vendor has, with an abatement of the price in respect of that which cannot be conveyed; and with the addition of nominal or substantial actual damages, dependent upon the particular circumstances of the case.

I cannot entertain the defendant's objection to his own title to the water lot.

The plaintiffs in this case are entitled to a conveyance from the defendant in fee simple of such part of the land in question in this action as was granted by the Crown to the defendant by patent thereof dated the 7th October, 1874, and, as regards the residue of the lands agreed to be conveyed, to a conveyance of the defendant's life interest therein, with an abatement of the

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purchase-money in the proportion in which a fee simple exceeded this life interest in value, at the end of the ten years' term.

There will be the ordinary judgment for specific performance to this extent, with a reference to the Master at Sandwich to take an account upon that basis, to inquire as to damages as hereinafter provided for, and to settle the conveyance in case the parties cannot agree.

It is my duty to determine the character of the damages which the plaintiffs should recover. When the lease was executed, the plaintiffs' obligation to pay rent and taxes and to build a wharf, purchased, not only the right of occupation for ten years, but the option and its incident as well, namely, the right to the land in fee upon notice and payment of an additional consideration of $22,000. The defendant did not know of the limitations of his title when he made the lease; and there are decisions limiting the damages to actual outlay in favour of a vendor acting bonâ fide and without negligence in such a case.

But the defendant did know of the defect in his title in 1908. For ten years the plaintiffs have been bonâ fide expending money in improving this property, and in establishing and extending their business there, to the knowledge of the defendant. The defendant, with full knowledge of his position, and as well after as before the receipt of the plaintiffs' letters of the 2nd October and 24th December, 1908, and the notice of exercising the option served on the 5th January, 1912, by his deliberate and continued silence, invited and encouraged the plaintiffs to continue their improvements and expenditures and to believe, and they evidently did believe, that the defendant would be able to and would in fact carry out his contract.

This does not seem to me to be the case of a bonâ fide excusable mistake, in which all the loss is to be thrown upon the purchaser by an award of nominal damages or of solicitor's expenses only. But I am inclined to believe—although I have no actual evidence of it—that by a little exertion the defendant can obtain the title and carry out his bargain. This is what he should do if possible; and this, I believe, he can do with less expense to himself, if my judgment as to his liability is correct, than will be involved in a protracted reference and assessment of damages.

I direct that all proceedings be stayed for one month to enable the defendant to get in the title and convey the property to the plaintiffs, if the defendant determines to do so, and gives notice of his intention within fifteen days from the 19th June instant; and in this event there will be judgment against the defendant for specific performance of the contract according to its terms; the plaintiff paying interest on the $22,000 as being about equal to the rental, with costs, and a reference to the Master to compute the interest and settle the conveyance.

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If this suggestion is not or cannot be acted upon by the defendant, then in the reference hereinbefore directed to ascertain and fix the abatement in price, will be included a direction to the Master to ascertain and report what amount the plaintiffs are entitled to as damages in addition to abatement in price, for breach of contract, calculated on the basis of the plaintiffs' loss.

The plaintiffs are entitled to costs down to and including the trial. Costs of the reference and further directions reserved.

Judgment accordingly.

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Feb. 10.

PEARSON v. ADAMS.

(Decision No. 3.)

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. February 10, 1913.

1. BUILDINGS (§ II—18)—RESTRICTIONS — DWELLING-HOUSE — APARTMENT HOUSE AS.

A covenant that certain land shall be used only for a detached dwelling house is not broken by the erection of an isolated apartment house on the land.

[*Pearson* v. *Adams*, 7 D.L.R. 139, 27 O.L.R. 87, reversed; *Pearson* v. *Adams*, 3 D.L.R. 386, restored.]

Statement

APPEAL by the defendant from the judgment of a Divisional Court, *Pearson* v. *Adams* (No. 2), 7 D.L.R. 139, 27 O.L.R. 87, reversing the judgment of Middleton, J.

Argument

J. M. Godfrey, for the appellant, relied upon the arguments advanced and the cases cited in the argument before the Divisional Court, 27 O.L.R. at p. 89 and referred to the following additional authorities: Stroud's Judicial Dictionary, 2nd ed., vol. 1, p. 589; *Kimber* v. *Admans*, [1900] 1 Ch. 412, 415; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, 409. The case is governed by *Re Robertson and Defoe* (1911), 25 O.L.R. 286, where the authorities are considered by Meredith, C.J. Reference was also made to *Formby* v. *Barker*, [1903] 2 Ch. 539, 554.

J. H. Cooke, for the respondent in addition to the authorities cited in his argument before the Divisional Court, 27 O.L.R. at pp. 88, 89, referred to *Tulk* v. *Moxhay* (1848), 2 Ph. 774; *Yorkshire Insurance Co.* v. *Clayton* (1881), 8 Q.B.D. 421; Gray on Perpetuities, p. 254.

Godfrey, in reply.

Meredith, J.A.

February 10, 1913. MEREDITH, J.A.:—If we have regard only to the interpretation of the words of the "condition" in question, this case presents no great difficulty; but, if we unconsciously let our minds be carried away by that which we

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may feel ought to have been provided against in the "condition," our chances of going astray, too many under any circumstances, are very greatly increased.

The provisions of the deed in question are, that the grant contained in the deed shall be subject to the "further condition that the said land shall be used only as a site for two isolated dwelling-houses . . ." So that the single and simple question, on the subject of the interpretation of the deed, is, whether the plaintiff has proved that the building in question is not a dwelling-house, or, if a dwelling-house, is not an isolated one: the restriction must, like an exception out of the grant, be well proved, by those asserting that it has been violated.

That it is a dwelling-house no one can reasonably deny; its one purpose is a settled dwelling-place for human beings; it is to be a house to be used solely as such a dwelling-place. And that it will be isolated, is obvious.

It cannot be the less a dwelling-house merely because more than one person, or more than one family, is to dwell in it; the character is the same, and the quantity of that character is greater only.

Structurally, it is unquestionably one isolated building, and that building is unquestionably a house; the number of persons living in it cannot, nor can the manner in which they live in it, change these obvious facts. If it were the intention of the parties that they should be more restricted, it should have been so provided; it is as easy to say a dwelling-house for one family only, as to say merely a dwelling-house, which no one can but know has a much wider meaning.

To call one isolated house, within four walls, under one roof, and with outer doors for one house only, several houses, merely because several persons may occupy different parts of that one isolated house, would, I cannot but think, amuse rather than convince the minds of ordinary people.

Does the word "apartment," or "apartments," in the language of this Province in general, or of Toronto in particular, ever mean a house? Would one person in ten thousand, seeing such a house as that in question, and being asked whether it was one or several houses, say anything but that it was one only, and say it with a strong impression that the questioner was either blind or silly? A compact, but very tall, building, in a prominent place in Toronto, has or is to have tens, if not hundreds, of separate office rooms and suites of rooms more separate, and in a measure publicly separate, than any dwelling-apartments. Would any one of the tens of thousands of persons who pass that building ever describe it as not one house but tens or hundreds of houses? And how do local notions agree with those of the lexicographers? Taking the first

dictionary at hand, and a very good one too, I find the definition of the word "apartment" to be a room in a house, and the word "apartments," a set of rooms; whilst the next nearest, that mine of legal information nick-named "Cyc.," gives this very much in point definition of the word "apartment"—"One or more rooms in a house, occupied by one or more persons, distinct from other occupants of the same house."

It is not an unknown thing for different members of one family residing in one house to occupy different parts of it as exclusively as the house in question is to be occupied separately; indeed, and not so very infrequently too, in farm-houses in this Province the same thing occurs, sometimes being provided for in the last will of the owner; but no one would ever dream of calling the farm-house more than one house, even though the carpenter were called in and had done such work as had made the exclusion effectually exclusive.

It is very likely that, when the deed in question was made, apartment houses, such as are very common in these days, were unknown to the parties to it: that which was known to every one was the double house—semi-detached—and terraces and rows and blocks of houses, things which were generally considered more or less objectionable to exclusive building schemes, and which, in each case, and in every sense, was more than one house, the one severable from the other, even to demolition, leaving the other substantially intact.

For some special purpose, under some special enactments, such as those affecting the franchise, part of a house is to be deemed a house, but that is quite contrary to the popular meaning of the words: see *Thompson* v. *Ward* (1871), L.R. 6 C.P. 327, at p. 341; which popular meaning must prevail in such a case as this.

I am, therefore, clearly of opinion that, assuming the "condition" to be binding, as creating an equitable easement, or otherwise, there would be no breach of it in the erection of the building in question: and so it is unnecessary to say anything upon the other points dealt with by Riddell, J., further than that silence is not to be taken as assent.

But I must add that this is, most likely, another case of wasted energy, as, in all probabilty, the now existing by-law against the placing of apartment houses in certain localities in Toronto prevents the erection of this house at the place in question.

I would allow the appeal and restore the judgment dismissing the action.

GARROW, J.A.:—I agree.

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Hodgins, J.A.

HODGINS, J.A.:—In construing the covenant or condition in question, found in a grant of the land, the rule is thus laid down in *Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135, at p. 149: "It is well settled that the words of a deed, executed for valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee."

The words are: "to be used as a site for a detached brick or stone dwelling-house, to cost at least $2,000, to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lots."

There is no evidence, as there might have been (see the limitations thereof *per* Tindal, C.J., in *Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at p. 565), that these words, when used in 1888, had any different sense from the strict, plain, common meaning of the words themselves.

The onus is, therefore, upon the respondent to shew that this property is not being used for the site of a detached dwelling-house; for the rest of the condition is not in question.

I prefer to follow the views expressed in *Re Robertson and Defoe*, 25 O.L.R. 286, and by my brother Britton in this case, in the absence of any evidence entitling me to construe these words as preventing the erection of the building in question. It seems to conform literally to the words of the condition, and its user as an apartment house is not provided against. See *Wright* v. *Berry* (1903), 19 Times L.R. 259.

I do not, therefore, pursue the interesting question as to the respondent's right to maintain this action, and express no opinion upon that question as dealt with by the Divisional Court.

The appeal should be allowed, and the action dismissed.

Maclaren, J.A. (dissenting).

MACLAREN, J.A. (dissenting):—The question to be decided in this appeal is, whether an apartment house of six suites is "a detached dwelling-house" within the meaning of a covenant or condition in a deed of the 18th April, 1888, of a lot on Maynard Place, in the city of Toronto, that it was "to be used only as a site for a detached brick or stone dwelling-house."

This covenant should be construed as laid down by the Court of Appeal in *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, at p. 409, "in an ordinary or popular and not in a legal and technical sense." Construed in this way, I can hardly imagine such a building as that now in question being described, in Toronto at least, either in 1888 or at the present time, as "a detached dwelling-house." It would more properly be described as "a house of six attached dwelling." If pointed out to a stranger, or described to him as a dwelling-house, he

might, if at all inquisitive, ask "Whose?" And, no doubt, he would be very much surprised if, in reply to such a question, a string of names—from six, as in this case, even up to twenty or more—should be given as an answer. Or can any one imagine that, if a street or section of the city were composed entirely or chiefly of such buildings, any one would dream of describing it as a street or section of "detached dwelling-houses."

One ought not to lose sight of what was manifestly in the minds of both grantor and grantee as to what was intended by the words used in the deed, namely, to secure a high-class residential street or neighbourhood by restricting the buildings to one residence of a certain minimum value, built back a certain distance from the street-line. The prejudice against these apartment houses, as tending to lower the quality and desirability of a street or neighbourhood for private residences of a high-class, may be an unreasonable one; with that we have nothing to do. The fact that it exists, and that it would appear to be one of the things against which the parties to the deed in question sought to guard, so far as we can gather their intention from the language they have used, helps to lead me to the conclusion which I have indicated.

If we turn from the popular use of the words in this country to a consideration of the technical meanings which have been given in the foreign cases which have been cited to us, I do not think we find much assistance. Even here, I am of opinion that the preponderance of authority is in favour of the judgment of the Divisional Court. The meanings are always more or less controlled by the context, by the objects had in view, such as taxation and the like, and by the surrounding circumstances.

For instance, in the case of *Campbell* v. *Bainbridge*, [1911] 2 Scots L.T.R. 373, which Britton, J., the dissenting Judge in the Divisional Court, cites as being expressly in point, the prohibition was as to the erection of "houses or buildings of any kind other than villas or dwelling-houses" (in the plural); and the use of such words as "disponer and disponee" and "tenements of flatted dwelling-houses" are illustrations of the difference of language between Scotland and Canada.

In the case of *Kimber* v. *Admans*, [1900] 1 Ch. 412, strongly relied upon by the appellant, the word "house" was used without any qualifying word or anything in the context to cut it down, which led Vaughan Williams, L.J., to come to the conclusion that it referred solely to the brick and mortar erection, and not to the user of the house.

The case of *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, is more in point. The proposed building in that case was substantially the same as in this case, and Farwell, J., says (p. 393): "In my opinion, a flat such as is proposed is not one messuage, or

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dwelling-house, but several. I cannot see any substantial difference for the purposes of a covenant of this nature between a terrace of adjoining residences, separated from one another vertically, and a pile of residences, separated from one another horizontally." His judgment was affirmed by the Court of Appeal.

With great respect, I am unable to agree with either the reasoning or the conclusion in the case of *Re Robertson and Defoe*, 25 O.L.R. 286.

On the foregoing points and with respect to the right of the plaintiff to maintain the present action, I agree with the judgment of Riddell, J., in the Divisional Court.

The above conclusion has been arrived at after making due allowance for the presumption in favour of the defendant of dealing with the property he has acquired. The prohibition is so strong in this case that, in my opinion, it clearly destroys such a presumption.

I consider that the appeal should be dismissed.

Magee, J.A.

MAGEE, J.A., was also of opinion that the appeal should be dismissed.

Appeal allowed; MACLAREN *and* MAGEE, JJ.A., *dissenting.*

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Feb. 11.

BANK OF HAMILTON v. BALDWIN.

Ontario Supreme Court, Middleton, J. February 11, 1913.

1. WRIT AND PROCESS (§ I—6)—AMENDMENT—WRIT ISSUED IN NAME OF DECEASED SOVEREIGN.

A writ of summons in time to prevent the barring of an action by the Statute of Limitations, but in which by error, the name of a deceased sovereign and not that of the reigning sovereign was inserted, may, under Con. Rules 310 and 312 (Ont. 1897), be amended after service, so as to cure the irregularity, notwithstanding that defendant was thereby precluded from setting up the statute as a bar.

Statement

MOTION by the defendants to set aside the writ of summons and an *ex parte* order of a Local Judge allowing the plaintiffs to amend the writ.

S. H. Bradford, K.C., for the defendants.
Bicknell & Co., for the plaintiffs.

Master in Chambers.

January 28. The MASTER:—This action is brought on a judgment dated the 5th December, 1892. The writ of summons was issued only on the 4th December, 1912, barely in time to bar the Statute of Limitations. This may account for the writ issuing as a command from His late Majesty King Edward VII., who departed this life on the 6th May, 1910.

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The error escaped the notice of the Local Registrar. When it first dawned on the plaintiffs' solicitors, does not appear.

But, on the 4th January, 1913, after service of the writ in its original form, but before the time for appearance had expired, an *ex parte* order was made by a Local Judge to amend by inserting the words "George the Fifth," in the place and stead of "Edward the Seventh."

This order was served on the defendants on the 15th January; and, two days later, the defendants moved to set aside the writ as a nullity and the amending order as having been made *ex parte*. It was conceded that, unless the writ was a nullity, nothing would be gained by setting aside the order to amend.

The mistake would seem one almost impossible to occur, had it not been for the similar instance to be found in *Biggar* v. *Kemp* (1908), 12 O.W.R. 863, and cases there cited. It is pretty safe to say that the case of *Drury* v. *Davenport* (1837), 6 Dowl. 162, 3 M. & W. 45, would not be followed at the present day.

As long ago as 1856, by 19 Vict. ch. 43, secs. 37 and 38, very wide powers of amendment were given; these sections are found later as secs. 48 and 49 of the Common Law Procedure Act, C.S.U.C. ch. 22. If the argument in support of the motion was pushed to its extreme limit, all writs issued under any other name than that of Queen Victoria would be void unless protected by Con. Rule 1224, as, no doubt, they are—the concluding words shew that this motion cannot succeed unless the variance from the fact is "matter of substance." The effect of my decision in *Biggar* v. *Kemp, supra*, by which I am bound, is, that the amendment was properly made in this case.

These mistakes are not to be condoned always and as a matter of course. But here it will be a sufficient penalty if the plaintiffs are left to bear their own costs.

If the defendants wish to carry the matter further, the time for that purpose can be extended, if necessary.

These cases seem to shew that it would be economy in the long run to destroy old forms.

The defendants appealed from the order of the Master in Chambers.

S. H. Bradford, K.C., for the defendants.
Bicknell & Co., for the plaintiffs.

Middleton, J.

February 11. MIDDLETON, J.:—The action is upon a promissory note. The writ was issued just before the note would have become barred by the Statute of Limitations. The motion is important, as, if successful, the note is now outlawed. By a mistake of the plaintiffs' solicitor, not noticed by the officer issuing the writ, an old form of writ was used, printed during the reign of His Majesty King Edward VII., and no change was made in it;

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so that the command in the writ is in the name of the deceased and not the reigning sovereign. It is said that this is fatal, as an action can be commenced only by writ, and that the writ is a command by the sovereign.

Cases can be found in the old reports shewing that at one time such an irregularity could not be cured: see, for example, *Drury* v. *Davenport*, 3 M. & W. 45, where the writ commencing "William IV.," etc., instead of "Victoria," etc., issued after the beginning of her reign, was set aside by the full Court.

There is no doubt that the writ is irregular. The real question is as to the effect of Con. Rules 310 and 312. These provide that non-compliance with the Rules "shall not render the writ . . . void," but the same may be set aside as irregular or be "otherwise dealt with" as may be deemed just; and it is made the duty of a Judge to "amend any defect or error in any proceedings . . . necessary for the advancement of justice, determining the real matter in dispute," etc.

The distinction between mere irregularity which is amendable and such a defect as to render the proceedings incurable and void, is not easily to be drawn. Very many years ago Twisden, J., in *Maleverer* v. *Redshaw* (1669), 1 Mod. 35, said: "The statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest."

This view, thus quaintly expressed, affords a working rule, reconciling most, if not all, of the authorities. Where the defect is in respect of a matter which, by some statutory or other provision, is made a condition precedent, then its non-observance is fatal. The tyrannical statute has made void the thing done. In other cases, the Consolidated Rule, a nurse yet more gentle and sympathetic than the common law, enables the defect to be cured.

In *Anlaby* v. *Prætorius* (1888), 20 Q.B.D. 764, a judgment signed before the expiry of the time for entering an appearance, was regarded as a nullity, because the lapse of the proper time was a condition precedent to the right to enter judgment.

In *Appleby* v. *Turner* (1900), 19 P.R. 145, a judgment was set aside as a nullity because the Rule provided that, before taking proceedings upon default of appearance, the writ and affidavit of service should be filed; thus making the filing a condition precedent.

In *Hoffman* v. *Crerar* (1899), 18 P.R. 473, 19 P.R. 15, a judgment was set aside as void because the writ was not specially endorsed, and this was a condition precedent.

In *Hamp-Adams* v. *Hall*, [1911] 2 K.B. 942, a judgment was set aside because a due memorandum of service had not been endorsed upon the writ, and the Rule in England provided that, if this is not done, "the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default."

Little purpose would be served by the citation of instances in which the Court has exercised its remedial jurisdiction. The general principle underlying all the cases is, that the Court should amend where the opposite party has not been misled or substantially injured by the error.

In *Dickson* v. *Law*, [1895] 2 Ch. 62, a writ was served out of the jurisdiction, which was in the form provided for service within the jurisdiction; and the notice prescribed to be endorsed upon the writ where service is made out of the jurisdiction was entirely absent. It was held that the defendant was not misled; and the motion to set aside the proceedings was refused.

Many of the cases—*e.g.*, *Fry* v. *Moore* (1889), 23 Q.B.D. 395—suggest as the test the question whether the defect is one that could be waived. Manifestly, the defect in this case could be waived, as the defendant could appear; and, appearance once entered, the form of the writ becomes immaterial.

I have no doubt that this is the kind of defect or irregularity in the proceedings which the Court is empowered to amend. The duty cast upon the Court by Con. Rule 312 is to make all amendments necessary for the determining of the real matter in dispute. The real matter in dispute here is the existence of the debt. When the plaintiffs issued the writ, they had, within the time limited by the law, resorted to the Court for the enforcement of their claim. The defect in the writ arose from the default of the solicitor, an officer of the Court, in using the wrong form. This defect was not discovered because of the default of another officer of the Court, the Local Registrar; and the defendant was in no wise misled. When the writ was served, the defendant knew that he was called upon to defend himself in the Court. He knew the place where he was to enter his appearance; and the fact that there was a mistake in the name of the sovereign was abundantly plain.

Then it is said that I ought not to amend because amending will defeat the right of the defendants to set up the Statute of Limitations. I quite concede that, after the Statute of Limitations has run, the Court ought not to introduce a new cause of action into a pending action so as to defeat the statute; nor should one who has not been sued be added as a party as of the date of the original writ, so as to deprive him of his statutory defence. The case relied upon by Mr. Bradford of *Challinor* v. *Roder* (1885), 1 Times L.R. 527, falls within this category. So also does *Hudson* v. *Fernyhough* (1889), 61 L.T.R. 722; for what was there sought was really the addition of a plaintiff in whom the cause of action was vested.

I think the appeal fails, and should be dismissed with costs to the plaintiff in any event.

Appeal dismissed.

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June 20.

MATTHEWSON v. BURNS.

Ontario Supreme Court. Trial before Boyd, C. June 20, 1913.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT—OPTION FOR PURCHASE OF LAND—IMPROVIDENCY—INADEQUACY.

Specific performance of an option agreement for the sale of land will not be refused merely because of inadequacy of price as a result of appreciation in value before the exercise of the option; or improvidence in making it on the part of the vendor, who, although well able to transact business, was physically incapable of attending in person to the details thereof.

2. CONTRACTS (§ I C—12)—CONSIDERATION—OPTION GIVEN TENANT TO PURCHASE DEMISED LAND—REVOCATION.

An option given in a lease to a tenant to purchase demised premises at any time during the term is based on a sufficient consideration, i.e., the creation of the tenancy and is not revocable at the will of the land owner although not under seal.

[*Davis* v. *Shaw*, 21 O.L.R. 474; and *Pyke* v. *Northwood*, 1 Beav. 152, specially referred to.]

3. CONTRACTS (§ V A—381)—OPTION OF TENANT TO PURCHASE DEMISED PREMISES—WAIVER.

An option given a tenant in his lease to purchase demised premises at any time during the term, is not waived by the tenant's acceptance of a new lease for a further term to commence from the expiry of the original term, where the new lease is taken as a precautionary measure by the tenant in case he does not exercise the option to buy and is so taken without any intention of waiving the latter right.

4. PRINCIPAL AND AGENT (§ II A—8)—POWER TO SELL LAND—SUFFICIENCY OF.

A power of attorney to let, manage and improve land, or to sell and absolutely dispose of it as and when the agent should see fit, will permit him to make a lease of the land and give the tenant an option to purchase it at any time during the term of leasing.

Statement

ACTION for specific performance of an alleged agreement for the sale of a house and lot in the city of Ottawa.

J. I. MacCraken, K.C., for the plaintiff.

N. Champagne, for the defendant.

Boyd, C.

BOYD, C.:—I think credit must be given to the evidence of W. G. Hurdman, who acted as agent for the owner of the land in question, Thomas Burns, under power of attorney dated the 4th September, 1909. Burns, the owner, unmarried and invalid, was living in a hospital at the time at which he arranged, through the intervention of his agent Hurdman, to lease his house and land to the plaintiff. The terms arranged were in writing and signed by both parties. The term was to begin on the 1st June, 1910, and to extend to the last day of April, 1913, and the plaintiff was to have the option of purchasing at any time, on or before the expiration of the lease, for the sum of $2,800. This paper is dated the 30th April, 1910, and was signed by Hurdman as attorney for the owner on that day, and this was communicated by telephone to the plain-

tiff, who was at Montreal. Burns agreed that it would be enough if she signed on her return, and this she did in the first week in June. Possession was taken by her on the 11th and 12th June, and rent was duly paid.

Burns, forgetful apparently of the dealing between the plaintiff and his agent, signed a lease of the same house on the 6th May, 1910, to Mrs. Constantineau, for six months, at the same rent, $25, and with option to purchase (no price being named, however). A letter dated the 7th May, 1910, written by Burns to Hurdman, was received by the latter in these words: "The other day I gave you a power of attorney to act for me in connection with my property, on the understanding that you would not sell or dispose of any of it unless first approved of by me. I hereby revoke any power of attorney given by me to you, and you are hereby notified accordingly. Since seeing you, I have rented the place till fall, with option of purchase. Thanking you for your kindness."

Hurdman forthwith repaired to the hospital, and saw Burns, and shewed the letter. Burns spoke about some crooked work going on, and Hurdman had typewritten at the bottom of the letter these words, "I hereby cancel the above letter," which Burns signed, on the evening of the day that the letter reached Hurdman. A letter dated the 11th May was sent, signed by Thomas Burns, to Mrs. Constantineau, in these words: "I regret to inform you that my agent had rented my house, 134 Stewart street, previous to your renting from me, and to inform you that you cannot have it. Enclosed you will find my cheque for $25, being the amount you paid in advance." Mr. Burns was aware of the lease to the plaintiff and its terms, and there is found in a book kept in his own writing a page headed: "Mrs. M. Matthewson: rent 134 Stewart St. from 1st June at $25 per month." It contains entries of payments of rent down to the 30th November, 1910, after which it is transferred to a pass-book (not in evidence).

Mr. Burns died on the 28th January, 1911, leaving a will by which he devised this house and land to his brother, the defendant.

The plaintiff took a lease of the house from the defendant, dated the 10th March, 1913, to commence on the 1st May, for 12 months, at the rate of $25 a month rent, i.e., the day after the first lease with the option expired (viz., the 30th April, 1913). It is disputed whether she spoke of the exercise of the option at the time when this last lease was made: but she signed without advice as to her rights, and with no intention of waiving the privilege of purchasing. The defendant and his solicitor were under the impression that the option to purchase was revocable; and, claiming that it had not been accepted by the

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plaintiff, they served notice of withdrawal, by letter without date, but in an envelope post-marked the 1st May. The defendant in his defence admits that on the 29th April the plaintiff tendered a conveyance of the land for signature, and the balance of the price, $2,800, after deducting the amount due on a mortgage. Even if there had been no prior statement of intention to act on the option, and even if it were revocable, this act would be sufficient to shew that the plaintiff claimed to exercise the right within the allotted time.

The defence is based on a denial of the authority of the agent to execute the lease with the option at $2,800; that the option was not under seal, and revocable, and was also withdrawn before acceptance; that specific performance should not be granted because the price is inadequate and the agreement made improvidently; that, if the plaintiff had an option, she waived it (presumably by executing the lease of the 10th March, 1913.)

The action was begun on the 1st May, 1913.

Upon the defence raised in the pleadings the plaintiff should succeed. Both parties agree that the deceased was well able to transact business, though physically disabled from attending to details in person.

No case is made as to inadequacy or improvidence. The evidence given as to the present values does not count because the prices of land began to go up in the fall of 1910. In 1909, one witness was ready to offer $3,500 for it, but it was then valued at $4,000. The testator told the witness Hurdman, his agent, that the best he had been offered for it was $2,700. The fall before, he had told the plaintiff that he was willing to take $2,800 for the place: and she, when the lease was made, was willing to pay that at the end of the term, and would not have taken the lease unless on that condition. The price, as things were in 1910, was not so low as to give rise to any suspicion of unfair dealing.

This option being obtained as I have said, it follows that the option was not given without consideration, and that it is not a revocable concession terminable at the will of the landlord. I base this conclusion on the view taken in American authorities discussed by Falconbridge, C.J., in *Davis* v. *Shaw*, 21 O.L.R. at p. 474. The agreement to pay rent and the payment of rent under the lease (though not under seal) are applicable to the whole agreement. The lease for the term would not have been taken by the plaintiff, unless it was accompanied by the option, and the whole contract stands or falls together: one part cannot be separated and eliminated at the will of the landlord; the right to buy exists exercisable at any time during the period specified: *Pyke* v. *Northwood*, 1 Beav. 152.

There is no evidence of any waiver by the plaintiff of the option to purchase. The taking of a new lease, to begin at the termination of the other, was merely a provident act in case she did not think fit to purchase. Had she elected to purchase during the former lease, that would ipso facto have determined the relation of landlord and tenant, and a new relation of vendor and purchaser would have arisen. None other follows in regard to the second lease; it did not become operative on the plaintiff electing to purchase at the end of the first term.

Next and last as to the power of the agent to enter into a contract giving the option to purchase. He acted under a power of attorney most comprehensive in its terms: power was given to let, set, manage, and improve the lands: to sell and absolutely dispose of the land "as and when he shall think fit:" he shall execute and do all such things as he shall see fit for any of the said purposes and generally to act in relation to the estate, real and personal, as fully and effectually in all respects as the principal could do personally.

These ample powers per se would cover selling by way of option, during the term, at a fixed price. The option is a possible prospective sale, and is a manner of dealing which was not foreign to the way in which Burns himself managed the property. Besides, Burns was told of this very arrangement with the plaintiff, and in fact ratified it by his letter of the 11th May, 1910.

It was further urged that there had been a revocation of the power of attorney. That, however, was an act which was itself revoked and cancelled by Burns on the same day that the agent was informed of the revocation. There was no withdrawal of the signed and sealed power of attorney, which remained always with the agent. And Burns recognised the tenancy created under that power, on till his death, by the receipt of rent. Another answer to this contention is, that the first lease had been made and signed by the agent before this attempted revocation took place.

On all grounds, therefore, I think that the plaintiff is entitled to specific performance, with costs. The usual reference, if desired, as to the amount, if the parties cannot agree.

Judgment for plaintiff.

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June 25.

BINDON v. GORMAN.

Ontario Supreme Court (Appellate Division) Clute, Riddell, Sutherland, and Leitch, JJ. June 25, 1913.

1. PARTNERSHIP (§ IV—15)—TRANSACTIONS IN LAND—AGREEMENT TO "DIVIDE" PROFITS—EQUALITY.

An agreement that the profits are to be "divided" means that they are to be equally divided unless it is stipulated otherwise. (Dictum *per* Riddell, J.).

[*Bindon* v. *Gorman*, 10 D.L.R. 431, 4 O.W.N. 839, reversed on the facts.]

Statement

APPEAL by the defendant Gorman from the judgment of Lennox, J., *Bindon* v. *Gorman*, 10 D.L.R. 431, 4 O.W.N. 839.

G. F. Shepley, K.C., and *J. J. O'Meara*, for the appellant.

G. E. Kidd, K.C., for the plaintiff.

M. J. O'Connor, K.C., for the defendant Murray.

Riddell, J.

RIDDELL, J.:—The defendant Gorman is a man of some means, but a very defective memory, living in Ottawa; the defendant Murray is a land speculator; and the plaintiff, a common friend of these two.

In 1905, the defendant Murray was in need of money to enable him to go west to ply his business. Talking with the plaintiff in Ottawa about the "good many snaps" there were lying about in the west and his own need of money, the plaintiff suggested seeing Gorman. The two went to Gorman's office; Gorman lent Murray $300 on his note, and Murray told him that he would let him and the plaintiff know of "anything good," and that, if they cared to invest, he was sure they would make good profits. Murray says: "We talked over a division of profits; he said, if there was anything good, he would furnish the capital and divide up the profits . . . between Mr. Bindon, Mr. Gorman, and myself." Murray went west to Brandon and got an option on some property in Brandon which is now called Victoria Park. He wrote to Bindon and in answer got a telegram from Gorman: "I authorise you to invest ten thousand dollars in real estate and divide profits between Bindon, myself, and yourself." The property was transferred to a syndicate managed by Mr. Curry, of Toronto, and composed of Murray, Gorman, and three others. Gorman, who had gone to Kansas City and elsewhere, contributed some money to the scheme and ultimately made some profit. Murray had intended apparently to take up the option for Gorman, Bindon, and himself, but Gorman's money did not come soon enough, and so he applied to Curry to finance the scheme, with the result we have seen.

Afterwards, Murray became interested in the Kensington Park property in Montreal, and induced Gorman to take $10,000 stock in a company handling that property. This was brought

about by Bindon writing Murray to come up to Ottawa and see Gorman; but there was no new bargain made about sharing profits. What happened, according to Bindon, was, that he drew Gorman's attention to the scheme and said it was a good investment; then he sent for Murray, who came up from Montreal; the plaintiff again recommended the investment; Gorman went to Montreal, saw the property, and did invest—nothing, however, seems to have been said about the plaintiff receiving any share in the profits. This statement of facts (except the last sentence) is derived from the evidence of Murray, whose manner of giving evidence particularly impressed the learned trial Judge: and a careful perusal of the evidence does not enable me to say that his faith in Murray was misplaced. We must accept the findings of fact.

The pleadings are in rather a curious state. The plaintiff sues both defendants, claiming a partnership with them for the purpose of dealing in real estate in Brandon and elsewhere, alleging the receipt of profits by Gorman, and saying that Murray is a member of the partnership and entitled to participate in the profits; the pleader asks for a dissolution of the partnership and a taking of the partnership accounts; Gorman denies everything and pleads the Statute of Frauds: Murray admits everything and "submits his rights under said partnership agreement to the consideration of this honourable Court." It is fairly manifest that Murray desired the advantage of a favourable issue of the plaintiff's claim without rendering himself liable for costs if it failed. At the trial, he sought to amend by asking for a share in the profits, and the case was thereafter treated as though the amendment had been made.

I am unable to agree with the learned trial Judge in his view of division of profits. He has either overlooked or discredited the evidence of the plaintiff that the profits were to be divided equally between the three. But, even if this be wholly eliminated, an agreement that the profits are to be divided, in the absence of other evidence, means that they are to be equally divided: *Robinson* v. *Anderson*, 20 Beav. 98, 7 D.M. & G. 239; *Peacock* v. *Peacock*, 16 Ves. 49; *Webster* v. *Bray*, 7 Ha. 159; *Farrar* v. *Beswick*, 1 M. & Rob. 527; *Stewart* v. *Forbes*, 1 Man. & G. 137; *Copland* v. *Toulmin*, 7 Cl. & Fin. 349; and see in the case of a bequest *Peat* v. *Chapman*, 1 Ves. Sr. 542; *Ackerman* v. *Burrows*, 3 V. & B. 54.

I can find no evidence to support any claim of the plaintiff or the defendant Murray to a share in the profits of the Montreal transaction, unless it was looked upon by all parties as in continuance of a previously existing relation.

Murray says that the conversation in the first instance was about him placing "the money up there," and that the agreement was, that Gorman would advance the capital. When the

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transaction "up there" was completed, I do not see that there was any new arrangement made. Murray did not say anything, but left it to Bindon; while all that Bindon says is, that he brought it to Gorman's attention, and, after talking the matter over, Gorman made his investment. Bindon, however, tells us that he had advised Gorman in other transactions which realised for him a great deal of money—"supplied brains" as he puts it—and it does not appear that he was a partner or a gainer in these transactions. I am unable to see that the purchase of stock in a joint stock company in Montreal was a continuation of any relationship which may have existed between the parties or any two of them in connection with lands in the west. The judgment, so far as it refers to the profits on the Montreal transaction, must be set aside.

As to the Brandon transaction, the case is not so clear. The transaction was to be "to invest amounts in the west," "Brandon or elsewhere," "in real estate" (so far, Bindon in direct examination), "invest in real estate in the west," "for Murray to go out to the west and invest in real estate," "investments in the west," "for Murray to go out to the west and to make a selection of lands for this new partnership," for Gorman "to put up money if suitable investments were got;" and the final arrangement was to invest $10,000 in those lands in Brandon—"there was no syndicate formed at the time he agreed to put up the $10,000 or when he sent the telegram to put up $10,000" (Bindon on cross-examination). Murray's account is not materially different.

What happened was, that Murray procured an option on certain lands and wrote Bindon. Bindon saw Gorman, and Gorman sent a telegram authorising Murray "to invest $10,000 in real estate." This, I think, meant, at the time, "invest $10,000 in real estate, obtaining the fee in the land," in other words, "invest $10,000 in buying land," not "in buying an interest in land." Had it not been for Gorman's not sending forward money promptly, it seems that the transaction would have gone through in the manner contemplated. But there was danger of the deal falling through, and Mr. Curry was appealed to, and he sent the money. Curry was insistent that other friends he had should come in; and, says Murray: "I insisted on Gorman coming in, as he had made this offer, and that he was a good capitalist in that way, and that we might want him for other deals, so Curry let him in." And "he was let in on a fifth of this deal." "He came in on the ground floor . . . but not getting the whole space." At this stage, there can be no doubt that Gorman might have withdrawn when he was informed of the arrangement: but he did not do so; on the contrary, he went into the syndicate of five who were to share equally in the profits.

The proposed transaction was an investment by Gorman of

all the capital, with an agreement that he should have one-third of the profits, and Bindon and Murray each one-third: what did take effect was an investment by Gorman of part of the capital, with an agreement that he should have one-fifth of the profits, and Murray another fifth. This is so entirely different a scheme from that proposed that, unless Gorman and Murray were bound not to enter into any deal in real estate to the exclusion of Bindon, I do not see that Bindon can claim any share of the profit. It has not been argued that they could not have transactions with each other to the exclusion of Bindon, nor, as I conceive, can it be so argued. No doubt the admission of Gorman into the syndicate would not have taken place if he had not been expected previously to finance the whole deal; but it was not as carrying out in whole or in part the original scheme that he came in, but on a new and different scheme.

Of course, this is not the case of a real estate agent suing for commission, where the rules are very broad; but of one partner suing another for profit unduly made in what is alleged to be a partnership transaction. Nor is it the case of a partner attempting to secure for himself a benefit which it was his duty to obtain, if at all, for the firm. If Murray had acted in bad faith, and, after securing the property for the three, had wrongfully turned it over to the syndicate, an action might have lain against him; but he is blameless in that regard; he could not do otherwise. And, if Gorman had wrongfully permitted to be abandoned a contract which he was in a position to enforce, and which would have procured the property and the profits for the three, it may be that an action would lie against him—but he could not do any better than he did. If Murray and Gorman had conspired to defraud Bindon out of his share and took this way of doing it, an action might have lain against them. But the fact seems to be that a joint deal for purchasing real estate for three in the profits of which the three were to share, because one was to furnish the money, another the work, and the third the brains, fell through from nobody's fault, and a new deal was made whereby five shared the expense and the profits. This is, in my view, not a partnership transaction of the three parties to this action.

If Bindon has any claim upon Gorman as a member of a partnership, he must have the same claim against Murray: and that he repudiates.

While the right should be reserved to both Bindon and Murray to bring any other action that they may be advised to bring, I am of opinion that this action wholly fails, and that the appeal should be allowed with costs payable by both the plaintiff and the defendant Murray—and, in view of the position taken at the trial, the action should be dismissed with costs payable also by these parties.

Appeal allowed.

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GOLDFIELDS Limited v. MASON.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Kelly, J. June 26, 1913.

1. PARTIES (§ I A 2b—20)—RIGHT OF THIRD PERSON TO SUE ON CONTRACT.

A company has no right of action on a contract made before its incorporation between its promoters to transfer to it, on its subsequent formation, shares of stock of the companies amalgamating with it.

Statement

APPEAL by the plaintiff company from the judgment of Clute, J., of the 14th November, 1912, dismissing without costs an action for a declaration that the defendant was not and never had been a shareholder in the plaintiff company in respect of 41,000 shares of the stock of the Harris-Maxwell Company, which were transferred to the plaintiff company for an equal number of shares in the plaintiff company, and for delivery up by the defendant of his certificate for the plaintiff company's shares; or for damages for breach of contract.

G. H. Kilmer, K.C., for the plaintiff company.
W. A. McMaster, for the defendant.

Maclaren, J.A.

The judgment of the Court was delivered by MACLAREN, J.A.:—I think that this appeal must be dismissed. The appellants did not give us any precedent for such an action as the present, and I have not been able to find any. The action is based upon the alleged violation by the defendant of a contract or agreement between the defendant and the other holders of a majority of the shares of two mining companies whereby they agreed to form a third company, to which they promised to assign the shares which they held in the two amalgamating companies, in exchange for an equal number of shares in the new company. This agreement bears date the 18th January, 1910. The charter was not granted to the new company (Goldfields Limited, the plaintiff company) until the 14th March, 1910.

The action was begun by one Mackay, who was a shareholder in one of the amalgamating companies, and a party to the agreement of the 18th January, 1910, and Goldfields Limited as co-plaintiff; but during the trial the name of Mackay was dropped, and the action continued by the company alone.

It is an elementary principle of law that no one can sue on a contract unless he be either an original party to it or the lawful assignee of an original party.

The plaintiff company was not a party to the agreement of the 18th January, 1910, the breach of which forms the basis of its present action, as it was not even in existence until nearly two months after that agreement was made. It does not claim to have

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any assignment from any of the original parties to the agreement in question of their claims against the defendant—if, indeed, such claims as it seeks to have enforced in the present action are susceptible of being legally assigned.

But, even if this objection were not a fatal one, the plaintiff company, as pointed out by the trial Judge, with full knowledge of all the circumstances, sought to enforce the registration of the shares in the Harris-Maxwell Company, transferred to it by the defendant, which it now seeks to compel him to take back and to return the equal number of shares in the plaintiff company which he received in exchange. I agree with the learned trial Judge that it is now too late for the plaintiff company to take this position.

As an alternative, the plaintiff company made a claim for damages; but no evidence was given on which such a claim could be based. It may be noted that the plaintiff company did not claim before us that there had been an implied agreement, when the defendant received the shares of the plaintiff company, that he should do nothing to prevent the registration of the Harris-Maxwell shares which he gave in exchange, and that he was liable in damages for preventing such registration and compelling the plaintiff company to purchase other shares to give it control of the Harris-Maxwell Company. Nor was there any evidence produced that the plaintiff company was obliged to pay more for such shares than they were really worth.

There being no evidence of damage, this branch of the plaintiff company's case fails also.

Appeal dismissed with costs.

CORNISH v. BOLES.

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Ontario Supreme Court, Middleton, J., in Chambers. June 23, 1913.

1. JURY (§ I D—31)—JUDICIAL DISCRETION—STRIKING OUT JURY NOTICE.

A judge in chambers hearing a motion to strike out a jury notice under Ont. Con. Rule 1322, passed in 1913, has the like discretion as the trial judge would have at the hearing.

[*Brown* v. *Wood*, 12 P.R. (Ont.) 198, applied.]

2. APPEAL (§ XI—720)—LEAVE TO APPEAL—FROM DISCRETIONARY ORDER.

Leave to appeal from the exercise of a judicial discretion as to striking out a jury notice will not ordinarily be granted by the court.

Statement

MOTION by the defendant for leave to appeal from an order of Falconbridge, C.J.K.B., striking out the defendant's jury notice.

Bicknell & Co., for the defendant.
R. R. Waddell, K.C., for the plaintiff.

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MIDDLETON, J.:—This action is one which could well be tried by a jury; but this is not the question. The action can equally well be tried by a Judge; and, under the Judicature Act, the trial Judge or a Judge in Chambers may, in his discretion, direct the action to be tried without the intervention of a jury.

The Rule recently passed (Con. Rule 1322) requires the Judge in Chambers, upon an application being made to him, to exercise the same discretion as he would if presiding at the hearing. *Brown* v. *Wood*, 12 P.R. 198, determines that at the trial the Judge has absolute control over the mode in which the case shall be tried, and that his discretion will not be interfered with upon an appeal to a Divisional Court. The same principle is applicable to the exercise of discretion by the Judge in Chambers; and I do not consider that the matter is one which is properly the subject of appeal.

Clearly, the case is not brought within the provisions of the Rules regulating appeals from Chambers orders. The application is, therefore, dismissed, with costs to the plaintiff in any event.

Leave refused.

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MARTIN v. COUNTY OF MIDDLESEX.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

1. WATERS (§ II D—95)—OVERFLOW—LIABILITY OF MUNICIPAL CORPORATION—DEFECTIVE PLAN OF PUBLIC IMPROVEMENT.

It is actionable negligence for a municipal corporation to make a road improvement in such a manner as the result of a defective plan, as to cause the flooding of adjacent lands.

[*Martin* v. *County of Middlesex*, 4 O.W.N. 682, affirmed.]

2. WATERS (§ II D—95)—OBSTRUCTION—OVERFLOW — LIABILITY OF MUNICIPAL CORPORATION—HIGHWAY IMPROVEMENT—DEFECTIVE PLAN—EMPLOYMENT OF COMPETENT ENGINEER.

The fact that a municipal corporation in making a highway improvement followed plans made by an engineer of competent standing will not relieve it from liability for the flooding of adjacent lands as the result of the defective plan of the work, the engineer being merely an agent of the corporation, where the improvement was not of the class requiring a by-law and the preparation of plans by an engineer as a preliminary thereto.

[*Martin* v. *County of Middlesex*, 4 O.W.N. 682, affirmed; *Williams* v. *Township of Raleigh*, [1893] A.C. 540, distinguished.]

Statement

APPEAL by the defendant corporation from the judgment of Sutherland, J., 4 O.W.N. 682.

The appeal was dismissed.

J. C. Elliott, for the appellant corporation.

P. H. Bartlett, and *T. W. Scandrett*, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The learned trial Julge found that the work which was done by the appellant corporation, and which, according to the contention of the respondent, caused damage to the land, was defective in that the road was not carried to a sufficient height east of the cove, and that the ditch on the north side of the road, which the corporation constructed, led the water to the east, and caused the two breaks in the road between the cove and the hill through which the water came which caused the damages to the respondent.

There was some evidence to support these findings, and, therefore, to fix the appellant corporation with liability for the damage caused to the respondent's land.

There was evidence, also, we think, to warrant a finding that the appellant corporation stopped up a watercourse which crossed the highway, through which the waters at flood-time passed; and that the result of this was to cause an accumulation of the waters to be penned back and ultimately to break through the embankment and cause damage to the respondent's land; and that was an actionable wrong.

Counsel for the appellant corporation argued that, as a competent engineer was employed to design the works which it constructed, and the corporation acted on his advice, no action lay, but that the respondent's remedy was to seek compensation under the Municipal Act; and, in support of his contention, counsel cited and relied on *Williams* v. *Township of Raleigh*, [1893] A.C. 540.

That case is clearly distinguishable. The work there in question was a drainage work, and was constructed under the authority of a by-law of the council. It was a preliminary requisite to the passing of the by-law that a report of an engineer should be procured recommending a plan to be adopted for carrying out the drainage scheme, which the council had been petitioned to undertake; and the decision proceeded upon the ground that, as the council, acting in good faith, had accepted the engineer's plan and carried it out, persons whose property was injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute.

In the case at bar, the work was not done under a by-law, and the appellant corporation was not required as a preliminary to doing the work to have a plan prepared by an engineer. The engineer employed was but the agent of the corporation, and for his acts it is as responsible as if the work had been done without the intervention of an engineer.

Appeal dismissed with costs.

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NEY v. NEY.

Re NEY.

(Decision No. 2.)

June 26. *Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.*

1. INFANTS (§ I C—11)—CUSTODY—CONDITION AS TO PROVIDING HOME.

The court exercising its discretion as to awarding the custody of children aged six and four respectively to the father as against the mother living apart from him, may require the father to provide a suitable house with a relative in charge to look after the children.

[*Ney* v. *Ney*, 11 D.L.R. 100, 4 O.W.N. 935, affirmed.]

Statement APPEAL by the plaintiff in the action, which was for alimony, from the order of BRITTON, J., made when giving judgment in the action, awarding to the defendant, the husband of the plaintiff, the custody of the two infant children of the marriage: *Ney* v. *Ney*, 11 D.L.R. 100, 4 O.W.N. 935.

The appeal was dismissed.

L. F. Heyd, K.C., for the appellant.

J. M. Godfrey, for the defendant, the respondent.

Hodgins, J.A. The judgment of the Court was delivered by HODGINS, J.A.:—The order in appeal was made by Mr. Justice Britton after hearing the evidence in this action, which was brought for alimony. The motion on which the order was made had been referred to the trial Judge; and, although the writ of habeas corpus affected only the infant Marshall Ney, the order covers the case of both children, Marshall Ney and Dorothy Ney; the former now six years of age, and the latter now four and a half years.

The effect of the order is, that the father is given the custody of the children. The mother is to have access to them at reasonable intervals; and the children are to be maintained by their father in a home, where together they and their father will reside. The order is, therefore, one made after the learned trial Judge had seen and observed both the father and the mother.

In cases affecting the custody and welfare of the children, nothing is more important than the character and disposition of the parents; and I think the utmost importance should be attached to the view of an experienced Judge, who has had the advantage of seeing the parents, hearing them detail their complaints, and has listened to their explanations.

The evidence discloses a case of continual quarrelling, resulting in personal violence on both sides from time to time.

The position in which the children now are is the direct result of the desertion by the wife of the husband, which produced a situation the consequence of which is, that the husband now declines absolutely to take the wife back.

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In the evidence reference was made to an offence committed by the husband after the separation in 1909, and to an event in the life of the mother, both of which were passed over lightly by counsel at the trial: yet they occupied the attention of the trial Judge, and, I have no doubt, influenced his decision.

In view of the evidence given, I should be disposed to think that this is peculiarly a case in which the welfare of the children should outweigh every other consideration affecting the parents, and that the order in appeal is the only order which could be made at this stage of the case.

In *Re Hutchinson*, 5 D.L.R. 791, 26 O.L.R. 601, (in appeal 4 O.W.N. 777, 28 O.L.R. 114), the Court thought it necessary to stipulate that the father should at least undertake to procure a suitable house, with his sister in charge of it, before he obtained the custody of his child. In this case the order of the learned Judge has made a similar provision; and I think the order is right, and should be affirmed.

Appeal dismissed.

TORONTO RAILWAY CO. (defendants, appellants) v. **FLEMING** (plaintiff, respondent).

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May 6.

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. May 6, 1913.

1. EVIDENCE (§ II H 1—251)—NEGLIGENCE—ELECTRIC RAILWAY — EXPLOSION OF CONTROLLER—EVIDENCE OF WANT OF CARE.

An explosion in the controller of an electric street car which would not have occurred in the ordinary course of events had proper care been used in inspecting it, is *primâ facie* sufficient to shew negligence as regards a resulting injury to a passenger.

[*Fleming* v. *Toronto Railway Co.*, 8 D.L.R. 507, 27 O.L.R. 332, affirmed.]

2. CARRIERS (§ II G 1—111)—NEGLIGENCE — ELECTRIC RAILWAY — EXPLOSION IN CONTROLLER—INJURY TO PASSENGER.

A carrier is liable for an injury received by a street car passenger as the result of an explosion in the controller of the car due to a defect that should have been discovered by proper inspection.

[*Fleming* v. *Toronto Railway Co.*, 8 D.L.R. 507, 27 O.L.R. 332, affirmed.]

3. CARRIERS (§ II G 1—111)—NEGLIGENCE — ELECTRIC RAILWAYS — PROPER INSPECTION—QUESTION FOR JURY.

In an action for injury sustained by a street car passenger as the result of an explosion in the controller of the car due to defects that might have been discovered by proper inspection, it is for the jury to determine whether the carrier exercised due care in that respect.

[*Fleming* v. *Toronto Railway Co.*, 8 D.L.R. 507, 27 O.L.R. 332, affirmed.]

Statement

APPEAL from a decision of the Court of Appeal for Ontario, 8 D.L.R. 507, 27 O.L.R. 332, maintaining the verdict for the plaintiff at the trial.

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Davies, J.

Idington, J.

The appeal was dismissed.

D. L. McCarthy, K.C., for the appellants.
H. D. Gamble, K.C., for the respondent.

SIR CHARLES FITZPATRICK, C.J.:—The case is not free from doubt, but on the whole I am of opinion that we should not interfere.

DAVIES, J., concurred in the opinion stated by ANGLIN, J.

IDINGTON, J.:—The respondent has recovered a verdict and judgment for damages suffered in consequence of being pushed off an open street railway car by passengers whom a panic had seized on the occasion of an electric explosion therein and its results. It is claimed all this was consequent on the negligence of appellants.

The panic and its consequences so far as we are concerned was, I think, the natural result of the explosion and its results, and hence if appellants are liable at all, the damages are not too remote.

The jury found, amongst other things, as follows:—

> Q. 2. If they were, of what negligence were they guilty? (If there are in your opinion more than one act of negligence, state them all fully.) A. For using a rebuilt controller in a defective condition, and not being properly inspected.

The explosion and fire creating all the excitement and confusion in question were the result of a short circuit caused by some defect in the electric controller or wires connected therewith, in use in said car. The controller was not a year old. It was of an approved kind. It had been a couple of months before this accident overhauled so that it might be correctly described as rebuilt according to its pattern. It was in daily use thereafter till the accident and supposed to be inspected daily.

Mr. McCrae, the master mechanic of appellants, who has supervision of the maintenance and inspection of the company's cars, says he never knew of so serious an explosion and loss of control of the electric current as happened on the occasion in question. He was called by respondent and suggests one possible cause of the accident. Mr. Richmond, an electrical engineer, also examined as an expert on behalf of the respondent, suggests another possible cause thereof. Both agree it was the result of a short circuit produced by some defect. Either man may unconsciously be biased by his peculiar views as to the exact cause of the accident. No intelligent person experienced in such tasks as involved in considering evidence, can read their evidence without feeling that both are absolutely honest in all they say in regard to the conclusions they have reached. Their mode of thought or point of view may account for the divergent results of their evidence. In either result it seems to me we are forced to the conclusion that there is evidence presented by them both that

rendered it impossible for the learned trial judge to withdraw the case from the jury.

The broad facts appear that the accident was the result of some defect in the controller or wires connected therewith, and that there was no external cause, suddenly supervening, such as an electric storm or collision, for examples, to account for such defect, or abnormal results. It seems to me the whole matter is reduced to one of whether or not due and proper inspection the night before should not, if had, have averted the accident. It is almost incredible that if such due care had been used, as ought to have been, in the inspection, that either of the only possible causes suggested could have existed without detection by the inspecto . It is not difficult to see how in his routine way of discharging his duties, the inspector may have failed to observe the defect on its first appearance. But the question of whether or not he, or his employers, could be reasonably excused therefor or not, is one for the jury.

It seems to me that a trial Judge presuming to decide that question would clearly be going beyond his duty. Indeed, to hold that on such facts there could only be that conjecture which alone would justify a nonsuit, would in every case free the negligent and the careful inspector alike and his employers from responsibility in every case of the kind where a doubt may exist as to exactly what might have been discovered.

It seems clear that eighteen years' experience of a capable, vigilant man, in so wide a field of experience having brought to the court and jury the results thereof that his story demonstrates due care can avert such results as produced on this occasion. In the finding I quote there is an apparent resting upon the fact of the rebuilding of the controller. That seems to me only apparently so, for it is the non-inspection of such rebuilt controller that is charged. No doubt greater care is perhaps due in case of an old or rebuilt controller than in the case of one quite new, but the reason given does not affect the finding of negligence.

I cannot agree with the Court of Appeal that a motorman able to turn round and go back to warn passengers is excused by reason of shock from applying the brake. I think the appeal should be dismissed with costs.

DUFF, J.:—I think there was evidence from which the jury, if they accepted it, might conclude that a short circuit, such as that to which the accident seems to be attributable, would not ordinarily occur if the controller were properly constructed and properly inspected.

Duff, J.

If the jury took this view it was for them to say whether the company had acquitted itself of the onus which rested upon it to shew that in these respects proper care and skill had been exercised.

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ANGLIN, J.:—This action is brought to recover damages for personal injuries sustained by the plaintiff as the result of his being thrown from a moving car in a panic caused by an explosion and fire resulting from a short circuit in the controller of the car. The controller, originally purchased from the Canadian General Electric Co., was admittedly of an approved type. It had been overhauled or rebuilt by the defendant company, according to their ordinary custom, about two months before the plaintiff was injured, and had been in regular use during that period. The accident resulted in such a complete destruction of the wires and parts of the controller that it was not possible afterwards from inspection of them to determine its precise cause. The evidence clearly establishes, however—it was in fact admitted—that the short circuit could not have happened unless there had been a defect in the controller. The plaintiff charges that this defect was due to negligence in the rebuilding of the motor by the defendant company, or, if not, that it was of such a character that proper inspection would have discovered it. He also charges that the defendants' motorman was negligent in not applying the brake of his car so as to stop it immediately after the explosion.

The first trial of the action took place before Middleton, J. It resulted in a verdict for the plaintiff for $1,200. That verdict was set aside by the Court of Appeal and a new trial ordered (25 O.L.R. 317), on the ground that certain evidence tendered by the defendants had been improperly rejected. At the second trial before Sir William Meredith, C.J.C.P., the jury again found for the plaintiff. The damages were assessed at $1,100. The negligence attributed to the defendants consisted in their "using a rebuilt controller in a defective condition and not being properly inspected." The motorman was also found to have been negligent "in not applying his brake."

The Court of Appeal upheld this verdict and from its judgment the present appeal is taken. Counsel for the defendants contended that there was no evidence upon which any finding of negligence against his clients could properly be based; and he further argued that the injuries sustained by the plaintiff were not the direct or proximate result of the explosion or fire, but were caused by an independent and voluntary act of two passengers who deliberately pushed him from the car. While the evidence may be susceptible of the view that the plaintiff was thus pushed from the car, it is quite open also to the construction that the two passengers were impelled by fear of injury to themselves to escape from the car, and that in the course of doing so, owing to the narrowness of the space between the seats, they necessarily pushed against the plaintiff, who was sitting at the outside of the seat, and involuntarily caused him to fall from the car. I find no allusion in the charge of the learned Chief Justice to this contention on behalf of the defendants, and it is not referred to either in their reasons for appeal to the Court of Appeal or in the reasons for judgment

given by that court. Counsel for the plaintiff stated at bar that it was presented by the defendants for the first time in this court, and his statement was not controverted. Under these circumstances it would not, in my opinion, be proper to give effect to this defence even if the evidence sufficiently established it, which I do not think it does.

I agree with Mr. Justice Garrow that if the verdict for the plaintiff depended on the finding of the motorman's negligence the evidence would not support it. It is very questionable whether owing to the fire which immediately resulted from the explosion it was possible for the motorman to apply his brake. The only evidence on this point is his own, and it indicates that he could not have done so. In the exercise of his judgment in the emergency he appears to have considered that the most important thing to do promptly was to cut off the current from the car. He immediately shut off the controller with one hand and tried to reach the hood-switch at the top of the vestibule with the other, but was prevented from doing so by the fire. He then leaned out of the vestibule and called to the conductor to pull the trolley pole off the wire, simultaneously shouting to the passengers not to attempt to get off the car. Having regard to all the circumstances, I think the evidence does not support a finding of negligence on the part of the motorman. He appears to have done all that he could or, at all events, what he thought best in the emergency to prevent injury either to the passengers or to the property of his employers.

There was, however, in my opinion, evidence from which the jury might reasonably infer that an efficient inspection of the controller would have revealed the defect which caused the short circuit. They may, for the reasons which he gave, have not improperly accepted the view of the witness Richmond as to the place where the short circuit occurred and as the probable cause of it. Unless it should be held that where an accident results in the destruction of the physical evidence of its cause an injured person cannot recover—a position which the Judicial Committee has decided to be not maintainable (*McArthur* v. *The Dominion Cartridge Co.*, [1905] A.C. 72)—a jury must be allowed to act upon evidence such as that which was put before them by the plaintiff in the present case. The defendants attempted to meet that evidence by shewing that they had a regular and adequate system of inspection of controllers and that the controller in question had been inspected on the 2nd of August, and again on the 7th of August. The accident happened on the 10th of August. Of neither inspection was the evidence offered entirely satisfactory. There certainly was room for the contention made on behalf of the plaintiff that the report of the inspection of the 2nd of August indicated that the controllers had not then been inspected. The evidence of the inspection of the 7th of

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August was still more unsatisfactory in that the man who made it was not called as a witness and the foreman, who was called, was unable to speak from personal knowledge as to its thoroughness or extent. I doubt whether the report of the inspection which was put in was admissible in evidence. But, if it was, the jury may not improperly have reached the conclusion that the plaintiff had sufficiently established that the defect was one which proper inspection would have disclosed and that the defendants had failed to satisfactorily establish that there had been such inspection.

This suffices to dispose of the case, and renders it unnecessary to consider the other finding of the jury that the defendants were negligent in using a rebuilt controller in a defective condition. In regard to that finding I desire merely to remark that if by it the jury meant that the existence of the defect in the controller was due to negligence in rebuilding it, I am not satisfied that the evidence would support such a finding.

In the result the appeal fails and must be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—The jury in stating that the company defendant was guilty of negligence by using a rebuilt controller in a defective condition and by not inspecting it properly, have returned a verdict that could be reasonably found on the evidence.

It seems to me that if the equipment had been minutely inspected the defect would have been detected and the injury would have been avoided. Besides, when the short circuit occurred and the fire started the motorman should have applied the brakes and stopped the car in order that the passengers could get off without fear and without accident.

In the circumstances of the case the principle laid down in *Scott* v. *London and St. Katherine Docks Co.*, 3 H. & C. 596, should apply. The car was under the management of the defendants and their servants, and the accident is such as in the ordinary course of things would not have happened if those who had the management used proper care. It affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

The *onus probandi* that fell upon the appellants has not been fulfilled to the satisfaction of the jury, and a verdict of negligence has been given.

It is claimed by the appellants that the shoving of the plaintiff off the car by the other passengers was not the natural and direct outcome of the explosion, because the passengers took hold of the respondent and pushed him off. It is pretty evident that the passengers who pushed off the respondent were panic-stricken on account of the explosion, and in trying to get off the car to reach the street and save their lives, they removed the respondent from his seat and he fell on the street.

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A similar case came before the Supreme Court in Illinois, and it was held as follows:—

Where the passengers in a street car when an explosion occurred in the controller rushed to rear door in a panic, and the plaintiff being one of them was pushed and thrown from the car and injured, there was *prima facie* evidence of negligence on the part of the railway company under the doctrine of *res ipsa loquitur*, and judgment for the plaintiff was affirmed. *Chicago Union Traction Co.* v. *Newmiller*, 18 Am. Neg. Rep. 380.

The appeal should be dismissed with costs.

Appeal dismissed.

TURNER v. FULLER et al.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. January 30, 1913.

1. MECHANICS' LIENS (§ VI—51)—RIGHT TO—SUB-CONTRACTOR—COMPLETION OF BUILDING BY OWNER—EXCEEDING CONTRACT PRICE.

A sub-contractor's claim for lien on a building, the completion of which was taken over by the property owner, is defeated by sec. 8 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, where, at the time the claimant finished his work, the payments made the original contractor, together with the cost of completing the building, exceeded the original contract price.

[To the same effect see *Canadian Equipment and Supply Co., Ltd.* v. *Bell and Schiesel*, 11 D.L.R. 820.]

Statement

AN appeal by the defendants from the judgment of Grant, County Court Judge, in an action claiming a lien for the balance due under a contract for the plastering of a house of the defendants which one Beech had contracted to erect.

The appeal was allowed and judgment below varied.

Bray, for appellant.

White, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff was a sub-contractor for the plastering, including the material, of a house which one Beech contracted to erect for the defendant Turner. Both were entire contracts and for lump sums. The contract between the defendant Turner and Beech provided that in certain eventualities, one of which happened, Turner might supply the labour and material to complete the contract. Turner did this after having made payments in the aggregate of $6,100 to Beech of the total of the contract price of $8,500 plus some extras. At the time Turner took the work over, the plaintiff in this action had almost completed his sub-contract. He afterwards fully completed it. It cost defendant Turner more than the balance of the contract price to complete Beech's contract. Plaintiff claims a lien on defendant Turner's property for a balance of his

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contract price. Section 8 of the Mechanics' Lien Act, ch. 154, R.S.B.C., reads as follows:—

> With the exception of liens in favour of labourers for not more than six weeks' wages, no lien shall attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

Nothing was owing by the owner to the contractor when the plaintiff completed his sub-contract. It was therefore contended by the defendant Turner's counsel that the judgment below declaring the plaintiff's right to a lien is erroneous. Sec. 15 of the said Act was relied upon by the plaintiff in answer to said contention. That section provides that a contractor or sub-contractor must post up a pay-roll, and deliver to the owner.

> The original pay-roll containing the names of all labourers and persons placing or furnishing materials who have done work or placed or furnished materials for him upon such works or improvements with a receipt in full.

And it is declared that—

> No payment made by the owner without the delivery of such pay-roll shall be valid for the purpose of defeating or diminishing any lien upon such property, estate or interest in favour of any such labourer or person or furnishing material.

I do not think this section helps the plaintiff: he is not within it. The section protects only labourers and materialmen. For some time I was puzzled by the peculiar wording of the first part of the section above quoted, particularly the words "persons placing or furnishing materials who have done work." It seemed to me at first sight that three classes were included in the first part of the section, and two classes only in the second part above quoted, but on examining the original section, being sec. 12 in the Revised Statutes of 1897, which extended only to labourers, it now seems plain that the words "who have done work" must relate to labourers, not to persons placing or furnishing materials. The manner in which the original section was amended gave rise to the apparent difficulty in construing it.

I do not see any escape from the conclusion that said section 8 on the facts of this case bars the right of the plaintiff to a lien.

I may add that I have given full consideration to the learned County Judge's views. He thought that the defendant repudiated his contract with Beech, and held that after doing this he could not, by spending all the balance of the contract price in the completion of the building, deprive the plaintiff of the right to a lien. With respect, I think the learned Judge was in error in finding such repudiation. Defendant was entitled under the contract to complete the work should, *inter alia*, Beech make an assignment for the benefit of creditors. This

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Beech did some hours before defendant notified him that he, defendant, would complete the work. Beech acquiesced, and made no attempt either to complete his contract or to dispute defendant's right to take over the work. It cannot be suggested, nor did counsel venture to argue, that after his discontinuance of the work, Beech could have claimed a dollar from defendant.

Nor does it, in my view of the case, matter whether or not defendant kept back from Beech the 25% he was entitled to retain under the terms of his contract with him. This was an arrangement between themselves to which the plaintiff was not privy, and which could be departed from at will by the parties to the agreement. Our Mechanics' Lien Act does not afford a sub-contractor the protection provided by similar laws of other provinces, viz., that a proportionate part of the contract price shall be retained by the owner at the peril of his paying twice, as a fund to which sub-contractors may resort to satisfy their liens. We have in this province what appears to me to be an anomaly, that while he who does work alone and he who supplies material alone are protected, he who does work and finds material with which to do his work is left to shift for himself.

The appeal should be allowed, and the judgment below varied by striking out the third, fourth and fifth paragraphs of the same.

IRVING, J.A., concurred with judgment of MACDONALD, C.J.A. Irving, J.A.

MARTIN, J.A., concurred in allowing the appeal. Martin, J.A.

GALLIHER, J.A.:—In this case I think the appeal should be allowed. We were referred to secs. 6, 8 and 15 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, but of these I think sec. 8 is the only one that we have to consider, as in my opinion the others do not apply here. The learned trial Judge assumed that the sum of $6,100 being the amount paid by Turner to the contractor Beech, represented only 75 per cent. of the work then done, and that inference might be drawn from the evidence of the architect, Julian, at 31, where he uses the expression, "We were supposed to have paid 75 per cent. and from the contract itself calling for the payment of 75 per cent. of estimates. But I think when one examines the receipts shewing the amounts paid after the work was taken out of the hands of Beech we must come to a different conclusion. The progress certificates of December 18th, 1911, shewed $6,100 paid Beech, leaving a balance of $2,712, before the full contract price was reached. Now, if this $6,100 only represented 75 per cent. of the work done, there would be held back for work then done a sum approximately of $2,000, which, added to the balance of $2,712 would practically give in round numbers $5,000 to apply in comple- Galliher, J.A.

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tion of the contract. But when we examine all the payments made on account of that contract from the time it was taken out of the hands of Beech, they amount to approximately $2,800 not including $400 which was paid to Fuller by Turner on account of work done during the time the contractor Beech was in charge. So that instead of there being a deficit between the contract price and the amount actually paid, as shewn by receipts and estimates, there would have been a considerable surplus. I think we must therefore conclude that the $6,100 represented the actual amount of work done by Beech up to December 18, 1911, and not 75 per cent. of the work done. In this view then there was nothing due from Turner to the contractor Beech, and as Fuller, who was a sub-contractor, does not come within the saving clause under sec. 15, we are confronted by the provisions of sec. 8, which, in my opinion, are fatal to his claim.

Appeal allowed and judgment below varied.

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BERRY v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. April 23, 1913.

1. STREET RAILWAYS (§ III B—28)—ACCIDENT AT STREET CROSSING—NEGLIGENCE—EXCESSIVE SPEED OF CAR.

It is actionable negligence to run a tram car toward an intersecting street at an unlawful rate of speed without attempting to slacken speed on discovering an automobile on or near the track in a position of danger.

2. STREET RAILWAYS (§ III C—48)—ACCIDENT AT STREET CROSSING—EXCESSIVE SPEED OF CAR—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.

Contributory negligence sufficient to prevent a recovery against a street railway company for a collision with the plaintiff's automobile, is not shewn from the facts that, on approaching an intersecting street, the plaintiff reduced the speed of his automobile so as to avoid a slowly moving westbound car without discovering an eastbound car approaching at an unlawful rate of speed until his automobile was near or on the track, and in the emergency, he increased speed and attempted to pass in front of both cars, when his automobile was struck by the eastbound car, the speed of which was not slackened after the motorman discovered the plaintiff's danger.

Statement

APPEAL by the defendant from the trial judgment in the plaintiff's favour. This was an action for injury from a collision between the plaintiff's automobile and the defendants' tram car, where the question of alleged concurrent negligence and an emergency with its accident was considered.

The appeal, on an equal division of the Court, was dismissed.

L. G. McPhillips, K.C., for appellant (defendant).
R. L. Reid, K.C., for respondent (plaintiff).

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Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal. The plaintiff was approaching Robson street, on which the accident occurred, coming along Seymour street going north. He heard the noise of the car as he approached the street, looking he saw the tram car on the right hand side of him, that is to say, the car that stopped at the corner, proceeding in a westerly direction. His own auto car he said, was slowed down before he reached the railway tracks, but just about at the time he reached the track he noticed another tram car coming along Robson street in an easterly direction at a high rate of speed—whether he realised at that time that it was running at a high rate of speed or not, the evidence does not shew conclusively, but he afterwards ascertained the car was running at about 20 miles an hour.

The evidence is not clear whether the car at the right hand stopped or not. He was, therefore, in this position, that when he reached the tracks, he was in danger, or might reasonably suppose that he was in danger, from the westbound car. He was also in danger from the eastbound car; and having to choose on the spur of the moment he thought he could get across ahead of the eastbound car.

Now, the evidence is, that the driver of that car was going at a rate of 20 miles an hour, and did not, although he saw the plaintiff, slacken down his car at all but came on at the unlawful rate of speed, striking the plaintiff's automobile, carrying it some 40 feet.

It is quite clear that the defendants were guilty of negligence, they were running their car at an unlawful rate of speed, when the accident occurred; and I am not satisfied that the learned Judge was wrong in coming to the conclusion he did that the whole fault lay with the defendants, and that the plaintiff was not guilty of contributory negligence.

Irving, J.A.

IRVING, J.A.:—I would allow the appeal. The defendants were guilty of negligence in driving at an excessive rate of speed. The plaintiff was also guilty of negligence. Before he got so far as the southerly crossing of Robson street he should have ascertained whether he could get across and that there was no danger of his colliding with the eastbound car. If he was going as slow as he says he was, he could have and should have stopped when he saw the pace at which the eastbound car was going. There was no reason for his being afraid of the westbound car which Maclean was driving; in the first place he, Maclean, was not going fast, in the next place he, the plaintiff, had a right to presume that Maclean would do the proper thing and stop before any collision took place.

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MARTIN, J.A.:—I agree that while there was negligence on the part of the defendant, and while there was contributory negligence on the part of the plaintiff, though an error of judgment may excuse the one the agony of it, the plaintiff is not in that position by the sole act of the defendant company, but by his own act, and therefore is not entitled to take that position before us.

The appeal should be allowed.

GALLIHER, J.A.:—I think the appeal should be dismissed. I was, for a time, through misapprehension of the evidence, strongly of opinion that the appeal should be allowed, that is to say, that the plaintiff should have seen the eastbound car when he was about even with the south boundary of Robson street, and after he slowed down, or started to slow down, if he afterwards went on and placed himself in a dangerous position certainly his act would have been his own wrong, but on reading the evidence it appears that he first saw the car that struck him when within five or six feet of the line of the track, and that way I view it, it would not have been negligence, it was not negligence on his part in so far as the westbound car was concerned to have attempted to cross the road, so that unless you can put it on the ground that it was contributory negligence on his part to have seen the other car practically at the same time, it seems to me you cannot fasten contributory negligence on him.

That being the case, he finds himself in this position; the car behind him, I think, had started up slowly, the westbound car just moving at the time of the impact with the eastbound car. He finds himself within 6 feet of the rails where he sees the eastbound car, with what he might have presumed the other car starting on, and in fact the evidence is, if I remember rightly, that it had started on very slowly about the time the impact came.

Then I think he finds himself in the position where it is a matter of judgment, exercising judgment as to what is best to do. If he had attempted to turn at that point it might have been that the westbound car would have struck him, he takes what he thinks under the circumstances is a safe, or the best way out. Now, if he makes a mistake when trying to choose the best way in an emergency of that kind, and if it turns out not to be the right thing, it does not bring him within the principle where you say he is guilty of contributory negligence, but where a man in case of emergency acts possibly wrongly, but does what he thinks at the moment is right.

The distinction I draw between what Mr. McPhillips says and this is, if he had been at a safe point and saw and knew this car was coming and then moved on in this position, I

would agree that it would have been his own wrong and could be classed contributory negligence, but I think the evidence does not bear that out, so that unless the very fact that he did not see the car on the left hand can be said to be contributory negligence on his part, I do not see anything else that brings it home to him. For these reasons, I think the appeal should be dismissed.

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MARTIN, J.A.:—I wish, in deference to the opinion of the learned trial Judge, to say that I came to the conclusion I did on the evidence of the plaintiff himself and not interfering with the learned trial Judge.

Martin, J.A.

MACDONALD, C.J.A.:—The appeal will be dismissed with costs, the Court being equally divided.

Macdonald, C.J.A.

Appeal dismissed.

OGLE v. B.C. ELECTRIC R. CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Martin, JJ.A. January 7, 1913.

1. STREET RAILWAYS (§ III C—47)—LIABILITY FOR INJURY TO PERSON CROSSING TRACK TO BOARD CAR—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A judgment against a street railway company for injuries sustained by the plaintiff by being struck by a street car while crossing a track to board another car, will not be disturbed on appeal on the ground that the plaintiff's negligence contributed to his injury, where, under all the circumstances of the case, the question of the defendant's negligence as well as the plaintiff's contributory negligence, were proper questions for the jury.

[*Finegan* v. *London and N.W.R. Co.* (1889), 5 Times L.R. 598; *Ruddy* v. *London and S.W.R.* (1892), 8 Times L.R. 658; and *Toronto Railway Co.* v. *King*, [1908] A.C. 260, followed.]

Statement

APPEAL by defendants from judgment of Morrison, J. The appeal was dismissed, MACDONALD, C.J.A., dissenting.

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

Baird, for respondent.

Macdonald, C.J.A. (dissenting)

MACDONALD, C.J.A. (dissenting):—The appeal should be allowed and the action dismissed. I think the plaintiff's own evidence puts him out of Court. He admits that he knew that the Davie street car was standing at the corner opposite him, where it would stand in taking on or discharging passengers before rounding the curve into Davie street. The plaintiff wished to catch the Granville street car at the opposite corner, that is to say, he would have to cross Davie street to catch his car. He had either to cross ahead of the Davie street car, which would round the corner as aforesaid, or behind it. He took the former course, and then appears in his haste, and with his mind concen-

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trated on his own errand, to have become oblivious to the oncoming Davie street car. After crossing the tracks on Davie street he appears to have swerved sharply to the left to reach the Granville street car, and was then struck by the fender of the Davie street car aforesaid. Whether the car ran into him, or he ran into it is not disclosed in the evidence. It was not dark, and he must have been partly facing the Davie street car, and within a few feet of it when he swerved towards it, as already mentioned. That he did not see it is only to be accounted for on the assumption that he was so entirely engrossed with his object, which was to catch his own car, that he lost thought of everything else.

Under these circumstances I cannot think that a jury could properly find a verdict in his favour.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal. The time, place and circumstances all make the case one particularly for a jury. Having regard to the degree of light, the number of people in the street, the time allowed by the company for people to transfer from one car to another, the custom of the motormen in Vancouver with reference to sounding their gongs, the sworn statement that the gong was not rung as the car made the turn into Robson street, all these were matters for consideration of the jury.

As to when and upon what evidence in any action for negligence a Judge is justified in taking the case from the jury has always been a troublesome question. Lord Coleridge in *Finegan* v. *London and N.W.R. Co.* (1889), 5 Times L.R. 598, being of opinion that on the plaintiff's own evidence he (the plaintiff) had been guilty of contributory negligence, nonsuited the plaintiff; but the Queen's Bench Division, Denman and Charles, JJ., thought there was not such clear evidence of contributory negligence to justify a nonsuit. Particularly as there was clear evidence of negligence on the part of the defendants' driver.

The moral of the decision is that where it is a question of degree or whether the accident has risen wholly from the fault of one or the other, it is better to leave the question to the jury.

Ruddy v. *London and S.W.R.* (1892), 8 Times L.R. 658, tried before Grantham, J., who, being in doubt, let the case go to the jury, who found for the plaintiff. The Judge afterwards gave judgment for defendant on the ground that there was no evidence of negligence in the driver, and that on the plaintiff's own shewing he walked right into the danger. But the Court of Appeal, Lord Esher, M.R., Bowen, and A. L. Smith, L.JJ., thought, in view of the pace, admittedly fast, at which the van was going, the case was a proper one for the jury.

Toronto Railway Co. v. *King*, [1908] A.C. 260, points out

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that to entitle the defendants to a direction from the Judge the evidence of folly and recklessness must be clear.

The jury having found for plaintiff, I do not think we can interfere.

MARTIN, J.A., concurred in dismissing appeal.

Appeal dismissed, MACDONALD, C.J.A., *dissenting*.

GOODE v. BURO.

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June 11.

Saskatchewan Supreme Court. Trial before Johnstone, J. June 11, 1913.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR THE SALE OF LAND —RIGHT OF ASSIGNEE—COVENANT AGAINST ASSIGNMENT.

Specific performance of a contract for the sale of land assigned by the vendee in defiance of a covenant against assignment, will not be decreed on behalf of the assignee in the absence of the vendor's consent to the assignment.

[*Weatherall* v. *Geering*, 12 Ves. 504, referred to.]

2. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR THE SALE OF LAND —FAILURE TO SHEW PAYMENT AND CONTINUED READINESS TO PERFORM.

Specific performance of a contract for the sale of land will not be decreed where the plaintiff does not allege or shew that he has made and is and always was ready and willing to make the stipulated payments and otherwise to perform his part of the contract.

ACTION for specific performance of a contract for the sale of land. Statement

The relief sought was denied.

W. E. Dunn, for plaintiffs.

J. F. Hare, for defendant.

JOHNSTONE, J.:—The plaintiffs (T. Goode, W. L. Stipp, and C. C. Pickard) sue for specific performance of an agreement, bearing date July 8, 1910, entered into by the defendant for the sale of the lands in question to the plaintiff Thomas Goode for the sum of $3,280, payable $240 in cash, the balance, $3,040, to be paid by delivering to the defendant or his order, the proceeds of fifty acres of crop (less cost of threshing) each year free of charge at the most convenient elevator. Said delivery to be made on or before the 1st of January in each year beginning with the year 1911. The proceeds to be applied in the reduction of the purchase price, $3,280, or so much thereof as might from time to time remain due and owing, and interest at the rate of six per cent. per annum from July 8, 1910. Interest to be paid yearly on the 1st of January until the whole of the moneys payable are fully paid, the first payment of interest to be made on January 1, 1911. No part of the purchase price, $3,280, or of the interest thereon has ever been paid, and Johnstone, J.

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there remained due and unpaid when this action was brought $240, and the interest thereon, and also the interest on $3,040.

On July 13, 1911, the plaintiff Goode assigned his interest in the said lands and in the said agreement to his co-plaintiffs contrary to the provision contained in the said agreement that no assignment of the agreement should be valid unless it should be for the entire interest of the purchaser and be approved and countersigned by the vendor or his agent.

On November 2, 1911, the plaintiff Stipp wrote to the defendant at Mantroville, Minnesota, enclosing by registered letter the assignments from Goode to himself and Pickard for the defendant's approval. This letter was written from the King's Hotel, Regina, where Stipp said he was then working; at what he did not say. On November 6, following, Messrs. Norton & Norton, solicitors for the defendant at Mantroville, wrote Stipp in reply that Buro declined to consent to the assignment of Goode to Stipp and Pickard: that he had not been paid the cash payment of $240, called for by the agreement or the interest past due, nor had he received his share of the crop. Messrs. Caldwell & Dunn, then, by wire of the 17th, requested to know if Buro would consent on payment of $480, and interest. Messrs. Norton & Norton wired in reply that they were awaiting information from Moose Jaw, and as soon as received they would advise as to what would be done with the offer. On the 18th, next day, Messrs. Caldwell & Dunn forwarded to Messrs. Norton & Norton, $690.40, said by the former to be the amount then due for principal and interest. The defendant's solicitors, on the 29th November, wrote acknowledging receipt of draft and stated they were still awaiting reply from Moose Jaw. On December 7, 1911, Messrs. Norton & Norton returned this money to Messrs. Caldwell & Dunn with an intimation that Buro would treat the contract in question as at an end.

These are the principal facts as found by me. The plaintiffs rely upon a waiver by the defendant of the formal legal tender of the amount due to him for principal and interest. Relief by way of specific performance is in the discretion of the Court. The Court in exercising jurisdiction has regard to the conduct of the plaintiff, and to circumstances outside the contract itself, and the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favour. The plaintiff on his part must have been always ready and willing to perform the contract to entitle him to performance. I think, in the circumstances of this case it would be inequitable to interpose for the purpose of granting the relief asked by the plaintiffs in their statement of claim. The contract may be said to be personal in its nature. The defendant residing in Minnesota, being desirous of selling the lands in question owned by him, enters

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into an arrangement with the plaintiff Goode, a farmer of Elbow, Saskatchewan, to buy on what is generally known as the crop payment plan, that is an agreement to pay for the land in the manner before set out. Buro sells to Goode. There were several different elements which had to be taken into consideration on the entering into of such an arrangement. Was, first of all, the proposed purchaser a farmer? Was he a person capable of cultivating the land in a good and husbandlike manner? Because, were he not such a person, the payments agreed to be made were very likely destined not to be made. The land would as well be in danger of injury through poor cultivation. The vendee would also have to be a person the vendor was satisfied would be likely to return to the vendor his share of the crop, and various other circumstances would have to be taken into consideration before entering into a contract of such a peculiar nature. What assurance had Buro (even were he compelled to seek any) that the assignees of Goode would be likely to carry out the contract entered into by Goode? Appearances, I must say, were against it.

A contract by Goode to assign the agreement in question could not be enforced by way of specific performance because of the provision against assignment before referred to and Buro's refusal to approve: *Weatherall* v. *Geering*, 12 Ves. 504. And why should it be enforced in this action against Buro?

The plaintiffs, moreover, do not allege in their statement of claim that the moneys required by the contract to be paid on specified dates were paid, or that the plaintiffs were always ready and willing to pay, nor was it attempted to be proved at the trial, nor was there any allegation or proof of payments deferred, and considering this case entirely apart from the questions of notice of cancellation and tender, I think the plaintiffs are not entitled to succeed. They were never ready and willing to carry out the contract of purchase.

There will, therefore, be judgment for the defendant with costs.

Action dismissed.

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May 1.

FLITTON v. STANGE.

Alberta Supreme Court. Trial before Walsh, J. May 1, 1913.

1. WEEDS (§ I—2)—NOXIOUS WEEDS ACT (ALTA.)—CIVIL ACTION TO INJURED PARTY.

Under the Noxious Weeds Act, 7 Edw. VII. (Alta.) ch. 15, sec. 4, making it an offence for an owner to fail to destroy all noxious weeds on his land, the owner is liable in damages for injuries resulting to his neighbour's crops by reason of the spreading of such noxious weeds on to the neighbour's land.

[*Winterburn* v. *E.Y. & P.R. W. Co.*, 1 A.L.R. 298; *White* v. *G.T.P. Ry. Co.*, 2 A.L.R. 522; and *Grand Trunk Pacific R. Co.* v. *White*, 43 Can. S.C.R. 627, referred to.]

Statement

ACTION to recover damages for the loss of a part of a wheat crop belonging to the plaintiff through the alleged neglect of the defendant in allowing his adjoining premises to become overrun with a noxious weed.

Judgment was given for plaintiff.

W. M. Campbell, K.C., for plaintiff.

A. B. Mackey, for defendant.

Walsh, J.

WALSH, J.—The plaintiff sues to recover the damages which he claims to have sustained through the destruction of the greater part of his wheat crop in the year 1912, by a noxious weed known as tumbling mustard. He alleges that this weed took root in his ground from seed deposited there from a growth of the same which the defendant allowed to mature on his land, which is separated from that of the plaintiff only by a road allowance.

That the defendants' land was rank with this growth is not disputed. That he failed to destroy the same is practically admitted, and that these weeds after rotting off at the base of the stem, as is their habit, lodged on the plaintiff's land and covered up one of his fences, is not open to question. These at any rate are my findings of fact. I have absolutely no doubt and I further find as a fact that the seeds of these weeds were in this manner deposited in the plaintiff's land and took root there and grew up and choked out a portion of his wheat crop.

This weed is a noxious weed within the Noxious Weeds Act, statutes of Alberta, 7 Edw. VII. ch. 15, sec. 2. Sec. 4 of that Act provides that "every owner or occupant of land shall destroy all noxious weeds thereon and if he makes default in so doing he shall be guilty of an offence." The weed inspector for the district notified the defendant under sec. 5 of the Act to pull these weeds and he failed to do so. In this he was grossly indifferent to the interests of the plaintiff and his other neighbours.

I doubt if the defendant could be held liable for such a claim as this at common law: see *Giles* v. *Walker*, 24 Q.B.D.

656. I think though that he is liable for the breach of the statutory duty imposed upon him under sec. 4 of the Act. Beck, J., in delivering the judgment of the Court in *Winterburn* v. *E. Y. & P. R. W. Co.*, in 1 A.L.R. 298, at 308 says:—

> I think that the law is that where a statutory duty is imposed, the neglect by the party upon whom the duty is imposed to fulfil the duty gives a right of action to any party sustaining damage in consequence of the breach of the statutory duty unless the terms of the enactment are such as clearly indicate that the statutory duty is imposed only for the benefit of a class of persons of which the plaintiff is not one or only to avoid certain consequences in which those complained of are not included.

The same learned Judge in delivering the judgment of the Court in *White* v. *G. T. P. Ry. Co.*, 2 A.L.R. 522, at 546 re-affirmed this view of the law. Both of these are judgments of this Court *en banc*. The judgment in the latter case was reversed by the Supreme Court of Canada, *Grand Trunk Pacific R. Co.* v. *White*, 43 Can. S.C.R. 627, but in reversing it, I do not understand that the principle enunciated as above by Beck, J., was disagreed with, but its application to the statute there in question made by him was not approved of. I need therefore go no further in my enquiry into the state of the law upon this branch of the case. The statute in question is clearly not within either of the exceptions noted by Beck, J. I think it plain that it was passed for the benefit of the owners and occupants of other lands so that their lands might be kept free from weeds originating in lands other than their own. The plaintiff is one of the class for whose benefit the statute was passed and the consequences which it aims to avoid are exactly those which have happened here.

Evidence was given to induce the belief that the weeds which grew upon the plaintiff's land came either wholly, or in part from other sources. I think that if the evidence established that there was a substantial and ascertainable portion of the damage done fairly to be attributed solely to the fact that the plaintiff's land was seeded with weeds which came from places other than the defendant's land there should be a proper deduction in that respect from the amount for which he would otherwise be liable. This is the conclusion which I draw from my reading of *Nitro Phosphate, etc.* v. *London, etc., Co.*, 9 Ch.D. 503, adapting to the facts of this case as nearly as may be as I have done the language of James, L.J., at 527, in delivering the judgment of the Court of Appeal. I do not see, however, how upon the facts of this case any such deduction can be made. The evidence under this head is for the most part that there were weeds of this kind growing upon other lands in that district, and I was practically asked to draw the inference that some of the seeds from them found their way to the plaintiff's land. Some evidence was given that before the year of which the

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plaintiff complains weeds of this kind were growing on his land. I do not credit this evidence, but accept the statement of the plaintiff to the contrary. Even if there was satisfactory evidence that other causes contributed to the wrongs of which the plaintiff complains, which I do not think is the case, there is absolutely nothing to shew me what portion of the plaintiff's loss is to be attributed to them and I would therefore, be unable to make the proper deduction on that account from the amount of the entire loss for which I think the defendant is otherwise liable.

The amount claimed by the plaintiff is $1,400. This, I think is very largely in excess of the amount to which he is entitled. Mr. Campbell cited to me the case of *Smith* v. *Consolidated, etc.*, 11 W.L.R. 488, in support of his contention that the full market value of the ripened wheat crop less the cost of reaping, threshing and marketing it should be awarded to the plaintiff. That case appears to me, to be an authority against, rather than in support of this proposition; but it is distinguishable in its facts from the present case. Here the plaintiff sowed 70 acres of his land with wheat, 10 acres of which were saved from destruction, he having been able to pull the weeds from that area. The wheat growing upon it was harvested and the results from it are known. But for the weeds, the plaintiff would have harvested the wheat growing on the other 60 acres with the same results per acre as those secured from the 10 acres, for the 70 acres were in a block and I do not think that any climatic or other conditions existed which would have resulted in varying yields from different parts of the block. This, I think, makes inapplicable here the language of Hunter, C.J., in *Smith* v. *Consolidated*, 11 W.L.R. 488, that allowance should be made for possible blights, untoward weather, want of market, etc." and that there should be taken into account "the possibilities of failure and mishap as well as of a dull season."

What I think the plaintiff is entitled to is in the first place, the value of the crop thus destroyed less the cost of reaping, threshing and marketing it, and this I fix at $622 which I figure out as follows. I find that the total yield from 60 acres would have been 1,200 bushels being 20 bushels per acre as established by the yield from the 10 acres. I find that the current market value for this wheat at the time when the plaintiff could have marketed it was seventy cents per bushel, so that the gross value of his destroyed crop was $840. I deduct from this $60 as the cost of reaping being at the rate of $1 per acre, $108 for threshing, being at the rate of nine cents per bushel and $50 for marketing it, making in all $218 which, being deducted from $840, leaves a balance of $622. The plaintiff was obliged to mow down 25 acres of the crop for which I allow $10, being at the

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rate of forty cents per acre, and this, being added to the above sum of $622, makes $632 in all, which I award to the plaintiff.

The plaintiff ploughed up the remaining 35 acres of the 60 acres which he re-seeded, but this second crop was a failure partly on account of the lateness of the period of sowing. He claimed the cost of this ploughing and seeding, but he is not entitled to it. It was not a prudent thing for him to do, for he should have known that there would be no result from so late a sowing. He also claimed damages for the future injury to his land from this growth of weeds, but this claim was withdrawn.

There will be judgment for the plaintiff for $632 and costs.

Judgment accordingly.

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MAN.

Manitoba King's Bench, Mathers, C.J.K.B. May 1, 1913.

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May 1.

1. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION BY-LAW—PRIOR PUBLICATION OF NOTICE.

The provision of sec. 66 of the Liquor License Act, R.S.M. 1902, ch. 101, as amended by 1 Geo. V. (Man.) ch. 25, sec. 1, requiring the publication of a notice of a proposed local option by-law within two weeks from the second reading of the by-law is mandatory and a failure to substantially comply with this provision is fatal to the validity of the by-law and the curative provisions of sec. 76 (*a*) of that Act do not apply.

[*Hatch* v. *Oakland*, 19 Man. L.R. 692; and *Shaw* v. *Portage la Prairie*, 20 Man. L.R. 469, followed.]

Statement

APPLICATION to quash a local option by-law.

The by-law was quashed.

F. M. Burbidge, for the applicant.

H. R. Hooper, for the municipality.

Mathers, C.J.

MATHERS, C.J.K.B.:—This is an application to quash local option by-law No. 346 of the rural municipality of North Cypress. Nine objections in all are taken to this by-law, but I only find it necessary to consider one.

Section 66 of the Liquor License Act, as amended by ch. 25, sec. 1, of the Acts passed in 1911, provides that the council shall, within two weeks after the first and second readings of the proposed by-law and before the third reading and passing thereof publish in some newspaper in the municipality if one be published therein and if not in the newspaper published nearest to such municipality and in the *Manitoba Gazette* a notice stating the object and purpose of the proposed by-law, etc.

The by-law received its first and second readings on October 12, 1912. The first publication of the notice required by sec. 66 in a newspaper took place on November 1, 1912, and the first publication of the notice in the *Gazette* was on November 9, 1912.

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The objection is that the requirements of sec. 66 have not been complied with, and that therefore the by-law should be quashed. In my opinion the objection must be sustained.

That the provision of this section as to the publication of notice is mandatory and that failure to comply with this provision is fatal has been decided in numerous cases in this province commencing with the decision of the late Mr. Justice Killam in *Hall* v. *South Norfolk*, 8 Man. L.R. 430. To the same effect are *Re Cross* v. *Town of Gladstone*, 15 Man. L.R. 528; *Little* v. *McCartney*, 18 Man. L.R. 123; *Hatch* v. *Oakland*, 19 Man. L.R. 692, and *Shaw* v. *Portage la Prairie*, 20 Man. L.R. 469. Quite consistent with these Manitoba cases are the decisions in the Province of Ontario.

The notices in this case, in order to comply with the statute, ought to have been published on or before October 28, 1912. As they were not so published the by-law must be quashed unless it is saved by the saving provision introduced into the Liquor License Act as sec. 76(*a*).

This section says:—

> No local option by-law or repealing by-law shall be declared invalid by reason of non-compliance with the provisions of this Act covering the case as to the taking of the poll or the counting of the votes or by reason of any mistake in the use of the forms contained in this Act or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the proceedings on the petition and the voting were conducted substantially in accordance with the requirements of this Act and that such non-compliance, mistake or irregularity did not affect the result of the voting.

It will be observed that this clause does not extend to all provisions of the Liquor License Act relating to local option by-laws, but is expressly confined to the provisions of the Act as to the taking of the poll or the counting of the votes or the use of the forms contained in the Act or to irregularities. If the provision which has not been complied with relates to any of these matters then the by-law shall not be declared invalid, if it appears to the Court (1) that the proceedings on the petition and the voting were conducted in substantial accordance with the requirements of this Act, and (2) that such non-compliance, mistake or irregularity did not affect the result of the voting.

Section 76(*a*) is practically identical with sec. 204 of the Ontario Municipal Act which has been held in that province to apply to local option by-laws. The provision as to publication of the notice required by sec. 66 cannot be said to relate to the taking of the poll or the counting of the votes. It manifestly does not relate to the use of the forms contained in the Act. Then is it an irregularity?

It was held in *Re Bell and Township of Elgin*, 13 O.L.R. 80, by the Divisional Court that the omission in a local option by-law of the time and place where votes are to be summed up as provided for by secs. 341 and 342 of the Ontario Municipal Act was more than an irregularity and that such a defect was not cured by sec. 204 of the Municipal Act. In the later case of *Schumacher* v. *Town of Chesley*, 21 O.L.R. 522, the view was expressed by Mr. Justice Riddell that the Ontario sec. 342, which provides for the actual appointment of scrutineers pursuant to the provisions of the by-law, related to the taking of the poll, but that sec. 341 which related to the fixing by the by-law of the time and place for the appointment of scrutineers did not relate to the taking of the poll.

I cannot hold that the entire omission to publish the notice required by sec. 66 within the two weeks prescribed by the statute was an irregularity. To my mind it is a matter of substance and must be substantially complied with or the defect is not cured by the curative provision.

I arrive at this conclusion with much regret. As stated by Meredith, C.J., in *Hickey and Town of Orillia*, 17 O.L.R. 317 at 323:—

> My inclination would always be, in dealing with matters of machinery, to endeavour to uphold, if possible, a by-law notwithstanding mistakes upon the part of unskilled officers in complying with the exact provisions of the statute as to the manner of taking the votes, the preparation of the lists and matters of that kind.
>
> It is a very serious thing, after the electors have gone through the stress of a contest of the kind that these contests are, and the statutory majority has been polled in favour of the by-law, that some trifling irregularity on the part of some officer, entirely innocent, and which in all probability has not had the slightest effect upon the result, should be held to undo what has been done.

I must assume, however, that the Legislature had a purpose in view in requiring the notices required by sec. 66 to be published within two weeks from the second reading of the by-law, which the municipal officers are not at liberty to disregard.

An order must go quashing the by-law with costs.

By-law quashed.

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June 9.

CAMPBELL v. CANADIAN NORTHERN R. CO.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 9, 1913.

1. RAILWAYS (§ III—45)—ACCIDENTS AT CROSSINGS — NEGLIGENCE—OBSTRUCTING VIEW—COLLISION WITH AUTOMOBILE.

A railway company that permits the end of a string of freight cars to project into a highway for some time, in violation of sec. 279 of the Canada Railway Act, so as to obstruct the public view of approaching trains, is liable for a collision between an engine and an automobile driven by the plaintiff who, although he exercised due care, was unable, because of such obstruction to see the engine in time to avoid the collision.

2. RAILWAYS (§ IV 2—91)—AT CROSSINGS—COLLISION WITH AUTOMOBILE —CONTRIBUTORY NEGLIGENCE—DUTY OF DRIVER TO STOP, LOOK AND LISTEN.

It is not contributory negligence to drive an automobile across a railway track at a speed of eight miles an hour at a public highway crossing, although the plaintiff knew that trains and engines were liable to pass at any time, where, by reason of cars negligently left projecting into the highway, it was impossible for him to discover the approach of an engine, although the statutory signals were given, where the plaintiff and those riding with him looked and listened before going upon the track without hearing the engine, which was travelling "light."

[*Campbell* v. *Canada Northern R. Co.*, 9 D.L.R. 777, reversed.]

3. HIGHWAYS (§ I B—15)—WIDTH—OVER RAILWAY—RESTRICTING TO PORTION DEVOTED TO HIGHWAY TRAFFIC.

The right of the public in a street over a railway right of way is not limited to the portion planked and gravelled for traffic by reason of the fact that no town by-law was adopted for opening the street, under sec. 705 (*b*) of ch. 57 of 8 and 9 Edw. VII. after the crossing was ordered by the Board of Railway Commissioners, where, prior to application to the Board, a by-law was passed authorizing the extension of such street across the right of way of the railway company; and the latter acquiesced in the opening of the road for its full width, and subsequently recognized its existence.

Statement

APPEAL by plaintiffs from decision of Metcalfe, J., *Campbell* v. *Canadian Northern R. Co.*, 9 D.L.R. 777.

The appeal was allowed and judgment given for both of the plaintiffs.

H. J. Symington, for plaintiffs.

O. H. Clark, K.C., for defendants.

Perdue, J.A.

PERDUE, J.A.:—On July 10, 1912, the plaintiff was driving an automobile from St. Boniface to Transcona. Along with him were an acquaintance named Purvis, and plaintiff's wife and his two young children, one of them being the infant plaintiff, aged two years, and the other a still younger child in its mother's arms. They travelled along Marion street in St. Boniface, which is the highway generally taken by persons going from St. Boniface to Transcona. That street crosses the defendants' right-of-way diagonally, the angle between the street and the railway as one travels easterly to Transcona being about thirty-three degrees on the left or northerly side, and the angle upon the right-hand side being about a hundred and forty-seven degrees. Three lines

of defendants' railway cross Marion street at this point. The defendants had for some time used two of these lines for the purpose of leaving cars upon them. The main line ran in the centre, the lines used for storage purposes being upon each side of the main line, all being upon the one right-of way and the one grade. At the time when the accident in question occurred, and for some time previously thereto, a number of cars had been left standing upon the side tracks. Four cars were standing partly upon the street at the crossing. To the right, as one travelled easterly, a long line of cars had been left standing on the nearer of the side tracks, the car nearest the crossing being partly on the street, and the northerly end being only seven feet from the plank crossing over the rails. This line of cars would be within five or six feet of the cars passing along the main line. There were also cars on the left of the crossing. The effect of the long line of cars to the right was to obstruct the view of the main line for a considerable distance.

When nearing the crossing the plaintiff slowed up to about eight miles an hour. Both he and the man Purvis, who was with him in the car, heard no whistle or sound of bell, and saw nothing approaching on the railway from either side, although they both looked and listened, knowing that the crossing was a dangerous one. Another party who was travelling behind them at a distance of 150 yards did not hear a bell or whistle or see an engine coming. The cars which were encroaching on the street from either side left an opening at the crossing of about twenty-five feet. As the plaintiff attempted to run his automobile through this opening he collided with an engine which was proceeding northerly along the main line. In this collision the automobile was greatly damaged, and the plaintiff and the elder of the two children were severely injured. The accident occurred at 5.45 p.m. on a calm, clear day.

As might be expected in a case like this, there is flat contradiction between the plaintiff's witnesses and the defendants' employees as to whether the statutory warning was given by the persons in charge of the engine. The trial Judge has found as a fact that the whistle was sounded and the bell rung. Without expressing agreement with this finding, it is one with which this Court would not interfere, it being a finding on conflicting evidence by the trial Judge who heard and saw the witnesses.

The trial Judge finds that the defendants were guilty of negligence in leaving cars standing upon the crossing. Assuming the crossing in question to be part of a public highway, I think it is clear that the defendants committed a breach of sec. 279 of the Railway Act (Can.) in leaving cars encroaching upon the highway. The evidence shews that these cars had been there for some time before the accident. If we assume that the railway company had a right to leave a long string of cars on their own land adjoining the crossing, the plaintiff would have had a fairly

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good view of the main line to the right if there had been no car standing partly on the highway. By reason of the obtuse angle between the highway and the railway to the right, the plaintiff could, if the view was not obstructed, see further southerly along the main line than he could if the highway had crossed at right angles. It is obvious that each foot by which the car encroached on the highway made, by reason of the angle, a considerable difference in the distance which the plaintiff could see along the main line to the right. If the car had not been standing where it was, it is clear from the evidence and from an examination of the plans that the plaintiff might have seen the engine coming on the main line an appreciable time before he did. I think he would have had time either to stop his automobile, or at all events to have swerved to the right so as to avoid the engine, the angle permitting the turn to be easily made. I think that the defendants by leaving the car partly on the right-of-way obstructed the view and caused the accident. In so leaving the car they were negligent and they also committed a breach of the statute. They should, therefore, be liable for the damages, unless they can prove that the plaintiff by the exercise of reasonable care could have avoided the accident.

The learned trial Judge found that the defendant was "not paying the attention to the surroundings that, under the circumstances, he should have paid, and that his want of care contributed materially to the accident." The reasons for this finding are given by the trial Judge as follows:—

> What would a prudent man do under the circumstances? I am forced to the conclusion that a prudent man approaching a track where he knows that trains, yard engines and handcars are liable to pass at any moment to and fro, finding his view obstructed by standing cars, and knowing, as the plaintiff admits, that it was thus made dangerous, would, when approaching the crossing, reduce his speed to the lowest possible speed, and would exercise care both by looking and listening. The plaintiff could have reduced the speed of his car to one or two miles an hour; instead of that he goes over the crossing, as he himself says, at eight miles an hour. There is no doubt that the car going at eight miles an hour cannot be stopped within as short a distance as if it were going at a lesser rate of speed. I fail to understand why, if the plaintiff had exercised the caution which I think under the circumstances he ought to have exercised, he did not hear the bell, or see the moving top of the smoke-stack of the engine.

With great respect, I cannot, upon the evidence, come to the conclusion that the plaintiff was guilty of negligence disentitling him to recover. The evidence shews that both he and Purvis looked and listened, and that neither of them saw or heard the engine approaching. The man, Maranda, who was 150 yards behind, neither heard nor saw the engine before the collision occurred. It might have been an act of prudence to have slowed up or even to have stopped the automobile while one of the party got out and looked up and down the track, but the failure to take

such excessive precautions did not constitute negligence on the part of the defendant. The speed of eight miles an hour at which he approached the crossing was a reasonable one. It is true that if he had slowed up to two miles an hour the accident might have been avoided. On the other hand, if he had rushed through at twenty miles an hour he would have been over the crossing before the engine reached it. The plaintiff had no reason to believe that the crossing was immediately dangerous by reason of any engine or moving train being in the vicinity. He knew it was a place where caution should be observed, but I cannot find that he neglected any precaution he was bound to take. No doubt the long line of cars muffled the sound of the whistle and bell, if they were sounded. I can understand this happening on a hot July day. The same cars would, as the plaintiff neared the crossing, completely hide the smoke-stack from his view. He was sitting in an automobile, and the tops of the cars would be a considerable height above him. The smoke-stack of an engine would be completely hidden behind them. The light engine seems to have been drifting homeward on a level track at about ten miles an hour. It was probably emitting little, if any, steam or smoke.

It was contended by the defendants that the portion of their right-of-way at the intersection of Marion street was not included in or made part of the highway.

The railway had been constructed before the opening of Marion street at that point. On September 28, 1908, the city of St. Boniface passed a by-law opening as a public street the portion of Marion street from Rue de Meuron to Bourget road, the portion so opened being shewn and coloured pink on a plan annexed to the by-law. This street led up to and beyond the point of intersection where the accident occurred. The portion of the railway right-of-way where the street would intersect the railway was not coloured pink on the plan. The city corporation at that time had not obtained leave under the Railway Act to construct the street across the railway.

In 1911 the city of St. Boniface applied, under sec. 237 of the Railway Act (Can.) to the Board of Railway Commissioners for Canada for authority to construct Marion street across the defendants' railway at the point in question. On February 6, 1911, the Board made the following order:—

> Upon the report of an engineer of the Board approving of the said plan and profile, the Railway Company not offering any objection: It is ordered that the applicant be, and it is hereby, authorized to construct Marion street, in the city of St. Boniface, across the track of the Canadian Northern R. Co., as shewn on the plan and profile on file with the Board under the said file No. 16027, in accordance with the general regulations of the Board affecting highway crossings, as amended May 4, 1910.

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The authority there given is to construct Marion street across the track of the railway. This permitted the construction of the street to its full width across the track. Nothing is said in the order as to there being more than one track. The intention of the order was to permit the city of St. Boniface to construct Marion street across the railway at that point, and if more than one track existed there at the time the order was sufficient to include the right to cross such additional track or tracks. In accordance with this order the railway fences were torn down to the full width of Marion street, namely, sixty-six feet at right angles across the street. A plank crossing and approaches were constructed, which have since been constantly used by the public. The street has, in fact, become the usual highway for traffic between St. Boniface and Transcona. The defendants assented to this user, and have treated the crossing in question as a regular highway crossing. There is no foundation for the contention that the highway must be limited at that point to the mere width of the plank crossing. The order permits the opening of the street to its full width, and that was, no doubt, the intention of the city.

It is argued that after the order of the Board was made the city of St. Boniface should have passed another by-law opening up the street across the railway, under sec. 705, sub-sec. (*b*), of the St. Boniface city charter, 7 & 8 Edw. VII. ch. 57. That section enables the city to pass by-laws for

> establishing, opening, making, preserving, improving, maintaining, widening . . . within the city any highway or road through, over, across . . . or upon the railway and lands of any railway company.

within the jurisdiction of the council. No by-law subsequent to the order of the Board of Railway Commissioners was put in.

The intention of the by-law of September 28, 1908, was, as the recital shews, to open and continue Marion street from Rue de Meuron to Bourget road. This would necessarily mean that the street was to cross the railway as a continuous line of highway as soon as the Board of Railway Commissioners gave the necessary permission. Upon receiving authority from the Board to cross the railway the intention was rendered effective. I do not think that any further by-law was necessary. On this point I would refer to the opinion of Chief Commissioner Killam in *Re Reid and Can. Atl. R. Co.*, 4 Can. Ry. Cas. 272, at 275.

The defendants not only recognized the existence and validity of the crossing by treating it as a duly authorized crossing, but by their answers to the interrogatories, sworn to by their general superintendent for this Province, admitted that their railway actually crossed Marion street at that point. The following interrogatories were delivered to the defendants under rule 407B, 5 & 6 Edw. VII. (Man.) ch. 17, and the following answers received:

1. Did the Canadian Northern R. Co., on the 10th day of July, 1912, own a line of railway which crossed Marion street in the city of St. Boniface? The answer to interrogatory No. 1 is "Yes."

2. Were the Canadian Northern R. Co. on the 10th day of July, 1912, operating a line of railway which crosses Marion street in the city of St. Boniface?

The answer to interrogatory No. 2 is "Yes."

3. How many tracks owned or operated by the said company were lying across Marion street in the city of St. Boniface on the 10th day of July, 1912?

The answer to interrogatory No. 3 is "Three."

In view of these admissions and of the user of the crossing by the public with the assent of the defendants, I think that at all events the onus was cast upon the defendants to prove, if they could, that the street was not constructed or validly established across their right-of-way.

I think the appeal should be allowed with costs, the judgment in the Court of King's Bench set aside with costs, and a verdict entered for each of the plaintiffs. Ralph S. Campbell suffered much damage. His automobile, for which he had paid $2,200 a short time before the accident, was almost wholly destroyed. He suffered severe injury and a considerable loss of time, and he paid considerable amounts for hospital charges and medical attendance. I think the damages awarded to him should be assessed at $2,500.

The infant plaintiff, Isabel Campbell, had her nose badly broken and was severely injured. The broken nose is likely, according to the medical evidence, to result in a permanent disfigurement, a serious thing for a girl. I think the damages to the infant plaintiff should be assessed at $500.

CAMERON, J.A.:—This action is brought against the defendant company by the plaintiff for himself and as next friend of his infant daughter, to recover damages occasioned by the collision of his motor car with a switch engine belonging to the company, which collision was due, it is alleged, to the negligence of the company. Cameron, J.A.

It appears that the plaintiff, who had been in the business of transporting passengers by his motor from Winnipeg to Transcona, on July 10 took his wife, two infant children, and a passenger named Purvis, with him, intending to go to Transcona from this city. He drove in an easterly direction along Marion street in the city of St. Boniface, and when he approached the point where the Canadian Northern Railway tracks are crossed by the street he slackened speed. He found the street, as he approached the crossing, "blocked on the north and the south side of the street, leaving a space of about 25 ft." It was blocked, he says, with "box cars, standing on the siding, so that I hadn't any view of the main line whatever."

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The plaintiff, who had repeatedly gone over this crossing in the previous two months, says:—

I was watching for trains, as I always do, knowing it to be a dangerous crossing, and I could neither see smoke or steam, or hear a whistle or a bell ringing. When I approached the crossing I did not see the locomotive and I wasn't over two feet from the foot-board on the front of the engine, and I didn't have time to stop my car in so short a distance.

There was a box-car close up to the plank crossing on the right as the plaintiff approached. The end of the footboard in front of the engine struck the front of the radiator on the front of the motor. The plaintiff and all the others, with the exception of the youngest girl, were thrown out, and he and the elder little girl sustained painful injuries, and the motor car was practically demolished.

The plaintiff is positive that there was no bell rung or whistle blown. Purvis says the same. According to the plaintiff he had been going at the rate of ten or twelve miles an hour until approaching the crossing, when he slowed down to about eight miles an hour: p. 25. The plaintiff had no speedometer, and relies on his own judgment as to speed. He slackened speed by lessening the gasoline supply, and this was done about two hundred feet from the crossing: p. 30. It was at a distance of three or four hundred yards that he recognized that he could not see down the line because of the cars: p. 31. Purvis corroborates this evidence, and says that the plaintiff was not going over eight miles an hour if he was going that: p. 79.

Miranda, who was also engaged in the "auto-livery" business, followed the plaintiff on the occasion in question at a distance of from 150 to 200 yards: p. 38. He says, "we were generally watching ourselves to go across this crossing." He heard no whistle or bell and saw no smoke or steam: p. 39; and noted the cars standing on the track on both sides of the road, leaving an opening of about 25 feet. He says that the plaintiff was not going as fast as he was himself, and he was going at eleven miles an hour.

The evidence of the plaintiff on the point of ringing the bell and blowing the whistle was directly controverted by the defence. The learned trial Judge, as I take it, has found that the company complied with law in these matters, and there is evidence to sustain that view, and I am not disposed to question the finding.

If the defendant's cars obstructed this highway contrary to the provisions of the Railway Act, there is established against it a *prima facie* case of negligence. The by-law of the city of St. Boniface, put in evidence, declared that "portion of land coloured pink on the plan," being a production of Marion street across the railway "opened as a public street." Application was then made to the Railway Board for an order, which was accordingly made, authorizing the city of St. Boniface to construct Marion street across the track. The objection is made that, as there

was no subsequent by-law declaring open that portion of the street covering the right-of-way where the street crossed it (not coloured on the plan), such portion remained the property of the railway company. That is to say, sub-sec. (*b*) of sec. 705 of the St. Boniface charter was not complied with. In any event, if any portion of the crossing is to be considered a highway, it is argued that that portion only occupied by planking and actually used by the public can be considered such, and the remainder of the crossing area continues the absolute property of the company, which it is at liberty to use as it may choose, unhampered by the provisions of sec. 279 and other provisions of the Act.

In this case the fencing along both sides of the track had been torn down, a crossing signal post erected, and planking with gravel was put down between the tracks to a width of about 30 feet. There was ditching on the sides of the road apparently made by the city. There is an approach on the street leading up to the rails and the planking between the rails. It is apparent that the public used this crossing and to a considerable extent. The railway company evidently, according to the evidence, treated it as a highway crossing.

Now, what has been done with reference to this crossing was done pursuant to the order of the Board, and with the acquiescence, at least, of the company. Reading the by-law and order together, and keeping in view what was subsequently done by the city under the order, it seems to me that no further by-law was necessary: *Reid* v. *Canada Atlantic R. Co.*, 4 Can. Ry. Cas. 272, *per* Hon. A. C. Killam, Chief Commissioner.

The term "highway" includes (sec. 2, sub-sec. 11) "any public road, street, lane or other public way or communication." The words "public communication" are given a wide significance in *Canadian Pacific R. Co.* v. *Toronto*, [1911] A.C. 461, at 477:—

> The danger to the public is the same whether its members traverse the lines of a railway upon which trains run, as of right, or by express or implied permission.

I think, therefore, to the whole width of 66 feet, there was a "public communication" traversing the railway tracks at this crossing. The city was authorized to construct to the whole width of the street, and there was a partial construction by, or with the authority and acquiescence of, the city.

It was argued that, even if the highway should, at the crossing, be confined within the limits of the planking, there was nevertheless such a dangerous condition created by reason of the obstructions that more was required from the railway company than the statutory warnings; that is, that there was a liability imposed by common law in addition to that required by the Act. We were referred to *Jenner* v. *S. E. R. Co.*, 105 L.T.R. 131, where the jury found that the crossing there in question was habitually

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used for vehicular traffic, and that the company had been guilty of negligence in not providing sufficient safeguards therefor. It was held that the company was under an obligation to use proper precautions. There was no evidence of any failure of the company to comply with the statutory regulations:—

> The railway, at any rate, had laid upon them the obligation of seeing that there was nothing in the nature of a trap: p. 133.

A duty is cast on railway companies "to take reasonable precautions at dangerous points:" *Smith* v. *Niagara, etc., R. Co.*, 4 Can. Ry. Cas. 220. We were also referred to *Canada Atlantic R. Co.* v. *Henderson*, 29 Can. S.C.R. 632, and *Wallman* v. *C.P.R.*, 16 M.R. 82.

On the other hand, it is pointed out that our Supreme Court held that under our Act the powers given to the Board to determine the character and extent of the protection given the public at the intersection of highways with a railway track at rail level, are exclusive, and that a failure to invoke them does not take the matter away from that jurisdiction: *Grand Trunk R. Co.* v. *McKay*, 34 Can. S.C.R. 81. But the decision of Mr. Justice Davies is not so sweeping as that. For he says, at 101:—

> It by no means follows from the present judgment of this Court that railway companies might not be properly adjudged guilty of actionable negligence in cases arising out of shunting cars across railway crossings, apart altogether from questions relating to the speed of trains and the legality of their fencing at highway crossings.

Under the circumstances in this case, it may well be doubted, therefore, whether this judgment in the Supreme Court applies. But, as I consider the highway here extends the whole 66 feet in width contemplated by the plans and the by-law and order, it is not material to make the distinction.

There remains to be considered the defence of contributory negligence on the part of the plaintiff, and I must say that this is a matter that has given me much consideration. The plaintiff knew the dangerous character of the crossing and did keep an outlook; he watched the track on both sides as he approached it; he slackened his speed; he listened, but heard, he says, no bell or whistle; he looked, but saw no escaping steam or smoke. His evidence is supported by that of Purvis and Miranda. After all, it does seem to me that the determination of this case depends on the answer to this question, Was the speed of 8 miles an hour at which the plaintiff endeavoured to cross, too great in the circumstances? It would have been safer, no doubt, had he done what the learned trial Judge suggests he should have done, slackened to a speed of one or two miles an hour. Or, again, he might have stopped altogether and made a personal inspection of the main line before crossing. There is no doubt that the cir-

cumstances here were such as to call for the exercise of prudence on his part. The plaintiff knew the road, was familiar with the crossing, saw the obstructions to his full vision, and had with him in his car his wife and children. He was an experienced driver, and he did take precautions such as he thought necessary. He apparently did everything that the most exacting dictates of prudence could have prompted except that he did not slow down his car to a speed of one or two miles an hour or stop altogether to make a survey of the main line track. Some drivers (but certainly not many of them) might adopt one of these two last alternatives. Others might not, and I daresay many would not slacken their speed to the extent the plaintiff did, if they slackened at all. But we cannot hold the plaintiff to a standard of caution beyond that required of the ordinary man in his position.

The defence of contributory negligence, if established, bars the plaintiff's right to recover, because it is his negligence, and not that of the defendant, that is the proximate or "decisive" cause of the loss or damage. The onus of proving that defence is on the defendant, by whom it must be affirmatively established. As I have said, the whole question here comes down to this narrow point, viz., Does the fact that the plaintiff approached this crossing at the speed he did constitute such want of care and caution on his part as disentitles him to relief? After reflection, I am not prepared to hold that it does. It appears to me that the plaintiff, while not acting with the greatest degree of caution (as is indeed easy to say after the event), did nevertheless exercise such ordinary care as might be expected of the driver of a motor car in the circumstances confronting him in this case. It is my opinion, therefore, that the defendant company has failed in affirmatively establishing the defence of contributory negligence.

I think the judgment entered for the defendant must be set aside and a verdict entered for the plaintiff for the amounts stated in the judgment of Mr. Justice Perdue, with costs of appeal and of the Court below.

HAGGART, J.A.:—The trial Judge has come to the conclusion that the adult plaintiff, Ralph Stewart Campbell, was negligent and that his negligence contributed to the accident, and, as it is the duty of the trial Judge to find the facts and draw the inferences, I would hesitate before disturbing that finding. Where the story of the plaintiff and his witnesses differs from that of employees of the company, he accepts the version of the latter. He has done so after seeing and hearing the witnesses, and I would do so after reading the evidence. It is proved to his satisfaction that the bell was rung and that the whistle was blown, as required by statute, and that the engine was not running at an excessive speed. I would dismiss the appeal of Ralph Stewart Campbell.

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I think that Marion street, where it crosses the line of railway,

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is a highway 66 feet wide, and that, notwithstanding any irregularities in the passing of the by-law or in the making of the order of the Board of Railway Commissioners, it is a highway within the legal definition of that term, and also as defined by the interpretation clause of the Railway Act.

I cannot say that the allowing a part of the car to remain on the street was the act or thing done which was the cause of the injury, so as to make the company liable under sec. 427 of the Railway Act. It was the long line of cars extending along the siding eastward that prevented the plaintiff from seeing the approaching engine as he approached the crossing.

But the adult plaintiff's negligence does not dispose of the claim of the infant plaintiff; and there arises the very important question, which is, whether the negligence of the father is a defence to the claim of the infant plaintiff Isabel, two years of age, who was severely injured in the accident.

Waite v. *N.E.R.*, E.B. & E. 719, was a case in which the unanimous opinion of three Judges of the Court of Queen's Bench was affirmed by the seven Judges of the Exchequer Chamber. The grandmother had charge of a child too young to take care of itself, and took two tickets at a railway station for the purpose of being conveyed on the railway. While she and the child were on the railway and crossing the tracks to take their train, a train on another track struck them, killing the grandmother and injuring the child; and the evidence shewed, and the jury found, that both the company and the grandmother were guilty of negligence. The Court of Exchequer Chamber affirmed the judgment of the Court of Queen's Bench, which held that the child could not maintain an action against the company. Chief Justice Cockburn, in his reasons, on p. 732, says that

> the company must be taken to have received the child as under her control and subject to her management. The plea and the finding shew that the negligence of the defendants contributed partially to the damage; but that the negligence of the person in whose charge the child was and with reference to whom the contract of conveyance was made, also contributed partially. There is not, therefore, that negligence which is necessary to support the action.

Pollock, C.B., at p. 733, says:—

> There is really no difference between the case of a person of tender years under the care of another and a valuable chattel committed to the care of an individual and the action cannot be maintained unless it be maintained by the person having the apparent possession.

And Williams, J., at the same page:—

> There was here, as it seems to me, from the particular circumstances, an identification of the plaintiff with the grandmother . . . The person who has charge of the child is identified with the child. If a father drives a carriage in which his infant child is in such a way that he incurs an accident which by the exercise of reasonable care he might have avoided,

it would be strange to say that, though he himself could not maintain an action, the child could.

Crowder, J.:—

There is an identification such that the negligence of the grandmother deprives the child of the right of action.

Such was the doctrine as to the rights of children of tender years in cases of concurring negligence.

According to this authority the negligence of the person in charge is an answer to an action against the other wrong-doer.

Along the same lines is another authority: *Armstrong* v. *Lancashire, etc., R. Co.*, L.R. 10 Ex. 47. The plaintiff was an inspector in the employ of the London & N.W.R., which had running powers over a part of the defendant's line. He was travelling on this portion of the road. There was a collision. There was evidence of negligence on the part of the driver of the plaintiff's train, and the jury found joint negligence, and it was held that the plaintiff was so far identified with the L. & N.W.R. that he could not recover.

The plaintiffs contend that the above is not a proper statement of the law, and that this doctrine of "identification" is obsolete, and that if there is no relationship such as master and servant, or principal and agent, between the plaintiff and the third persons whose negligence contributed with that of the defendant to the injury or accident, then the contributory negligence of this third party is not a defence and the infant plaintiff relies upon the following authorities:—

Mills v. *Armstrong*, 13 A.C. 1. A collision occurred between the steamships "Bushire" and "Berina" through the fault or negligence of the masters and crew of both. Two persons on board the Bushire, one of the crew and a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased brought actions *in personam* against the owners of the Berina for negligence under Lord Campbell's Act, and it was held, affirming a decree of the Court of Appeal, that the deceased persons were not identified in respect of the negligence with those navigating the Bushire, that their representatives could maintain the actions and could recover the whole of the damages under Lord Campbell's Act; and on p. 16 Lord Watson discusses the question in these words:—

When the combined negligence of two or more individuals, who are not acting in concert, results in personal injury to one of them, he cannot recover compensation from the others, for the obvious reason that, but for his own neglect, he would have sustained no harm. Upon the same principle, individuals who are injured without being personally negligent are nevertheless disabled from recovering damages if at the time they stood in such relation to any one of the actual wrong-doers as to imply their responsibility for his act or default . . . If they are within the inci-

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dence of the maxim *qui facit per alium facit per se* there can be no reason why it should apply in questions between them and the outside public, and not in questions between them and their fellow wrong-doers.

And after discussing *Thorogood* v. *Bryan*, 8 C.B. 115, which with the foregoing case of *Armstrong* v. *Lancashire, etc., R. Co.*, L.R. 10 Ex. 47, were being overruled, he proceeds, at p. 18:—

> It humbly appears to me that the identification upon which the decision in *Thorogood* v. *Bryan* is based has no foundation in fact. . . . In my opinion an ordinary passenger by an omnibus or by a ship is not affected either in a question with contributory wrong-doers or with innocent third parties by the negligence in the one case of the driver and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions and thereby occasions mischief.

The facts here are not unlike those in *Eisenhauer* v. *Halifax, etc., R. Co.*, 12 Can. R. Cas. 168. That is a judgment of the Supreme Court of Nova Scotia, and that Court did not recognize the doctrine of identification relied on in *Waite* v. *N.E. Ry.*, E. B. & E. 719. A waggon driven by the father containing his wife and stepson, while attempting to pass a dangerous crossing on the defendant's railway on Sunday on their way to church, was struck by an engine sent out to perform some special work, resulting in the father and his wife being killed and the son seriously injured. There was negligence on the part of the company's servants in failing to give proper signals in approaching the crossing and in running the engine at an excessive speed which would have rendered the company liable, but the trial Judge found contributory negligence on the part of the father, precluding those claiming under him from recovering, and this finding was sustained by the Court. It was held that the negligence was not a bar to the wife or those claiming under her, or to the step-son precluding them from recovering for personal injuries, in the absence of evidence of contributory negligence on their part. The trial Judge, whose reasons were affirmed, on p. 183, says:—

> It was Mr. Ernst's (deceased) team; he had absolute control over it; neither his wife nor his stepson had any right to interfere with the management of it, and no duty was cast upon either to do so. Most men would not tolerate any interference with his mode of driving . . . Arthur (the stepson) was a mere passenger. He could not refuse to go to church, nor to take whatever place was assigned to him in the waggon. Moreover I do not think he was old enough and sufficiently advanced to appreciate the danger of the situation. The doctrine of contributory negligence does not therefore apply to him.

Matthews v. *London St. Tram Co.*, 58 L.J.Q.B. 12, was an action by a passenger on an omnibus against the owners of a tram car for compensation for injuries sustained in a collision. It was held that the direction to the jury, since the decision of the House of Lords in *Mills* v. *Armstrong*, 13 A.C. 1, should be:—

Was there negligence on the part of the tram 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.

Pollock, B., at p. 58, refers to the change in the law, saying that "in 1888 it was laid down by the House of Lords in *Mills* v. *Armstrong*, 13 A.C. 1, '*The Berina*,' that the old law on the subject could not be sustained."

In *Sangster* v. *Eaton*, 25 O.R. 78, 21 O.A.R. 624, 24 Can. S.C.R. 708, the facts were: The mother went with her child to the defendant's store to buy clothing for both. While there a mirror fixed to the wall fell and injured the child. The trial Judge nonsuited the plaintiff, and the Divisional Court sent the case back for a new trial, which judgment was affirmed by the Court of Appeal and Supreme Court, and I find Armour, C.J., in the Divisional Court, towards the close of his judgment, saying:—

> The doctrine of contributory negligence is said not to be applicable to a child of tender years: *Gardner* v. *Grace*, 1 F. & F. 359. It may be prudent in the present case to avoid further difficulty to submit the question to the jury whether the mother was taking reasonably proper care of the child at the time the accident occurred, although in my view the negligence of the mother in this respect would not under the circumstances of this case prevent the recovery by the child.

Citing *Mills* v. *Armstrong; Martin* v. *Ward*, 14 Ch. Sess. Cas. 4 Series 814; *Cosgrove* v. *Ogden*, 10 Am. Rep. 361; Pollock on Torts, 3rd ed., p. 418.

In Shearman & Redfield, in sec. 66, 5th ed., the authors say, in discussing the doctrine of identification, "that it has been exploded in every Court beginning with New York and ending with Pennsylvania," and "that it was finally overruled in England by *Mills* v. *Armstrong*," 13 A.C. 1, and on the subject of negligence of parents in sec. 71 I find the following:—

> The distinction between the two classes of cases is, however, well illustrated in two Ohio decisions. A child brought an action on his own injuries, and the Court held that his father's contributory negligence was no defence. The father brought another action upon the same injury to recover for the loss of services, and the same Court held his contributory negligence to be a complete defence.

The infant is not a valuable chattel to which he is compared by one of the learned Judges sitting in *Waite* v. *N.E.R.*, E. B. & E. 719. He has the ordinary rights of citizenship to protection from wrong-doers. Is it justice to make his personal rights dependent upon the good or bad conduct of others? If only one party offends the infant has his action. If two offend their faults neutralize each other and he has no remedy. Such would be the result.

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I think the infant plaintiff is entitled to recover. The injury is a serious one. It may be a permanent disfigurement and a good-looking face is an important asset to a girl. It is not an easy matter to assess such damages. I would fix them at $600. I would allow the appeal of the infant and enter a verdict for her for the above sum.

HOWELL, C.J.M., and RICHARDS, J.A., concurred with PERDUE, J.A.

Appeal allowed.

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May 30.

BANK OF MONTREAL v. WESTHOLME LUMBER CO., Ltd.

British Columbia Supreme Court, Morrison, J. May 30, 1913.

1. RECEIVERS (§ III—27)—CLAIMS AGAINST — PRIORITIES — CONTRACTING COMPANY—RIGHT TO USE PLANT ON DEFAULT.

Where a receiver and manager of a contracting company has been appointed at the instance of a creditor holding a floating charge by way of mortgage over its assets, and a direction has been given by the court that such receiver take possession of such assets, a summary order to the receiver to deliver up to a municipal corporation the material and plant used in the construction of works for the municipality is properly refused where the right of the municipality to possession depends on a notice purporting to terminate the contract, given after the creditor mortgagee had taken possession of the materials and plant under the floating charge, and the respective rights and priorities of the parties have yet to be determined.

Statement

MOTION on behalf of the corporation of the city of Victoria for an order to deliver up certain plant and materials to them as against the receiver and manager appointed in the action brought by the bank.

The motion was refused.

The defendant company had entered into a contract with the corporation of the city of Victoria for the construction of certain works. By one of the clauses of the contract the corporation was empowered to determine the contract and complete the work, and by another clause the corporation was given power upon such determination "to take possession of and use any of the materials, plant, etc., provided by the defendant company for the purpose of the work." Subsequently to this contract the defendant company gave to the plaintiff bank a floating charge over all its property and assets.

On April 11, 1913, the defendant company commenced an action against the corporation to set aside the contract, or in the alternative for damages for its breach.

On April 23, 1913, the corporation gave notice to the defendant company determining the contract.

On April 30, 1913, a receiver and manager was appointed in this action at the suit of the plaintiff bank; by the order appointing him the receiver and manager was directed to take possession

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of the defendant company's assets, which he accordingly proceeded to do.

The corporation now moved *pro interesse suo* in the action, for an order directing the receiver and manager to deliver possession of the materials and plant to the corporation, who claimed it under the above clause in the contract.

Judgment had been obtained in this action declaring the plaintiff company to have a first charge on all the assets of the defendant company. The action by the defendant company against the corporation was still pending.

Argument

W. B. A. Ritchie, K.C., and *T. R. Robertson*, K.C., for the City of Victoria:—The corporation obtained possession by the notice determining the contract with the defendant company. The judgment in this action directed an inquiry as to incumbrances, and the right of the corporation is an incumbrance. Moreover, on the analogy of assignees in bankruptcy, the holder of a floating charge can only take property subject to all claims attaching to it.

Mayers, for the plaintiff company:—This case is decided by two propositions, *viz.*, that the receiver and manager is entitled to possession of all chattels of which the property is still in the defendant company; and secondly, that the receiver is not bound by contracts made by the mortgagor: *Parsons* v. *Sovereign Bank*, 9 D.L.R. 476, [1913] A.C. 160, at 170. The corporation could not take possession by a simple notice, and therefore any right of the corporation rests in contract, and can in no legal sense be called an incumbrance; conditions in contract may run with land, but they can never run with chattels; therefore the receiver is entitled to possession of the defendant company's assets, and need not regard any contractual rights of the corporation, who are left to their remedy in damages against the defendant company. Moreover, any contractual right of the corporation is subject to the contingency of a rightful determination of the contract with the defendant company, and on the trial of the action between the defendant company and the corporation it may be found that the right has never arisen. Cases such as *Re Opera, Ltd.*, [1891] 3 Ch. 260; *Taunton* v. *Sheriff of Warwickshire*, [1895] 2 Ch. 319; *Norton* v. *Yates*, [1906] 1 K.B. 112; *Cairney* v. *Back*, [1906] 2 K.B. 746, shew that the mortgagee is entitled to all assets of the mortgagor, the property in which has not passed out of the mortgagor.

Ritchie, in reply.

Morrison, J.

MORRISON, J.:—The plaintiffs' possession pursuant to the terms of their mortgage is prior in date to the expression of intention by the city to invoke clause 15 of the contract with the defendants.

The receiver took possession also, and he has been dealt with on that footing by the city. In other words, the floating charge

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held by the plaintiffs has crystallized. To allow the city to intervene at this juncture would, in my opinion, necessitate deciding the rights of the parties respectively, which right can be determined only upon a full consideration of all the terms of both the contract and the mortgage. It is obviously impossible to do so upon the material before me upon which the present application is based, and from which it does not appear that the receiver is in any way acting beyond his powers or doing anything which can be deemed a hardship or tending to jeopardize those rights.

I do not, therefore, consider that it is necessary to interfere with the receiver in his attempt to get in the assets or manage the affairs of the defendant company.

The application is refused with costs.

Application refused.

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BAILEY v. GRANITE QUARRIES.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. April 14, 1913.

APPEAL (§ VII I—345)—WHEN ALLOWED—DISCRETIONARY MATTER.

An appeal will not be entertained against the dismissal by a county court of an application, in the nature of a demurrer, to strike out an entire pleading by which dismissal the validity of the plea was left over until the trial; as even if there be jurisdiction under the County Court rules (B.C.) to strike out a pleading as distinguished from directing an amendment of same, the jurisdiction is one of wide discretion.

Statement

APPEAL from a County Court Judge's order dismissing an application in an interlocutory proceeding.

The appeal was dismissed.

E. V. Bodwell, K.C., for appellant (defendant).
W. Martin Griffin, for respondent (plaintiff).

Macdonald, C.J.A.

MACDONALD, C.J.A.:—My learned brothers think that the trial Judge having exercised his discretion in the matter, it would be a dangerous practice to permit appeals in cases of this kind. I do not disagree with that. I even go further. I think that the learned County Court Judge had no power to apply the Supreme Court Rule having regard to the fact that the County Court Act and rules deal with the subject of pleadings. Powers to amend are given, but none to strike out. Had the case been in the Supreme Court I should have had no doubt. I should have felt that it was a proper case for the exercise of the power. But I am not at all satisfied that the Legislature ever intended County Courts to hear motions by way of what is tantamount to demurrer. County Courts were intended to

provide a simple and inexpensive forum where there should not be multiplicity of interlocutory proceedings.

The appeal will, therefore, have to be dismissed with costs.

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IRVING, J.A.:—Assuming that the County Court Judge had jurisdiction to grant the application, I think that in exercising that jurisdiction the Judge must have very wide discretion. He had to determine whether he would deal with it then or leave it to be dealt with at the trial. If in exercising that discretion he dismissed the application, I think we should not interfere with his decision.

Irving, J.A.

In reference to the jurisdiction of County Court Judges, my view is that the intention of the Legislature was to make that jurisdiction as flexible as possible, so that he could deal with a matter in any way he might think fit, and there should be no review of the question of jurisdiction on appeal.

Whether it is a good thing to have a statute authorising one County Court Judge to make a ruling one way to-day, and another County Court Judge to make a different ruling the next day, may be questioned, but apparently the idea is to make the machinery as flexible as possible so that the business of the Court can be dealt with as quickly as possible.

GALLIHER, J.A.:—I agree.

Galliher, J.A.

Appeal dismissed.

CAMPBELL v. MUNROE.

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Alberta Supreme Court, Scott, Beck, Simmons, and Walsh, JJ. June 17, 1913.

1. GUARANTY (§ I—9)—CONTRACT FOR SALE OF LAND—ABANDONMENT BY VENDEE—PAYMENT BY GUARANTOR—RIGHTS INTER SE.

The mere fact that a purchaser under an instalment contract, on becoming unable to pay an instalment overdue, went out of possession of the property is not evidence of an intention to abandon his rights thereunder to a surety, who thereupon paid the arrears and assumed possession; the latter's rights will be limited as to such purchase by the terms of the contract of suretyship, although the surety had procured the transfer of title to himself from the vendor.

Statement

APPEAL by the plaintiff from the judgment of the Chief Justice in the defendant Munroe's favour. The plaintiff, who had obtained from defendant Nic... an assignment of his interest in the lands involved claimed at the trial (*a*) a declaration that the plaintiff was entitled to be the registered owner of the lands; (*b*) an order cancelling the certificate of title issued to defendant Munroe and directing a certificate of title to be issued in the name of the plaintiff.

The plaintiff's appeal was allowed on terms, and a new trial ordered.

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W. H. McLaws, for plaintiff.
C. Montrose Wright, for defendant.
The judgment of the Court was delivered by

SCOTT, J.:—The material facts disclosed by the evidence at the trial are as follows. On February 25, 1907, defendant Hallett entered into an agreement in writing with defendant Nicholls whereby the former agreed to sell and the latter agreed to purchase certain lands and certain farm stock and implements for $6,000 payable $400 at the date of the agreement, $500 on August 1, 1907, and $5,100 on February 20, 1909, with interest at seven per cent. per annum. The defendant Munroe became a party to the agreement which contained the following provision:—

It is further agreed that John A. Munroe does, by his signature attached hereto, guarantee the fulfilment of the above agreement to the amount of three thousand dollars, but in the event of his being called upon to pay any amount on the above contract, he shall become to that extent purchaser and possessor of the above-mentioned property.

Defendant Nicholls paid the cash payment of $400 and went into possession of the property. It is not shewn by whom the second instalment of $500 was paid but at some time he made default in the payment of the purchase money, and, being unable to pay, he went out of possession of the property and defendant Munroe entered into possession, paid the balance of the purchase money and interest and procured Mrs. Hallett to execute a transfer of the lands to him upon which he obtained a certificate of title. The plaintiff, who obtained from defendant Nichols an assignment of his interest in the lands, claims (1st) a declaration that he is entitled to be the registered owner of the lands, and (2nd), an order cancelling the certificate of title issued to defendant Munroe and directing a certificate of title to be issued in the name of the plaintiff.

At the conclusion of the plaintiff's case counsel for defendant Munroe applied for a nonsuit, and, upon that application, and thereupon the learned Chief Justice gave judgment for the defendant Munroe with costs.

It is, I think, clear that the plaintiff was not entitled to the relief claimed by him and it appears from the reasons for judgment that such was admitted by his counsel. It is not shewn that he then applied to amend the statement of claim, but the fact that he made this admission points to the conclusion that an amendment may have been suggested by him. It appears from the reasons for judgment, however, that the learned trial Judge held that the evidence led him to the conclusion that Nicholls' payment had been forfeited; that he had abandoned any idea of acquiring any further interest in the land, and that there was nothing to shew that, if Munroe had paid all but the

$400, he should hold an interest only for the proportionate amount paid.

Beyond the fact that Nicholls went out of possession there is nothing to shew that he abandoned his interest in the purchase, and in my view that is not sufficient to indicate his intention to do so.

The agreement contains a provision to the effect that time should be of its essence and that, if the payments were not punctually made, it should be null and void, and the vendors should be at liberty to re-sell, and that all moneys paid thereon should be forfeited.

It is clear that the vendor did not exercise this power as it is shewn that Munroe paid the balance of the purchase money under the agreement to which he was a party and the transfer to him cannot be held to be a re-sale to him under the provisions referred to.

In so far as appears by the evidence, the plaintiff as assignee of defendant Nicholls is, in my opinion, entitled to an interest in the lands in question. The extent of that interest, *i.e.*, whether it is proportionate to the amount paid by him on account of the purchase money, or a half interest, subject to defendant Munroe's lien for moneys paid by him in excess of one half the purchase money, it is unnecessary to now determine.

In my opinion there should be a new trial and the costs of the trial already had should abide the event of the new trial. The plaintiff should have leave to amend by claiming such interest in the lands as he may be advised.

The defendant Hallett was not a necessary party to the action and no relief is claimed against her. Had she applied at the outset for an order dismissing the action as against her it would have been granted. Not having taken that course and having chosen to defend the action I think it should now be dismissed as against her, but with only such costs as she would have been entitled to had she applied in the first instance for such an order. These, I think, should be fixed at $30.

The plaintiff should have the costs of this appeal.

New trial ordered.

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ALBERTA LOAN AND INVESTMENT CO. Ltd. v. BEVERIDGE.

Alberta Supreme Court, Harvey, C.J., Scott, Beck, Simmons, and Walsh, JJ.
June 18, 1913.

1. PARTY WALL (§ I—13)—RIGHT TO USE END FOR FRONTAL FACING OF BUILDING.

The owners of a party wall in the absence of special circumstances, are entitled to extend the frontal facing of their respective buildings to the middle line of the end of such wall.

2. ESTOPPEL (§ III G 2 B—105)—PERMITTING IMPROVEMENTS—PARTY WALL —USE OF END BY ONE OWNER FOR FRONTAL FACING OF BUILDING.

Failure to object to the construction by one owner, for his own convenience, of the frontal facing of his building across the entire end of a party wall, does not estop his co-owner from insisting on the removal of half of it at a future time when he has occasion to make use of his portion of the wall.

Statement

APPEAL by the defendants from the trial Judge's finding on a question of estoppel. The plaintiff and the defendants had agreed upon a joint party wall between their proposed contiguous city buildings. The plaintiff, constructing its building first, erected a party wall with a frontal design extending in part to the defendant's property. Later, when erecting their building, the defendants sought to remove the portion of the party wall frontal design which jutted over their property. The trial Judge held them estopped therefrom in part. From this finding the appeal was taken.

The appeal was allowed.

James Short, K.C., for plaintiff.

C. F. Adams, for defendant.

The judgment of the Court was delivered by

Simmons, J.

SIMMONS, J.:—By a writing of March 22, 1911, the parties to this action entered into an agreement providing that either party might build a party wall of the thickness required by the by-laws of the city of Calgary on the boundary line between the lands of the respective parties as shewn on a blue print attached. The agreement provided that the party who constructed the wall should be paid for one-half of the cost of same at such time as the other party made use of the wall. The defendant Beveridge has assigned his interest to the lands to Johnson.

The party wall agreement did not provide for any common design or uniformity of design in regard to that part of the respective buildings which would front on the street. The plaintiffs constructed their building including the party wall and the defendant paid the plaintiffs for one-half of the party wall in accordance with particulars rendered him by the plaintiffs and these particulars do not contain any specified charges for the frontal design on the party wall. The plaintiffs in constructing their building extended a frontal design across the

whole width of the party wall fronting on the street. The plaintiffs' architect (Butler) says the defendant Johnson knew that the frontal design was included in the account paid by him for the party wall, but, as I have stated, the particulars of the account shew that this is incorrect.

The learned trial Judge has found an absence of any agreement between them as to an alleged common design which the plaintiffs in their claim set up. The defendants claim a right to extend the frontal design of their building now under construction to the middle line on the front of the party wall.

In *Jones* v. *Pritchard*, [1908] 1 Ch.D. 630, Parker, J., defines somewhat definitely the respective rights of parties under an agreement of this kind as follows:—

> When a man grants a moiety of an outside wall of his house with intent to make it a party wall between that house and a house to be built on his neighbour's adjoining land the law implies the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out the common intention as to the user of the wall, the nature of the easements varying with particular circumstances of each case; subject to such easements the owner of each half may deal with it in such manner as he pleases, and if he uses it only for the contemplated purposes and without negligence or want of reasonable care and precaution he is not liable for any nuisance or inconvenience occasioning such user. Subject, however, to the easements of which the grant or reservation will be so implied, the grantor and grantee being respectively absolute owners of their respective moieties of the wall, may respectively deal with such moieties as they please.

The defendants say they are entitled to extend their frontal facing to the middle line for structural purposes in making a junction with their front wall, and also that their half of the frontal face of the party wall may conform with the general design of the front of their building.

The learned trial Judge has recognized the first part of defendants' claim and allowed them to remove the frontal face to within five and a half inches of the middle vertical line in the party wall. He also finds that in the absence of any special circumstances the defendant would have the right to extend his facing to the middle line. I am of the opinion that these two conclusions of the trial Judge are absolutely correct. He finds, however, practically that the defendants are estopped now from having any more of the facing removed than is necessary for joining to the party wall as Johnson must have known of the construction of the frontal design by the plaintiffs upon defendants' half of the party wall. With the last proposition I can not agree.

> An estoppel is an admission, or something which the law treats as an admission, of so high and conclusive a nature that anyone who is affected by it is not permitted to contradict it: Encyc. Laws of England, vol. 5, p. 351; Smith's Leading Cases, vol. 2, p. 744.

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It is not of itself a cause of action. It is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying something which he has said: *per* Lord Bowen, L.J., in *Low* v. *Bouverie*, [1891] 3 Ch. 82.

The plaintiffs say that the extension of the frontal facing upon defendants' half of the wall was necessary for the appearance of their building. This contention of theirs seems to meet their subsequent claim of an estoppel. They added something to the face of the party wall which was not a necessary part of it, and did so for their own benefit. The defendant was not then, nor for a considerable period subsequent thereto proposing to join on to the party wall and there was no particular reason for objection on his part to something which did not in the meantime cause any inconvenience or harm to him. When he, however, commenced his own construction he was entitled to a proper junction with the party wall which of itself implied an interference and displacement of a part, at least, of the frontal facing constructed by the plaintiffs on the defendants half of the front face. An essential ingredient of an estoppel *in pais* is the element of "wilfulness" or an implication that the party intended that the words or acts relied upon as estoppel should be acted upon by the plaintiff: *Freeman* v. *Cooke*, 2 Ex. 654, 18 L.J. Ex. 114.

It does not seem reasonable to bring the defendant within this rule in view of the fact that the plaintiff made the extension for their own benefit and must necessarily have contemplated displacement at least to the extent of allowing a proper junction of defendants' front wall with the party wall.

I would, therefore, allow this appeal with costs, and dismiss plaintiffs' action with costs.

Appeal allowed.

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June 11.

DARLING v. FLATER.

Alberta Supreme Court, Scott, Simmons, and Walsh, JJ. June 11, 1913.

1. MALICIOUS PROSECUTION (§ II A—10)—LIABILITY FOR — ARREST FOR CATTLE STEALING—REFUSAL TO LISTEN TO EXPLANATION AS TO POSSESSION OF—EFFECT.

Want of reasonable and probable cause for laying information against a person for stealing cattle he had bought from the defendant, which were not to be delivered until paid for, is not to be inferred merely because, at the time of the plaintiff's arrest, the defendant had refused to listen to explanations made by the latter or to examine a receipt held by him shewing payment for the cattle to one not authorized to receive it, where the other circumstances leading up to the prosecution were such as to demand immediate action by the owner of the cattle to prevent their impending shipment.

Statement

PLAINTIFFS were arrested under a warrant issued upon an information laid by the defendant charging them with

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having stolen certain of his cattle. They were in custody for a few hours and were released on bail until the following day, when the hearing of this charge took place before the police magistrate at Edmonton, who dismissed it. This action for damages resulted. It was tried before the Chief Justice without a jury. He found that the defendant instituted these proceedings without reasonable and probable cause and that in doing so he acted with malice. All of the other essentials to an action for malicious prosecution being admittedly present he awarded damages in the sum of $1,000 to each of the two plaintiffs. From this judgment the defendant appealed.

The appeal was allowed.

H. A. Mackie, for plaintiffs.

S. B. Woods, K.C., for defendant.

Scott, and Simmons, JJ., concurred with Walsh, J.

Scott, J.
Simmons, J.

Walsh, J.:—The prosecution arose out of certain transactions between the plaintiffs and one Coulson on the one hand and the defendant on the other respecting the sale by the defendant to the plaintiffs of the cattle which they were afterwards charged with stealing. In my judgment an understanding of all of the facts which preceded the laying of the information is essential to the proper determination of this action. Many of these facts are in dispute, and as to them, the learned Chief Justice has expressly refrained from making any finding, stating that, in his opinion, it was unnecessary for him to do so. So far, therefore, as in the opinion of this Court, a finding upon any of the questions in controversy is necessary we must of necessity act upon our own view of the evidence.

It was undoubtedly the plaintiffs who either became, or who were to be the purchasers of these cattle from the defendant. A laboured effort was made by them throughout the trial to put Coulson forward as the purchaser from the defendant and to place themselves in the position of purchasers from Coulson, but this attempt entirely failed. This is the view that the Chief Justice took as evidenced by the dialogue between him and Mr. Woods at the close of the evidence of the defence, pp. 239 and 240. It is equally clear that these cattle were to have been paid for on their delivery by the defendant to the plaintiffs at Coulson's place at noon on October 31. The Chief Justice so regarded the arrangement as shewn by his remarks at the foot of page 221 and the top of page 222. The defendant was on hand at the appointed place and time with his cattle, but the plaintiffs did not appear. Being unable to wait for them very long beyond the agreed hour he left before they came. Instead of driving the cattle home again, a distance of

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ten miles, he left them at Coulson's. The evidence as to the arrangement under which they were so left is given by Coulson and the defendant and by no one else. Coulson says that the arrangement was that if the plaintiffs came along with the money for the cattle he was to take it and either pay it to the defendant at Leduc or pay it into a bank at Edmonton and have it wired to the defendant's credit at his bank in Leduc. This story the defendant denies. His version of the arrangement is that Coulson was to see that the plaintiffs came to Leduc that same afternoon to pay for the cattle. This appeals to me as the more probable of the two stories, and I therefore accept it. The plaintiffs were perfect strangers to the defendant and he knew absolutely nothing of their circumstances. Coulson is a man against whom, to the knowledge of the defendant, judgments have been outstanding, and Coulson himself did not know, even at the trial, whether they had been satisfied or not. The purchase price of these cattle amounted to $955.50, and it seems hardly likely that the defendant would part with cattle of that value to perfect strangers without getting his money or that he would entrust so considerable a sum to a custodian so financially unsound as Coulson seems to have been. The money was not forthcoming on either that or the following day and nothing whatever was heard by the defendant either of or from the plaintiffs or Coulson. The defendant's wife went to Edmonton by the train which left Leduc about three o'clock in the afternoon of the 1st of November. Her mission to Edmonton was not in connection with these cattle but the defendant told her to make enquiries whilst there with reference to them. About six o'clock on that afternoon she telephoned him from Edmonton and told him that she had located the cattle in the stock yards there and that they were being shipped out and that she could not find the plaintiffs. She also said that the brand inspector told her that Coulson stated to him that he had owned the cattle and had sold them to the plaintiffs. Later on in the same evening she talked with him again over the telephone, this time from the office of solicitors whom, as she informed him, she was consulting with reference to the matter. As a result he told her that he thought he had better go up to Edmonton on the night train, which he did, reaching the hotel at which his wife was stopping some time after ten o'clock. There he was met by one of the solicitors whom his wife had been consulting, to whom, as he swears, he told the facts just as he swore to them on the trial, and by whom he swears that he was advised to take the proceedings which have resulted in this litigation. He went with this solicitor to a justice of the peace and laid the information and then went to the police station with him when the warrant was handed to

the officer in charge. At the request of this officer he went with the policeman to identify the cattle which they found loaded for shipment in two cars. He then, at the request of the constable, went with him to help him find the plaintiffs. They found them at the railway station and the policeman placed them under arrest. One of the plaintiffs said that it was a mistake but the defendant, acting, as he says, under his solicitor's instructions, refused to talk with them and went outside. The plaintiffs say that one of them told him that they had receipts for the money which they wanted to shew him. He denies this. Be this as it may, the receipts which they had to shew him were all from Coulson dated November 1, 1911, for sums aggregating $1,355.30, paid to him for cattle. The defendant's name nowhere appears in any of these receipts which obviously included the purchase money of cattle other than the defendant's as the aggregate amount covered by them exceeds by $400 the sums payable for his cattle. The fact is that the plaintiffs did pay this money to Coulson some hours before their arrest, and that Coulson had it wired through an Edmonton bank to the defendant's credit at his bank in Leduc a few hours after the arrest, but as he says before he knew that they had been arrested. This statement covers, I think, all of the salient features of the case.

The learned Chief Justice rests his conclusion that the defendant acted without reasonable and probable cause upon the ground that the property in the cattle had passed to the plaintiffs upon, if not prior, to their delivery at Coulson's, and they therefore could not, after that, be guilty of stealing them, adding that even if there was any doubt as to this there could have been no stealing if the plaintiffs had reasonable ground for thinking that they had a right to take the animals. With very great deference, I am of the opinion that the question which arises for decision here cannot be disposed of in this way. It may be that the property in these cattle had passed to the plaintiffs. For myself, I will simply say that I am satisfied that it did not so pass prior to the delivery at Coulson's and I am very doubtful if it passed even then. I think it quite open to argument that the defendant left the cattle with Coulson for delivery to the plaintiffs only when they had paid to him the agreed purchase price and that as this condition was not fulfilled this delivery did not pass the property to the plaintiffs. But even if as a matter of law it had passed I cannot think that for that reason alone liability must be imposed upon the defendant and that the reasons which undoubtedly weighed with him in taking the action which he did must be excluded from our consideration of the case.

I am of the opinion that when the defendant laid the infor-

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mation against the plaintiffs he had every reason to believe that the plaintiffs were fraudulently converting these cattle to their own use, and this apart entirely from what had taken place between him and his solicitor. The cogent facts present to his mind were these. Cattle to which the plaintiffs were entitled, in his view, only upon the payment to him of the purchase price were found by him loaded for shipment several miles from the place where he had left them, having been brought to the place of shipment without his knowledge or consent and without the payment to him of a solitary dollar of the purchase money, and their shipment without a bill of sale from him as the vendor rendered possible by the statement to the brand inspector that Coulson who owned them had sold them to the plaintiffs. Upon these facts it seems to me that the most discreet of men might reasonably think that the plaintiffs were dealing with property which he, if a layman, might be excused for thinking was still his own, in a manner so filled with suspicion as to justify the setting in motion of the criminal law against them. I have no doubt but that he honestly thought that these cattle were still his, and he had in my opinion every reason as a layman for thinking so. I do not suppose that it would ever occur to any man not learned in the law that by dealings such as those which took place between these parties with reference to these cattle the former owner had divested himself of his title to them and was left simply to his civil remedy for the recovery of the purchase money from the purchasers. If the view of the learned Chief Justice that the property had passed is the proper one, and I am not prepared to agree that it is, the most that can be urged against the defendant is that he, not being a lawyer, misunderstood his legal position, or in other words he made a mistake in law in respect to a question which is often a difficult one even for Judges. In my judgment that of itself is not sufficient to impose liability upon him.

I have referred to the statements sworn to by the defendant that he told all of the facts to his solicitor and that he acted on his solicitor's advice in bringing about the plaintiff's arrest. The Chief Justice says that the evidence is not sufficient to satisfy him that the defendant disclosed all of the facts to his solicitor or that his solicitor advised him as he says he did. I do not know, for he does not say, whether his opinion rests upon the fact that the solicitor was not called as a witness or upon his belief that the defendant was not telling the truth. In reaching my conclusions I am not losing sight of this finding, although I must confess that but for it I would have seen no reason from my reading of the defendant's evidence to disbelieve his story in either of these respects.

It was urged that the defendant in refusing to give the plain-

tiffs a chance to explain when they were arrested did not act the part of a discreet or prudent man. In the words of Baron Bramwell adopted by the Lord Chancellor in *Lister* v. *Perryman*, 39 L.J. Ex. 177 at 181:—

> It would have been a very reasonable thing to have done so, but it does not therefore follow that it was not reasonable not to have done so.

He says that in refusing to talk to them he was but following the advice of his solicitor. However this may be, the information had at this time been laid, the warrant had been issued, the arrest had been made and in strictness the matter was out of his hands. If he had reasonable and probable cause, as I think he had, for setting the criminal law in motion I cannot see how liability can be imposed upon him simply because of this incident. In any event all that they could have shewn him in proof of their right to ship these cattle were the receipts from Coulson. It seems to me that these would but have served to strengthen his conviction that he was being made the victim of a scheme of the plaintiffs and Coulson to deprive him of his cattle. Coulson had no right to take the money or to let the cattle go on getting it and the fact that they were attempting to justify their dealing with them on the ground that they had paid Coulson for them would not I should think have tended to allay his suspicions.

In view of the conclusion which I have reached on the question of reasonable and probable cause it is of course unnecessary for me to consider the question of malice.

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

Appeal allowed.

VICK v. TOIVONEN.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

1. ASSOCIATIONS (§ I—1)—ALTERATION OF RULES—NECESSITY OF NOTICE.

   No previous notice of intention to introduce at an annual meeting a resolution making radical alterations in the rules of a voluntary society is required under a by-law providing that the rules may be altered, amended, or changed only at an annual or semi-annual meeting.

2. ASSOCIATIONS (§ II—6)—MEMBERS—RIGHTS IN PROPERTY OF—DIVERSION TO USE FOREIGN TO PURPOSE OF SOCIETY.

   The property of a voluntary society cannot be diverted by the majority of its members against the wishes of the minority, from the purpose for which it is acquired by their contributions, and devoted to a purpose alien to and in conflict with the fundamental principles of the society.

3. INJUNCTION (§ I G—60)—DIVERSION OF PROPERTY OF VOLUNTARY ASSOCIATION.

   Injunction lies to prevent the diverting of the property of a voluntary society by a majority of the members thereof to uses alien to

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and in conflict with the fundamental principles of the society, contrary to the wishes of the minority who contributed toward its acquisition.

Statement

APPEAL by the plaintiff from the judgment of the Judge of the District Court of the District of Sudbury dismissing the action, which was brought by the plaintiff, on behalf of himself and the other members of the Copper Cliff Young People's Society, to restrain the society from joining the Socialist Party of Canada, and from diverting the assets of the society to the purposes of the Socialist Party of Canada.

R. McKay, K.C., for the plaintiff, appellant.
W. T. J. Lee, for the defendants, respondents.

Maclaren, J.A.

The judgment of the Court was delivered by MACLAREN, J. A.:—The plaintiff was one of the twenty-five original members of the society, which was organised in February, 1903, and was an offshoot from the Finnish Christian Temperance and Fraternity Association of Copper Cliff, the members of the new society desiring to have more freedom than they had in the old society.

In their general rules they declare that, while "adhering to the principle of absolute temperance, they will work for the advancement of education amongst their nationality," and that "the members of the society shall have complete freedom to express religious as well as other opinions." To realise its purpose, the society was to "hold regular and special meetings, and prepare for lectures, discourses, educational courses, etc. Sub-societies for musical, singing, and sporting and other similar purposes were to be formed among the members, these to have their own rules, assented to by the society. They also provided for sick benefits for their members.

They erected a hall, which was a source of revenue, and raised money by fees, bazaars, etc. The society prospered financially, so that, when the annual meeting for 1912, out of which the present difficulties arose, came to be held on the 7th February, the society had their hall, worth about $3,000, completely paid for, and $1,240 in cash. The society was not incorporated, but the property was held by trustees for it, the lease being to the "Trustees of Finland Temperance Hall."

The society appears to have been composed of about the same number of members until the annual meeting of the 7th February, 1912, when over seventy new members were received. There was a good deal of contradictory evidence as to whether the reception of these new members was regular. The rule on the question is number 4: "Every person who is ten years old

and pledges himself to act in conformity with the rules of the society is entitled to become a member." Those under sixteen are exempt from dues and are not entitled to vote. The trial Judge held that these new members were regularly received; and I am of opinion that his decision on this point should be affirmed.

Later in the meeting, the object of the great influx of new members became apparent, when it was moved "that the Young People's Society join the Socialist Party of Canada."

After a stormy debate, this was carried on a ballot vote by 74 to 24. The secretary was instructed to apply for a charter, which he did, and one was issued to them as "Local Nuorisseura No. 31, Social-Democratic Party of Canada;" the charter under which the Copper Cliff local socialist branch existed up to that time being surrendered. The Young People's Society paid $12 for the new charter.

The plaintiff objected to the above resolution, on the ground that no previous notice had been given of it. The only rule of the society bearing upon this is number 25, which reads: "The rules cannot be altered, amended, or changed otherwise outside of an annual or semi-annual meeting." Nothing is said about notice. The resolution would, therefore, appear not to be invalid on this account.

There is, however, a more serious objection.

It is a well-settled principle of law that the property of a voluntary society like this cannot be diverted by a majority of its members from the purposes for which it was given by those who contributed to it, or devoted to purposes that are alien to or in conflict with the fundamental rules laid down by the society, and the dissenting minority who adhere to these rules are entitled to have them restrained from so doing. The question is, has this been done in the present instance?

It is quite evident that there has been a complete merger of the two societies. Their funds have been combined in a common fund. The officers of the Young People's Society are the officers of the Socialist Local No. 31. The treasurer, a witness for the defence, says that to become a member of the Young People's Society one must join the Socialist Party, and two members who wished to join the athletic association of the society would not be received because they would not become socialists or pay the socialist tax of 10 cents a month. The evidence is, that this applies to all the subordinate societies.

The rules shew that the leading principle of the Young People's Society was that of "absolute temperance" or total abstinence, and that they were to work for the advancement of education amongst the Finnish nationality; and this they were to seek to accomplish by the means already indicated. They

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were also to have complete freedom to express religious as well as other opinions—something suggested, no doubt, by what they considered the narrowness of the older society from which they had withdrawn, as stated in the preamble to the rules.

It can hardly be pretended that the proved objects and principles of the Socialist Party come within the scope of even the subsidiary objects of the Young People's Society. The mission of the party is stated in the charter issued to Local No. 31 in this case, to be "to educate the workers of Canada to a consciousness of their class position in society; their economic servitude to the owners of capital; and to organise them into a political party; to seize the reins of government, and transform all capitalistic property into the collective property of the working class."

Every applicant for membership must pledge himself to support the ticket of the party; and, if he supports any other party, he is expelled, or "kicked out," as one of the chief officers graphically puts it.

The original rules of the Young People's Society shew that its members, provided they kept their pledge of "absolute temperance," were to have perfect freedom to think and act on other questions as they saw fit, so long as they avoided "participation in low acts."

Without expressing any opinion as to the merits of the principles of the party to which the majority have decided to affiliate the society, I am of opinion that their compulsory and restrictive methods are at variance with the fundamental principles of freedom of opinion on which the society was founded; and those who contributed to the property and funds of the society for the propagation of these ideas have a right to complain when it is sought to divert these funds into another channel, and to prevent them from enjoying the advantages of the society and its property, unless they submit to restrictions inconsistent with the principles on which the society was founded.

The resolution of the 7th January, 1912, was, consequently, ultra vires of the Young People's Society, and the defendants should be restrained from diverting the property or moneys of the society to the Socialist Party or depriving the members of the society of any rights or privileges unless they join or contribute to the said party.

Appeal allowed with costs.

THE CANADA CEMENT CO. v. PAZUK.

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May 19.

Quebec King's Bench, Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. May 19, 1913

1. MASTER AND SERVANT (§ II A—40)—MASTER'S LIABILITY—FREEZING OF SERVANT AS "ACCIDENT" WITHIN WORKMEN'S COMPENSATION ACT.

The freezing of a servant's limb as the result of his exposure for ten hours to intense cold in the discharge of his duties, constitutes an "accident" within the meaning of the Quebec Workmen's Compensation Act, R.S.Q. 1909, sec. 7321 *et seq.*

2. MASTER AND SERVANT (§ II A—40)—MASTER'S LIABILITY—FREEZING OF SERVANT—EFFECT OF FACT THAT OTHER EMPLOYEES WERE NOT INJURED.

The fact that other workmen employed with the plaintiff on an intensely cold day in the discharge of their duties did not suffer from frost bites, will not relieve an employer from liability to the plaintiff for an injury caused by freezing on the assumption that the injury was not an accident but was due to the plaintiff's poor health which rendered him more susceptible than other persons to the cold.

3. MASTER AND SERVANT (§ II B 3 a—148)—INJURY TO SERVANT—RISK OF EMPLOYMENT—FREEZING.

Danger from freezing is not such a risk of a servant's employment as will absolve an employer from liability, where, on an intensely cold day the servant was required to work for ten hours in the open air without shelter, or any provision being made by the employer to protect him against the severity of the cold, or allowing him sufficient rest to warm himself.

Statement

ACTION under the Quebec Workmen's Compensation Act for the loss of a portion of an employee's foot which was frozen as the result of his being exposed for ten hours to intense cold in the discharge of his employment. The plaintiff recovered judgment and the defendant appealed.

The appeal was dismissed.

A. W. Atwater, K.C., and *W. L. Bond*, K.C., for appellants.

H. Weinfield and *P. Ledien*, for respondents.

The opinion of the majority of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—This is a claim for damages based on the Workman's Compensation Act, R.S.Q. 1909, sec. 7321 *et seq.* The respondent had his foot frozen whilst in the employ of the appellant, and was obliged to have it partially amputated. The question involved is whether the company is liable for the damages resulting therefrom. The trial Judge answered in the affirmative, and condemned the company to pay the respondent an annual rent of $100.

The company appeals to us on three grounds:—

(1) The freezing of a limb as a result of intense cold is not an accident within the meaning of the Act; (2) the amputation of part of his foot was the result of the respondent's own negligence in not obtaining proper treatment and was not caused directly by the cold suffered; (3) the judgment charges the company with having been at fault in neglect ng to properly protect its employees against cold and freezing, whereas the employer's negligence cannot be the *raison d'être* of his responsibility in such matters.

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I shall examine the three grounds invoked by the appellant.

1. In the first place the company contends that the freezing of a limb as a result of intense cold is not an accident arising out of the employment within the meaning of the Act.

The Legislature has not told us what the characteristics of an accident arising out of the employment are; the Act contains no definition as to what constitutes such an accident. This has been left to the Courts. Similarly in foreign states. In spite of the importance such a definition would have had, foreign Legislatures have abstained from giving it. The authors on the question have been less shy, however. Each one has endeavored to define this accident. In France and in England the Courts have, in different cases, expressed their idea on the subject. Although it might prove interesting to adopt one or the other of these definitions or even to formulate a new one, I do not think it necessary so to do in the present case. A definition must comprise all the characteristics of the object defined. It might be imprudent to venture on such dangerous ground when the necessities of the case do not demand it. We are called upon to decide only this: Whether the freezing of the respondent's foot in the course of his work, under the circumstances of this case, constitutes such an accident as will render the company liable in damages.

The appellant contends that the freezing did not occur as a result of the employment nor in the course of employment, but as the result of the forces of nature, and that the Workmen's Compensation Act does not cover an accident of this kind.

The Court of Cassation has held several times in France that as a rule the statute of April 9th, 1898, does not cover accidents due to the forces of nature even though they occur in the course of the employment. Nevertheless if the employment has contributed to the bringing into play of these forces, or has provoked or aggravated its effects, then the accident falls within the statute, according to the Court of Cassation. Thus, as a general principle, the employer is not responsible for damages caused to his workmen by lightning, storms, sunstroke, freezing, earthquakes, floods, etc. These are considered as "*force majesture*," which human vigilance and industry can neither foresee nor prevent. The victim must bear alone such burden, inasmuch as human industry has nothing to do with it and inasmuch as the employee is no more subject thereto than any other person. This is, says Loubat (*Le Risque Professionel No. 504*), what Mr. Lion Say called "the great professional risk of humanity." Every human being is liable to suffer from events in which he has no share of responsibility. There is here between the accident and the employment no relationship of cause and effect. Hence it cannot be said of such an accident that it arises out of or in the course of employment. But where the work, or where the conditions under which it is carried on, expose the employees to the happening of a *force majeure*

event, or contribute to bring it into play or to aggravate its effects, then we are no longer face to face with the sole forces of nature. This is no longer a risk to which everybody is exposed; this is a danger which threatens more particularly the employees who work under special conditions. Hence the occurring of a *force majeure* event under such circumstances is an accident arising out of the employment.

In England the Court of Appeals has held that a workman engaged in the construction of a building on a scaffolding 23 feet high, and struck by lightning, met with an accident *du travail*. The Court held that the danger had been increased by the elevated position of the workman, and that his death constituted an accident arising "out of the employment": *Andrew* v. *Failsworth Industrial Society*, 20 T.L.R. 429.

The House of Lords also held it as an accident arising "out of the employment" where a workman had been laid down by a heat stroke whilst working on board SS. Majestic as a result of the intense heat generated by the boiler near which he was working: *Ismay, Imrie & Co.* v. *Williamson*, 24 T.L.R. 881.

In another case one Morgan engaged as sailor on board SS. Zenaida in England was ordered to paint the boat whilst lying in a Mexican port. Excessive heat caused sunstroke. The Court of Appeals held the employer liable: *Morgan* v. *Owners of SS. Zenaida*, 25 T.L.R. 446.

The principles just enunciated have been sanctioned in quite a few cases. Thus it has been held tha where a painter employed, in a tropical heat, at painting a wall which threw off a strong reflection, suffered a sunstroke, the employer was liable: Pand. Fr., 1902-2-84. Similarly in the case of a street car inspector, whose duty compelled him to remain in the middle of the street without any protection from the sun's rays: S.P., 1902-2-292; of a labourer working in a car yard, without protection, under a broiling sun: Pand. Fr., 1905-2-98; of a driver compelled to drive his vehicle under a hot sun: Dalloz, 1901-2-339; *ibid.* 1904-1-553; Gaz. des Trib., 1st and 2nd April, 1902; in the case of a roofer killed by lightning whilst repairing a roof; of a mill hand killed in the same manner in an isolated mill whilst operating a chain for bringing up the sacks: 1 Sachet, p. 224, note 1.

Mr. Walton, in his work on our provincial statute, cites other examples. "No doubt," says he, "if a steeple-jack were blown down by a high wind, or if a man working on a high or exposed place were struck by lightning, this would be covered by the Act. And if a workman were so struck while employed in some work in which there was a special risk of lightning, from the presence, for example, of powerful electric currents in the works, the accident might be held to have the industrial character. It would be due to the forces of nature, but the employment exposed the workman to a greater risk than ordinary of suffering from these

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forces. Upon the same principle it has been held in England that when a workman is seized with an epileptic fit and falls into an excavation, or into any dangerous place, his proximity to which is due to the employment, this is an industrial accident."

And Sachet, at vol. 1, No. 405, shews us the very broad application made of these principles in Germany in accidents from lightning, which are there now considered as an accident arising out of and in the course of the employment. The ruling principle to be drawn from all the reported cases seems to me to be this: that where the accident is due to a *force majeure* which might have been foreseen there is an aggravation of the danger if the workman is more exposed thereto as a result of his employment than the ordinary man, and if there be aggravation the employer is liable. Thus, where a workman carries on his work during intense heat or excessive cold, during a prolonged length of time, under the rays of the sun or exposed to frostbites, it is evident that the conditions under which he is working expose him to a greater danger than the climatic conditions *per se*. The workman should be protected in a special manner against this increased risk. If he cannot be the employer should suspend work. If the employer does not do so and sunstroke or freezing ensues he should be held liable. The responsibility in such a case results not from the negligence of the employer, inasmuch as negligence is not the cause of the responsibility in these cases, but it results from the increased danger, and it is this increase in the risk which creates the relationship between the accident and the employment and gives the workman his recourse.

Therefore it follows that the question as to whether an accident resulting from the forces of nature falls or not within the statute is a question of law in principle, but a question of fact in practice.

The facts in each case, therefore, assist in aiming at a solution. What, then, are the circumstances of this case? On January 6, 1912, respondent was one of its workmen. His duties required him to load the lorries with the stone extracted from the quarry. It was very cold that day, the thermometer having fallen to 18 degrees below zero. Respondent worked at the bottom of the quarry pit, 18 feet below the level of the ground. And he worked so for 10 hours, from 7.30 a.m. to 5.30 p.m. He was paid 17½ cents an hour, $1.75 per day. Whilst returning home in the car that evening he felt a pain in his left foot, and on arriving at his house noticed it was swollen. The next day the swelling had increased. Finally, after three or four days, he called a doctor, who sent him to the hospital, where part of the foot was amputated. It was so cold on that day that about 10 o'clock the foreman told his men that such of them as wished to might leave and return home. A couple of them did. It seems to me, under the circumstances, that we are in presence of a plain case of increased danger of freezing brought about by the conditions under

which the work was carried on. And the foreman understood this full well, as he gave his workmen permission to leave if they found it too cold. But he should not have been content with allowing them to go, he should have ordered them to do so. By continuing their employment he was assuming responsibility for any accidents that might be due to the intense cold. I find the increased risk forming the relationship between employment and accident in the fact that respondent worked with his feet on the stone, worked for ten hours on an intensely cold day: *Vide* Loubat, vol. 1, p. 214, on the analagous case of sunstroke.

These principles received the stamp of approval of the Paris Court of Appeals in the case of *Potin* v. *Vve. Musetta*. Musetta was employed by Potin. He suffered sunstroke whilst completing the unloading of a vehicle in the full glare of the sun in the factory yard. The Tribunal Civil de la Seine held the accident fell within the statute and that his widow was entitled to the indemnity fixed by law. The Paris Court of Appeals confirmed.

Potin inscribed in Cassation, but his appeal was dismissed: Dalloz, J. G., 1904-1-553.

Finally I would refer to Sachet regarding accidents resulting from exposure to cold (No. 278).

The appellant insists that on the day in question some thirty other workmen worked with respondent, none of whom suffered from frost bites. I have found one decision of the Court of Cassation (June 8th, 1904) to that effect, holding that where a single workman is the victim of such an accident whilst many others are employed under the same conditions, it should be presumed that the accident was due to a particular defect in his powers of resistance, and the employer should be freed from responsibility: *Vide Galles* v. *Tissier*, Dalloz, 1906-1-107.

This decision is criticized by Loubat, and I prefer to follow the doctrine laid down by the Cour de Cassation in the case of *Potin* v. *Musetta* above referred to. In that case the Court laid down the rule that it is incumbent on the employee to allege and prove that the victim's state of health was deficient either by predisposition or through excesses. The mere degree of resistance shewn by the victim is immaterial. It plays no greater role in freezing or sunstroke than in any other accident. I admit without hesitation that an employer is not responsible for the results of illness. He is responsible for the consequences of accidents only. But in this case all the circumstances point to an accident and not to an illness. The mere fact that respondent's co-workers were not frozen is not sufficient to my mind, to establish that respondent suffered by temperament or disposition and not from an accident. He may, perhaps, have had less power of endurance than his companions, but this circumstance is not sufficient to relieve the appellant which voluntarily exposed him during ten hours' work to the dangers of excessive cold.

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2. In the second place, the appellant contends that the amputation which respondent suffered was due to his own negligence and not to the cold, and that respondent delayed unduly having recourse to medical science, and that had he been attended to immediately the amputation might not have been necessary. There is no proof of record on this point. The only witness heard was Dr. Fysche, of the General Hospital. It was not he who performed the operation. He did not see the respondent before the operation, nor at the time thereof. All he says is purely theoretical, and he does not say that the amputation was rendered necessary by the respondent's delay to call upon medical aid; nor is there any proof that the respondent refused to follow medical treatment, nor shewed any bad grace in this respect. The respondent is a poor labourer, an ignorant man, and his apparent negligence is probably due to his ignorance more than to any other cause.

3. Finally the appellant complains that the judgment has charged it with negligence, and argues that negligence cannot justify a finding of responsibility in matters of professional risk. The considerant complained of is as follows (translated): "Although the freezing of a limb resulting from extreme cold is, *primâ facie*, a risk incident to life, and does not constitute *per se* an accident arising from the employment, yet the case is different when the injury from freezing befalls a workman in the course of his employment by the lingering and incessant action of the extreme cold and results from want of reasonable precaution on the part of the employer who, in such intense cold, requires his employeee to work in the open air, throughout the entire day's work, without any shelter, and without any provision against the cold, and where the employer does not concern himself to allow the employees, from time to time, sufficient rest from work to enable them to warm up a little, and where the employer takes no other care whatever to protect the employees from the severity of the weather."

This considerant does not mean that the company's responsibility results from its fault. Its object is merely to shew that the "lien" between the employment and the accident exists in the present case. . . . The trial Judge demonstrates the fact that in this case the accident was aggravated by the employment in which the respondent was participating. This demonstration was absolutely essential to justify his holding and it is in accord with the decision I have referred to. Consequently I am of opinion to confirm.

Trenholme, J. Cross, J.

TRENHOLME and CROSS, JJ., dissented.

Appeal dismissed.

PATTISON v. TOWNSHIP OF EMO.

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Ontario Supreme Court (Appellate Division) Mulock, C.J.Ex., Riddell, Sutherland and Leitch, JJ. February 15, 1913.

1. TAXES (§ III E—142)—RECOVERY BY DISTRESS—FREE GRANT LAND—LIABILITY OF LOCATEE FOR TAX AGAINST PRIOR LOCATEE WHOSE RIGHTS HAD BEEN CANCELLED.

The goods of a locatee on land relocated by the Crown after the forfeiture or cancellation of a prior location under the Free Grants and Homesteads Act, R.S.O. 1897, ch. 29, are not subject to seizure or distress for unpaid taxes assessed against the prior locatee's interest, no attempt to collect having been made while he was in possession.

Statement

AN appeal by the plaintiff from the judgment of His Honour Judge Fitch, the Judge of the District Court of the District of Rainy River, dismissing the action.

The following reasons for judgment were given by the learned District Court Judge:—

This was an application by the plaintiff for an interim injunction restraining the defendants from proceeding with a sale of the plaintiff's chattels seized for arrears of taxes. I directed that notice of the application should be served on the defendants, and, by consent of both parties, the application is now turned into a motion for judgment. There is no dispute as to the facts, which are as follows:—

One Duval was, on the 10th June, 1904, located by the Department of Lands Forests and Mines on the south half of lot 29 in the 4th concession of the township of Carpenter. In July, 1908, the plaintiff made an arrangement with Duval whereby, in consideration of $100, Duval was to allow his land to be cancelled and the plaintiff to be located upon the land in question. On the 16th July, 1908, in pursuance of this arrangement, the plaintiff made his application, but no acceptance was apparently given by the Government at that time. In the following spring, other applicants asked to be located on the property, and the Department wrote the land agent at Emo saying that this application could not be entertained, owing to the previous application of Patterson of July, 1908, and asking that, if the plaintiff still wanted the property, he put in a new application, as the other one was made so long before. This was done; and on the 10th August, 1909, the Department notified the land agent that Duval's location had that day been cancelled and this plaintiff located for the land. At that time, arrears of taxes to the amount of $52.72 stood against the property. Duval, while in possession of the property, had cleared some acres of the land, but this had grown up with underbrush, while the house erected by him was nearly destroyed by the action of the weather.

In the case of lands owned by any one in fee, an assessment is made for the purpose of taxation, and, after due notice, the

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taxes are either paid by the proper person or returned by the collector as unpaid—in the latter case the amount still being an asset of the municipality and increasing the security of debenture-holders. As the rate of taxation is struck on the basis of the relation of the revenue required to the assessed value of land, etc., in the municipality, it is essential that the full amount of taxes should be received by the municipality sooner or later. It is apparently for this reason, therefore, that provision is made for the subsequent collection of arrears of taxes, and for those arrears, after the proper formalities have been gone through, to form a charge upon the land so assessed.

The question in this action is as to the rights of the municipalities as to free grant land in this district, in cases where taxes are in arrear, and the property is either given up or forfeited, and afterwards allotted to some other person. If there are no means of collecting these arrears, the municipalities in which a large proportion of the land is held by locatees under the Free Grants and Homesteads Act, R.S.O. 1897, ch. 29, under the Crown, will be seriously affected. The municipality may collect arrears of taxes levied on lands located under the Free Grants and Homesteads Act, either by sale of lands or sale of goods upon the property belonging to the owner and certain others. Section 26 of the Act provides: "Nothing in this Act shall be construed to exempt the land" (that is, land located under the Act) "from levy or sale of goods for rates or taxes heretofore or hereinafter legally imposed."

Thus the expressed intention of the Legislature is, that a person located by the Crown under that Act shall not escape payment of taxes heretofore or hereinafter imposed. To what possible taxes but arrears of taxes can the word "heretofore" apply?

By sec. 154 of the Assessment Act, 1904, 4 Edw. VII. ch. 23, it is enacted that the purchaser of these lands at a tax sale shall be subject to all the terms and conditions as to settlement, etc., required by the Free Grants Act. Provision has undoubtedly, therefore, been made whereby a sale for arrears of taxes may be made of the locatee's interest in land, the fee of which remains in the Crown; and, by sub-sec. 3 of sec. 151, the consent of the Commissioner of Crown Lands is not necessary to validate such sale. In the present case, admittedly, there are arrears of taxes with respect to the land in question; and, under sec. 141 of the Assessment Act, it is the duty of the treasurer to levy those arrears if it comes to his knowledge that goods and chattels liable to distress are upon the land in question.

Under sec. 103 of the Assessment Act, taxes may be collected by distress: (1) upon the goods (wherever found) of the owner or tenant whose name appears on the collector's roll; (3) upon

the goods of the owner of the land found thereon, though his name does not appear on the roll. And, by sec. 141, these clauses apply to arrears of taxes. If, therefore, a locatee under the Crown is covered by the word "owner" in the Assessment Act, the matter is much simplified; and I believe that it was the intention of the Legislature that he should be so considered.

Provision is also made under the Assessment Act for the collection of taxes from owners and tenants. A locatee is in no sense a tenant, but is rather the equitable owner of the land, subject to certain settlement duties, upon the performance of which he is entitled to his patent for the land. The interpretation clauses do not interpret the word "owner;" but sec. 86 (2) of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, defines "owner" at length, and undoubtedly covers a locatee.

It has been urged that, as the interest of the Crown is exempt from taxes, the cancellation of a location must cancel the arrears of taxes, and that a subsequent location will allot the land freed from the lien for taxes. If this is the law, it affords a very simple as well as inexpensive method of evading taxes. If such, however, were the intention of the Legislature, it should have been made plain by some enactment; but, while we find specific legislation as to the creation of liens, sales for taxes, etc., there is absolutely no legislation enacting that upon cancellation of a location the lien for taxes and rights of distraint upon the chattels of subsequent owners automatically cease.

Section 5 of the Assessment Act enacts that all real property in the Province is liable to taxes, subject to the following exemptions: (1) the interest of the Crown in any property. The interest of the Crown has not, however, been taxed by the defendants, they having taxed the interest of the locatee only, under the provisions of sec. 35 of the Assessment Act; and in that section it is expressly enacted that the interest of every person other than the Crown in such land shall be subject to the charge thereon given by sec. 89; also, that the owner of any land in which the Crown has an interest, etc., etc., shall be assessed in respect of the land in the same way as if the interest of the Crown was held by any other person. That is, all the clauses of the Assessment Act, including provisions for collection of arrears of taxes, are made applicable to located lands to the same extent as they would be if a private person, instead of the Crown, was the owner of the legal estate; and it cannot be argued for a moment that, had the legal estate in this property been held by a private person, instead of the Crown, and he had dealt with the property as the Crown has dealt with it, the present owner securing the property from that private person could escape paying those arrears of taxes, or that his chattels would not be liable for those arrears.

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Statement

Section 89 enacts that the taxes due upon any land, with costs, may be recovered from the owner or tenant originally assessed therefor, and from any subsequent owner of the whole or any part thereof, and shall be a special lien on the land, in priority to every claim, lien, or incumbrance of every person except the Crown. In the present instance, there is no attempt on the part of the defendants to enforce any lien against the Crown or in any way interfere with any right existing in the Crown.

I must, therefore, hold that the defendants have that lien for arrears of taxes, and that they are entitled to collect these arrears, by distress and sale of the goods and chattels of the plaintiff found upon the premises, the plaintiff being a subsequent owner within the meaning of the Assessment Act. These taxes represent arrears for five years, no taxes having been paid by Duval. For these five years the municipality taxed all the land, including the land in question, and the money went for roads, bridges, and improvements that enhanced all the property in the municipality, including this very property; but the original locatee never paid any of the taxes for the five years. The benefit of those improvements is secured by the present locatee for absolutely nothing, if he can escape payment of the taxes justly due upon the property, and which he located precisely as his predecessor did in 1904—the fact being that he never paid the $100 to Duval, electing to treat his application of August, 1909, as separate from his application of 1908, when he had agreed to pay the $100.

In addition to the improved roads, etc., in theory at least, the new locatee secures improvements made upon the property by his predecessor, because we must presume that the officers of the Crown do their duty. Those improvements would, at least, be two acres cleared and cultivated annually during the first three years and the erection of a habitable house, at least 16 by 20. While in the present instance the new locatee did not get all of these, the fact that compliance with the Free Grants Act was not insisted upon by the Crown Lands inspector does not alter the general effect of the Act.

As there has been considerable doubt about the application of the Assessment Act to lands such as those in question, I do not think the action is one in which costs should be given. Judgment will, therefore, be entered dismissing the action without costs.

The plaintiff appealed from the judgment of the District Court Judge.

Argument

A. E. Knox, for the plaintiff, argued that the forfeiting of Duval's location under the Free Grants and Homesteads Act

annulled the taxes due from him, and that, when the land was relocated to the plaintiff, in August, 1909, he became liable only for subsequent taxes, which he had duly paid. The learned trial Judge has overlooked sec. 38 of the Public Lands Act, R.S. O. 1897, ch. 28. Under sec. 103 of the Assessment Act, 4 Edw. VII. ch. 23, "owner" must mean the owner of the land at the time the taxes are levied. After the cancellation of Duval's location, the Crown was the only party interested.

A. D. George, for the defendant corporation:—The Assessment Act, 1904, sec. 5, enacts that all real property in the Province shall be liable to taxation, subject to certain exemptions. The interest of the Crown is exempt, but not the interest of the locatee, who is the equitable owner of the land, subject to the fulfilment of certain conditions prescribed in the Free Grants and Homesteads Act. The plaintiff is in the position of a subsequent owner: Assessment Act, 1904, sec. 89. "Owner" has the same meaning in the Assessment Act (see sec. 23) as in sec. 86 of the Municipal Act, 1903. Section 9 of the Free Grants and Homesteads Act should be construed strictly so as not to take away from the municipality its statutory lien upon lands for arrears of taxes. The right of the municipality to assess the lands of a locatee and to levy for taxes and to a lien therefor should not be taken away unless it is impossible to construe the statute otherwise. See sec. 26 of the Free Grants and Homesteads Act. The plaintiff knew of the occupation of the land by Duval, and in effect succeeded to Duval's rights; he should have known or ascertained the fact that there were arrears of taxes, and that the municipality claimed a lien therefor. Provision has been made for a sale of a locatee's interest for arrears of taxes: Assessment Act, sec. 151; the interest of the Crown cannot be affected by such a sale: sec. 151; the interest of the locatee must be assessed: sec. 35; but the interest of the Crown cannot be assessed: sec. 5. It is plain that the interest of a locatee is regarded as separate and distinct from that of the Crown. It is imperative for the municipality to assess the interest of the locatee and to collect the taxes levied: see sec. 141. This the treasurer of the defendant municipality did. There is no express legislation taking away the right of the municipality to a lien for taxes or the right to distrain; nor is there any provision limiting or doing away with the duty of the treasurer.

Mulock, C.J.

February 15. MULOCK, C.J.:—The facts are as follows. On the 10th June, 1904, one Duval, under the provisions of the Free Grants and Homesteads Act, R.S.O. 1897, ch. 29, became locatee of the south half of lot number 29 in the 4th concession of the township of Carpenter. Default having been made in the performance of settlement duties, as required by the Act,

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the Crown, on the 10th August, 1909, cancelled Duval's location, and relocated the land to the plaintiff.

Whilst Duval was such locatee, certain taxes against his interest in the land became due, and were unpaid when the plaintiff became locatee of the same land. The defendant corporation contended that his goods and chattels, then on the land, were liable to distress in respect of the arrears of taxes which had accrued due prior to his becoming locatee, and sought to make the amount by distress, whereupon the plaintiff brought this action to restrain the defendant corporation from proceeding with such distress. The learned trial Judge, being of opinion that the plaintiff's goods and chattels were liable to be so distrained, dismissed the action; and from that decision the plaintiff appeals.

The learned trial Judge, in his carefully prepared judgment, relies upon sec. 26 of the Free Grants and Homesteads Act as supporting his view. That section reads as follows: "Nothing in this Act shall be construed to exempt the land from levy or sale for rates or taxes heretofore or hereafter legally imposed." That section follows a number of other sections containing provisions which limit the locatee's or patentee's right to alienate Free Grant land, and is merely a precautionary expression by the Legislature that those provisions are not to be construed as effecting any change in the law as to the liability of the locatee's or patentee's interest in such land to taxation or sale for taxes.

The trial Judge has, by error, incorporated the word "of goods" after the word "sale" in his quotation of the section, but the error does not affect his argument.

His Honour also cites sec. 154 of the Assessment Act in support of his conclusions. That section, however, goes no further than, in effect, to declare that, where there has been a valid sale for taxes of Free Grant lands, the purchaser shall take subject to the provisions contained in the Free Grants and Homesteads Act. But it does not say that taxes assessed against the locatee's interest in such lands shall remain a charge on the land after his interest therein has been forfeited.

The interest of the Crown in any property is, by sec. 5 of the Assessment Act, being 4 Edw. VII. ch. 23, exempt from taxation; and, whilst the interest of a locatee of lands under the Free Grants and Homesteads Act is liable to taxation, yet such interest is subject to the paramount obligation of the locatee to perform the settlement duties required of a locatee by sec. 8 of the Free Grants and Homesteads Act. And, upon failure to do so, the Crown is entitled to forfeit the location, whereupon, by sec. 9 of the Act, "all rights of the locatee or of any one claiming under him in the land, shall cease."

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So long as Duval continued to be locatee, the defendant corporation was entitled to a lien upon his interest in the land in respect of the arrears of taxes. But when, by reason of the Crown's forfeiture, that interest ceased to exist, then the defendant corporation's lien, which was merely a charge on Duval's interest, also ceased to exist, and the Crown resumed the unqualified ownership of the land, free from the rights of all persons claiming through Duval, and was in position to relocate the land, free from any liens, whether in the nature of taxes or otherwise, that might have existed against the interest of the former locatee. Were it otherwise, it would practically mean that the interest of the Crown would not be exempt from taxation; for, if such taxes remained a liability recoverable out of the goods of a subsequent locatee or purchaser, the interest of the Crown in the land would *pro tanto* be reduced.

I, therefore, with much respect, am unable to accept the view of the learned trial Judge as to the rights of the parties; and am of opinion that the judgment appealed from should be reversed, with costs to the plaintiff here and below.

Riddell, J.

RIDDELL, J.:—In 1904, one Duval became locatee of a certain lot in the township of Emo; he failed to perform what the statute requires of a locatee; and, in 1909, his location was forfeited under R.S.O. 1897, ch. 29, sec. 9. He had not paid the taxes, and the township had not seized or made any effort to realise them.

In August, 1909, the plaintiff made application for the lot, and was there located. He paid his own taxes, but not the back taxes; and, on the 3rd October, 1912, the township seized for these back taxes.

The plaintiff brought an action to restrain the sale. Applying for an interim injunction, the motion was turned into a motion for judgment, and the District Court Judge dismissed the motion and the action.

The plaintiff now appeals.

I think the appeal must succeed, and on this short ground:—There can be no doubt that the Legislature can validly enact that the goods of one man may be sold to pay the debt of another. But, before such a result is declared by the Court to be the effect of a statute, the language of the statute must be scrutinised with care, and found clear.

By 4 Edw. VII. ch. 23, sec. 103, back taxes may be levied (3) "upon the goods and chattels of the owner of the land found thereon . . ." There is no definition of the word "owner" in the statute, and I know of nothing to compel us to hold that the plaintiff is the owner of the land.

The appeal should be allowed with costs and the injunction granted with costs.

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Other relief is claimed by the writ, *i.e.*, damages for seizure. The damages should be referred to the District Court Judge to be assessed by him, and he will dispose of the costs of such reference.

SUTHERLAND and LEITCH, JJ., concurred with RIDDELL, J.

Appeal allowed.

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Jan. 20.

GRAHAM ISLAND COLLIERIES v. CANADIAN DEVELOPMENT CO. AND H. R. BELLAMY.

British Columbia Supreme Court. Trial before Gregory, J. January 20, 1913.

1. CORPORATIONS AND COMPANIES (§ IV H—164)—PROMOTERS — SALES TO COMPANY—SECRET PROFIT.

A corporation which was one of the active promoters of a newly formed company, will not be permitted to make a secret profit from property purchased by it in the latter's behalf.

2. ESTOPPEL (§ III D—66)—BY RATIFICATION — SALES BY PROMOTER TO COMPANY—SECRET PROFITS.

The right to compel a promoter to refund secret profits made from a purchase of property for a company he was promoting, is waived by the company, where, with full knowledge of all the circumstances, it entered into an agreement with the seller of the property for an extension of the time for payment.

3. CORPORATIONS AND COMPANIES (§ IV H—164)—SALES BY PROMOTER TO COMPANY—SECRET PROFITS.

A promoter of a company who agrees to sell property to a fellow promoter for the benefit of the company, will not be permitted to make a secret profit from the transaction.

Statement

ACTION by a company to recover from promoters secret profits made on property purchased by them for the company.

Judgment was given against some of the defendants, but not as to the other because of the estoppel of the plaintiff as to the latter.

J. W. deB. Farris, and *J. Emerson*, for plaintiff.

S. S. Taylor, K.C., for defendant company.

J. A. Clark, for defendant Bellamy.

Gregory, J.

GREGORY, J.:—This is an action for relief against the defendants as promoters of the plaintiff company in connection with the sale made by them to the plaintiff of certain coal licenses. The defendant company purchased the licenses from defendant Bellamy, at attorney-in-fact of the original stakers thereof, at the price of $4.50 per acre, and sold them to the plaintiff at the price of $10 an acre, and agreed to return to defendant Bellamy the sum of $1.50 per acre.

Against the company it is claimed that it was actually engaged in promoting the plaintiff company when it bought these licenses, and that therefore it is a trustee for the plaintiff, and

is entitled to have the licenses at the price of $4.50, or, in the alternative, that at the time the defendant company sold to the plaintiff company it was one of its promoters and did not make any disclosure of the price at which it had purchased them, and that the plaintiff is entitled to retain the said licenses at the fair market value of the same at the time of its purchase.

Against the defendant Bellamy, it is claimed that he was a promoter of the plaintiff company, and so must account to it for the sum of $1.50 an acre, paid him by his co-defendant, he having made no disclosure to the plaintiff of his position.

So far as disclosure is concerned, I am fully satisfied that neither of the defendants at any time ever made any disclosure whatever to the plaintiff or their dealings with each other. But it is equally clear that plaintiff always knew it was buying from the defendant company, and assumed that such defendant was making a profit on the sale. Although in the view I take of the case it is immaterial when the defendant company became a promoter, or what disclosure it made, I feel that I should, in case the plaintiff wishes to appeal, make clear the conclusions I have reached on these points.

I cannot resist the conclusion that the defendant company was actively promoting the plaintiff company when it took this option to purchase from Bellamy on December 8, 1909, and when it actually took it up and purchased the licenses on January 12, 1910, it had secured the incorporation of the plaintiff on December 23, 1909, and had actually the day before, viz., January 11, 1910, sold the licenses to the plaintiff.

That the defendant company did promote the plaintiff company is abundantly clear by the agreement between the two defendants, dated December 21, 1909, which states in recital that it is "in course of promoting," etc. Munro and Cummings purchased the stock through one Brown, who guaranteed to sell the same within three months at a profit. The defendant company carried out this guaranty. Brown, who took most of the application for stock, represented the company. Mr. Jones, the president of the defendant company, said, on discovery, that Brown, who is now dead, conducted most of the negotiations with Bellamy and he presumed he acted on behalf of the company.

When did this promoting begin? Bellamy, in his discovery says that he gave the option on December 8, 1909; previous to that he had gone around with Brown to get applications for shares. Before taking the option, the defendant company proposed to form a new company to take over the coal areas. I understood it was contingent on the new company being formed that the option would be taken up, and if it was not formed, the property would go back to the stockholders. The option was

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given to enable them to form the company. There is ample evidence that a number of applications for shares were made on December 11, 1909, and Mr. Kerr swears that one at least of Bellamy's applications was dated December 8, 1909 (this is supported by Mr. Jones' evidence on discovery), which is the very date on which the defendant company took its option. Bellamy's first application was made in the name of the Graham Island Coal Co., on a printed form. In the ordinary course of business that form would have been printed, prior to that date, or at least instructions for its being printed would have been given, and if this is so, the Graham Island Coal Co. was being promoted when defendant company took its option.

The Graham Island Coal Co. and plaintiff company are one and the same, for the latter name was substituted for the former because the registrar of joint-stock companies refused to accept the former. That the plaintiff company's application forms were printed on December 11th there can be no doubt, and that could only have been done after word had been received from the registrar at Victoria that the name originally chosen would not be accepted. All of these preliminaries must have occupied several days, certainly more than three, and so these steps in the promotion were going on when the defendant company took its option—at least I can come to no other conclusion, especially in view of the fact that not a single officer of the defendant company, nor the defendant Bellamy, was called to deny the suggestion which was repeatedly made during the trial.

These facts seem to me to shew almost conclusively that at the time the defendant company took its option it was actually engaged in promoting the plaintiff company, and, if so, the plaintiff company would, unless it has lost its rights by some action of its own, be entitled to treat the defendant company as having acted in taking the option on its behalf and insist on taking the licenses at the price it gave for them, and this notwithstanding any disclosures made by such promoter: see Palmer's Company Precedents, 10th ed., part 1, p. 118, and cases there cited [11th ed., part 1, p. 143].

But it seems to me that the company has lost this right through its own actions, for on January 28, 1911, it entered into a new agreement with the defendant company whereby it was granted an extension of time for making its payment, etc., and it did this with a full knowledge of the facts of which it now complains so far as the defendant company is concerned, viz., that it purchased for $4.50 per acre. Mr. Kerr, in his evidence, says that he heard in the fall of 1910, rumours that another action brought by the original stake-holders of the licenses against the same defendants was to be compromised, and that

he learned then that the price paid by defendant company was "$4.50" per acre. On December 19, 1910, the plaintiff directors appointed a committee to inquire into this matter, and to take counsel's opinion thereon. On March 10, 1910, the directors declined an offer of $300,000 for the property. On November 14, 1910, the directors got an independent report from Mr. Cross as to the value of the property. On May 8, 1911, the directors reported to the general meeting, expressing confidence in the value of the property and stating it was then under option. In this condition of affairs the plaintiff, on January 28, 1911, took from the defendant company an agreement extending the time for making its payments, and in order to do so the defendant company had itself (to plaintiff's knowledge) to first get an extension from the stake-holders. It seems to me that this is equivalent to its saying to the defendant company, "We always knew you had purchased the property, we now know you only paid $4.50 an acre for it; we have had a committee inquiring into this matter—counsel's opinion on our rights, but if you will give us an extension of time we will say no more about it, for we are quite satisfied of the value of our property and that we have made a good purchase, and are also satisfied that you should make a good profit on your purchase." To permit the plaintiff to now change its attitude would seem to me to be unjust, because it has, by its conduct, done that which might fairly be regarded as equivalent to a waiver of its remedy, and particularly since there can be no question of a rescission of the contract, for plaintiff has not asked for that, and has in fact allowed a number of the licenses to lapse.

But it seems to me that the defendant Bellamy is in a different position. He has entered into a contract with his co-defendant by which he is to receive about $40,000 of the plaintiff's purchase money. This agreement is dated December 21, 1909; there was another agreement between the defendants which has entirely disappeared, and the evidence of its contents is most unsatisfactory. It appears to me that the defendant Bellamy is a promoter of the plaintiff co-equally with his co-defendant; see Halsbury, vol. 5, p. 48, and cases there cited.

I have no hesitation in deciding that the agreement between the defendants was in a sense a sham agreement. Its whole object was to enable Bellamy to get back a part of the consideration paid by the plaintiff company for the property he was in fact selling to it. He was the instigator and father of the whole scheme from beginning to end, and there is no doubt that it was a dishonest scheme, and in its intent a wrong against the original stakers as well as the plaintiff company, and his co-defendant is no better, for it had full knowledge of all the circumstances.

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At the trial it was questioned whether Mr. Bellamy was a mining engineer at all or not. No one has come forward to say that he knows he is, and in the absence of some direct evidence on the point, I am not satisfied that he is. Mr. Falls, a well-known engineer, received $1,000 for his services, and Mr. Bellamy is to have $40,000 or thereabouts, in consideration of what?—not subscribing for $10,000 worth of shares in plaintiff company, for that he had already done and not for reporting on this property, for that he had done days before this agreement was entered into. In the circumstances, I do not think that he is entitled to retain any of these moneys. The plaintiff has not, I think, lost by waiver or otherwise its right to have these moneys paid to it, for Bellamy's position and this agreement only came to its knowledge just before the institution of the present action—in fact, I have some considerable doubt whether this fact should not be held to suspend what I have already called the waiver by the plaintiff company of the extension agreement of January 21, 1911, for the defendant company was a party to it all.

There will be judgment directing defendant Bellamy to pay to the plaintiff all moneys received by him from defendant company under the agreement of December 21, 1909, an injunction restraining the defendant company from paying him any further sums thereunder; and a direction to pay the same to the plaintiff company instead, and such other relief as may be necessary to carry this judgment into effect.

As to the cases referred to to support the contention that the plaintiff company has no remedy except rescission, see *Gluckstein* v. *Barnes*, [1900] A.C. 240, 69 L.J. Ch. 385.

Judgment accordingly.

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Jan. 5.

MUNICIPALITY OF BURNABY v. BRITISH COLUMBIA ELECTRIC R. CO. Ltd.

British Columbia Supreme Court. Trial before Murphy, J. January 5, 1913.

1. ESTOPPEL (§ I A—6)—OF MUNICIPALITY TO DENY VALIDITY OF BY-LAW OR CONTRACT.

A municipal corporation cannot attack the validity of a contract between it and an electric railway company because the by-law authorizing its execution was not submitted to the electors for approval as required by sec. 64 of the B.C. Municipal Act of 1897, where the company had made large expenditures as a direct consequence of its execution, if not pursuant to the contract.

[*Re Point Grey*, 16 B.C.R. 374, distinguished.]

2. MUNICIPAL CORPORATIONS (§ II—142)—CONTRACTS — PARTLY ULTRA VIRES—SEGREGATION BY COURT.

In an action by a municipal corporation to obtain a declaration that a contract between it and an electric railway company is void because a portion of its conditions were *ultra vires*, the court will

not, on such general claim, make a selection of such of its provisions as are *ultra vires*, but will leave that to be settled in concrete cases questioning the validity of specific clauses of the agreement.

3. INJUNCTION (§ I L—109)—AS TO RAILWAY TRACKS—RIGHT OF CITY TO QUESTION POWER OF RAILWAY COMPANY.

An injunction will be denied a city to enjoin the operation of an electric railway on the ground that the company has no power to do so by reason of an irregularity in the proceedings of the municipality purporting to confer the franchise on the company, where it does not appear that the railway is a nuisance, or that the city suffered special damages from its operation, although it crossed some public streets under an order made by the Dominion Railway Board.

4. PARTIES (§ I A 4—45)—ACTION TO QUESTION EXERCISE OF POWER BY CORPORATION—RIGHT OF MUNICIPALITY TO MAINTAIN.

The Attorney-General should be made a party to a proceeding to question the power of an electric railway company to operate its road notwithstanding informalities in obtaining the municipal franchise, where, after due notice to the municipality, an authorization of certain crossings had been made by the Board of Railway Commissioners on the footing of the electric railway having the requisite franchise.

Statement

APPLICATION by a city to have a contract between it and an Electric Railway Company declared invalid, and to enjoin the operation of an electric railway, on the ground that the by-law authorizing the execution of the contract was not submitted to the electors for approval as required by sec. 64 of B.C. Municipal Act of 1897; and also because some of the conditions of the contract were *ultra vires*.

The action was dismissed.

S. S. Taylor, K.C., and *W. G. E. McQuarrie*, for plaintiff.

L. G. McPhillips, K.C., *E. P. Davis*, K.C., and *V. Laursen*, for defendant.

Murphy, J.

MURPHY, J.:—This action, on its main branch, is in form an application to have a by-law declared invalid. In substance, however, it is an action by a municipality to have a solemn agreement duly entered into by it with the defendant company declared null and void on the ground that the by-law authorizing its execution was not submitted to the electors as required by sec. 64 of the B.C. Municipal Act, 1897. This fact, in my opinion, differentiates the case from *Re Point Grey By-law*, 16 B.C.R. 374, 19 W.L.R. 638. The principles governing are, I take it, not those applicable to the quashing of by-laws at the suit of a ratepayer, but those applicable to contracts. Because some provisions of a contract are *ultra vires* of a corporation it is not, in my opinion, the law that the whole contract can be declared null and void at the suit of such corporation, particularly when, as here, a large expenditure of money has been made, if not pursuant to the contract, at any rate as a direct consequence of its execution.

The main feature of this contract is the provision for the

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construction and operation of a tramway within the limits of the plaintiff municipality. By sec. 33 of the Consolidated Railway Company's Act (1896), the defendant company, as successor in title to the Consolidated Railway and Light Co., is expressly authorized to construct, maintain, complete and operate a street railway *inter alia* along such road or roads between the limits of the cities of Vancouver and New Westminster as may be specified by any municipality through which the same may be constructed. Most of the roads—or, on any construction, a considerable number of them—upon which this agreement contemplates the laying down of a tramway, are so situate.

This section has been interpreted in this sense by Macdonald, C.J.A., in the *Point Grey* case, 16 B.C.R. 374, if I understand his judgment aright. The main provisions of the contract in question are, therefore, *ultra vires* of the municipality inasmuch as sec. 64 of the Municipal Act (1897) has no application. I think I am bound to hold, under the judgment of Irving, J.A., in the same case, some provisions of said contracts to be special privileges to which said sec. 64 applies, but, if I am right as to this case being one of contract and as to the principles then governing, the contract is not to be declared null and void because some of its provisions are *ultra vires*. Nor do I think the Court is to be asked to go through the multitudinous provisions of the contract and proceed to declare which of them are *ultra* and which *intra vires*. Such contentions are to be settled, I think, by concrete cases questioning the validity of the specific clauses.

As to the claim for an injunction, I do not see how the municipality can raise the question that the defendant company has no power to operate a railway such as the one here under discussion. It is not shewn that such railway is a nuisance, much less has it been shewn that the municipality has suffered any special damage from its operation. It is true the railway crosses some of the municipal streets but that was done pursuant to the order of the Dominion Railway Board after notice to the plaintiffs. It appears to me, under the circumstances, that before any consideration can be given to such contention, the Attorney-General must be a party to the proceedings. The action is dismissed.

Action dismissed.

RITCHIE v. GIBBS.

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June 17.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Walsh, JJ. June 17, 1913.

1. CONTRACTS (§ I D 4—62*b*)—OFFER AND ACCEPTANCE—TIME FOR PAYMENT OF DEPOSIT.

Time is of the essence of the contract as regards the cash payment or deposit on a sale of lands, and if the vendor under a contract requiring the cash payment to be made "forthwith" gives time to the purchaser until a future day specified, when payment is to be made at a business office of a firm authorized to receive it for the vendor, time remains of the essence of the agreement as to the deferred date and the vendor may withdraw if the purchaser fails to attend and pay the money within reasonable business hours at the time and place appointed.

[*Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, referred to.]

Statement

APPEAL from the trial judgment dismissing the action for specific performance.

The appeal was dismissed on an equal division.

A. L. Marks, for the plaintiff.

R. W. Manley, for the defendant.

Harvey, C.J.

HARVEY, C.J., concurred with STUART, J., in dismissing the appeal.

Scott, J.

SCOTT, J., concurred with WALSH, J., who would allow the appeal.

Stuart, J.

STUART, J.:—I would dismiss this appeal. I think the defendant had a right to insist on an immediate cash payment of $2,000 and to refuse to be bound by an agreement already made unless that payment were immediately forthcoming. I assume that by acceptance of the $25 from Mortimer on Thursday the defendant ratified his action in making an agreement on his behalf. And I assume that the payment of the $2,000 was not a condition precedent to the existence of any agreement at all; which, however, in view of the decision in *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, seems to me open to question.

I assume that there was called into existence a contract of sale between the parties. One of the terms of that agreement was that $2,000 should be paid forthwith as a cash or down payment. The defendant was clearly entitled to insist on immediate payment. Surely time is of the essence in respect of a cash payment at any rate. That being so I think the defendant was entitled if he liked to make a concession as to time, but to make that concession a strict one. He was entitled to say:—

> One term of our bargain is that you pay me $2,000 forthwith. I will give you an hour but no more.

And if at the end of that time the cash payment was not forthcoming I think the defendant would be entitled to withdraw

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from the agreement. He was entitled to know at once whether he had the property really sold or not. In the case before us the defendant was not so strict. The evidence is clear and uncontradicted that the defendant insisted upon payment on Saturday. No question of a formal agreement being intended before the cash payment was payable can arise because that was arranged on Thursday and it was not because of the necessity of a formal agreement that the payment was delayed. Any suggestion of postponement until Monday which may have been made by the agent Mortimer was clearly unauthorized because Mortimer himself, the plaintiff's witness, expressly says so. The plaintiff did not make the payment on Saturday. Tipton & Co.'s office had been arranged as the place of payment and that firm were authorized by the defendant to receive the money. The plaintiff knew that he was expected to pay on Saturday. He did not go to Tipton's office to do so until ten o'clock on Saturday night. The defendant was not, in my opinion, bound to wait there till that late in the night nor to ask Tipton's to keep their office open for the plaintiff's convenience until that hour. What the position would have been if the plaintiff had sought out the defendant at his house or elsewhere before midnight need not be considered because he did not do so in any case. In as much as the cash payment stipulated for was not made within the time limit which the defendant was clearly entitled to fix, I think he was entitled to withdraw, to refuse to accept it, and in effect to rescind the agreement, assuming that a binding agreement had ever been made. It is true that Tipton's received the cheque on Monday, but the plaintiff knew that it was then too late and that their receipt of it must be subject to the defendant's approval, which was refused.

Having reached this conclusion I have no reason for considering the other questions of law which are involved in the appeal which should be dismissed with costs.

Walsh, J.

WALSH, J.:—This is an action brought by the purchaser to compel specific performance of an agreement made by him with the defendant for the sale to him of certain land. It was dismissed at the close of the plaintiff's case upon the application of counsel for the defendant, on the ground that the agreement was not sufficiently evidenced in writing. The difficulty suggested under the Statute of Frauds is that the terms for the payment of the purchase-money do not sufficiently appear in any one of three receipts which contain the only written evidence of the agreement.

The first receipt which is given by a sub-agent who made the sale is as follows:—

Received of Dr. A. B. Ritchie, the sum of twenty-five dollars as deposit on first payment, the total first payment is two thousand dollars,

balance in 6 and twelve months, on purchase of lot 15, blk. 143, White ave., Scona.

$25 00/100 (total price $4,000) S. M. MORTIMER.

When this sum of $25 was turned over to the defendant he gave a receipt for it in the following words:—

$25.00 Edmonton, Alberta, Jany. 25, 1912.

Recd. from Dr. A. B. Ritchie twenty-five dollars deposit on lot 15, block 143, Strathcona, for $4,000. $2,000 cash, bal. 6-12 mos.

R. W. GIBBS.

The plaintiff paid to other agents the further sum of $1,975 for which they gave their receipt as follows:—

Strathcona, Alta., Jan. 29, 1912.

Received from A. B. Ritchie
W. W Lailey

Address ..... Occupation .....

The sum of One Thousand Nine Hundred and Seventy-five Dollars
Account lot 15, blk. 143, White ave.
Deposit of $25 paid to S. J. Mortimer.
Price, $4,000. Terms of Sale, ½ cash.
6—12 mos.

This receipt is given subject to vendor's acceptance, and is not an option in any way.

J. G. TIPTON & SON,
Agents.
Per.....

The objection arises with reference to the language used in each of these receipts to fix the time for the payment of the deferred instalments of the purchase-money. The sub-agents' receipt calls for payment of "balance in 6 and twelve months," the defendant's receipt says simply "Bal. 6-12-mos.," while the agents to whom the large payment was made say in their receipt, "Terms of sale ½ cash, 6-12 mos." The trial Judge held that these three receipts must be read together and that being so read they "do not sufficiently determine the terms on which the balance of $2,000 was to be paid," and for this reason he dismissed the action.

Some question is raised as to whether or not the receipts of the agents or of either of them can be read as evidence of this agreement. Without considering that question at all I think that the receipt of the defendant himself evidences quite plainly what the agreement of the parties undoubtedly was in this respect, namely, that the balance of the purchase-money over and above the cash payment was to be paid in equal instalments at the expiration of six and twelve months from the date of the cash payment. That is the view which I would take of it, in the absence of authority to the contrary, by applying to the language of this receipt its ordinary meaning. The case of *Duncombe* v. *The Brighton Club*, L.R. 10 Q.B. 371, cited to us by Mr. Ford, is an authority in support of this construction though decided

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under another statute. I think, therefore, that my brother Simmons was wrong in dismissing the action on this ground.

On the argument of the appeal, however, it was insisted by the defendant's counsel and apparently for the first time that even if the agreement was sufficiently evidenced by writing the plaintiff was not entitled to specific performance because of his failure to pay the balance of the cash payment, namely, $1,975 on Saturday the 27th of January. Upon the evidence before us (which, of course, is that for the plaintiff only) I do not think that this contention can be given effect to. The agreement with the agent was arrived at on the 24th of January. It was confirmed by the defendant on the 25th, another agent of the defendant told the plaintiff on the 26th that the defendant must have his money (though no time for the payment of it appears to have been then set) and that the plaintiff was to pay it for him at Tipton's office and on the 27th, between noon and one o'clock the defendant told the plaintiff over the telephone that he wanted the money right away. On that same night about ten o'clock the plaintiff took the money to Tipton's office, but it was closed and he was, therefore, unable to pay it. He was at Tipton's office with the money at nine on the morning of the 29th, Sunday having intervened, and handed it over a few minutes later as soon as the office was opened. He then got the third of the above receipts. He went in later on the same day as arranged when he paid the money to get the formal agreement and was then told that the defendant had "called the deal off" and his money was returned to him.

I cannot see enough in this to justify the Court in denying to the plaintiff his right to have this agreement specifically performed. It is quite obvious from the evidence that is now in that the defendant knew that there would be some slight delay in the payment of this sum of $1,975 and he acquiesced in that. It was not until the afternoon of the 27th that anything approaching a demand for its payment at or within any definite time was made. He wanted it then right away. The defendant was at that time in Edmonton and the plaintiff in what was then Strathcona, and he had the money at the appointed place within ten hours after this talk with the plaintiff. To say that upon these facts the plaintiff had disentitled himself to this right is to draw the line a great deal tighter than I feel disposed to do.

In my judgment the appeal should be allowed and the case sent back for another trial. The defendant should pay the costs of this appeal and of the former trial.

Appeal dismissed on an equal division.

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June 18.

Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll, and Gervais, JJ. June 18, 1913.

1. WATERS (§ I C 2—22)—FLOATAGE RIGHTS—LIABILITY FOR INJURY TO RIPARIAN PROPRIETORS.

The absolute right to float timber on any stream conferred by R.S.Q. 1909, art. 7298, is limited by art. 7349 so as to make the owner thereof liable for all damages inflicted on riparian owners in the exercise of such right.

[*Ward* v. *Township of Grenville*, 32 Can. S.C.R. 510; *Vezina* v. *Drummond Lumber Co.*, 26 Que. S.C. 492, followed; *Fraser* v. *Dumont*, 21 Que. K.B. 365, not followed.]

2. EVIDENCE (§ II H 1—224)—PRESUMPTIONS — NEGLIGENCE — INJURY TO MILL BY FLOATAGE OF LOGS.

Under art. 1054 of the Quebec C.C. a presumption of negligence arises from an injury to a mill from the floatage of logs down a stream, which can be rebutted only by evidence that the obstruction of the stream by the mill itself was the sole cause of the injury.

3. WATERS (§ I C 2—22)—FLOATAGE RIGHTS — NEGLIGENCE — INJURY TO RIPARIAN PROPRIETOR.

Permitting logs to form a jam in a stream above a mill, which the defendant knew was likely to occur, without taking precautions to prevent it, renders him liable for an injury to a mill as the result of efforts to break the jam.

4. DAMAGES (§ III S—355)—MITIGATION — INJURY TO MILL FROM FLOATAGE OF LOGS—PARTIAL OBSTRUCTION OF STREAM BY MILL.

Full damages will not be awarded for injuries to a mill as the result of the defendant's negligence in permitting a log jam to form in a stream above it where the mill itself partly obstructed the stream.

Statement

APPEAL by plaintiff, a mill proprietor, in an action for damage done to his mill by lumbermen in floating their logs and in the use of dynamite to break up a jam.

J. B. Prevost, K.C., for plaintiff, appellant.

G. Rochon, for defendant, respondent.

The judgment of the Court was delivered by

Carroll, J.

CARROLL, J.:—Pepin is the proprietor of a saw and flour mill on the Riviere aux Mulets, in the county of Terrebonne. He complains that Villeneuve & Co. caused him damages in the sum of $2,480. Villeneuve & Co. are owners of timber limits, and it is alleged that in the spring of 1904 they floated a large quantity of logs in the aforesaid river. In April they opened gaps which resulted in extraordinary swelling of the waters. Pepin alleges that the opening of these gaps resulted in the coming down of a large number of logs which stopped behind his mill and accumulated there; that in order to release these logs the defendants used dynamite and that the result of this use of dynamite caused the logs to damage part of the mill and to destroy part of the foundations; and that in the autumn,

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through a similar process, the tube was damaged and perforated by the mining operations. The details of the damages are enumerated in the plaintiff's declaration, and the defendants are charged with negligence in floating down their logs. The defendants pleaded in substance that they were not guilty of negligence, and that the plaintiff's mill constitutes an obstruction to the free passage of the logs. The Riviere aux Mulets is neither navigable or floatable. Mr. Justice Taschereau so held in 1906, and the evidence of records shews that this judgment is well founded. It is of record that Pepin is the owner of the land on both sides of the river. He is therefore the owner of the bed thereof. But this right of ownership is not absolute; it is subject to the servitude of passage of logs which are floated down by the lumber merchants, subject to their paying damages if any result from this operation.

No doubt where a proprietor builds a mill so as to close up the river, this closing up constitutes an obstruction, and in that case no damage can be due to him. If, however, the obstruction is only partial, we must see to what degree it is the cause of the damages resulting. I cannot concur in the decision rendered in *Fraser* v. *Dumont*, 21 Que. K.B. 365, in which it was held that, in virtue of the provisions of 54 Viet. ch. 25, reproduced in article 7298, R.S.Q., 1909, the right to use the rivers for the floating of timber is an absolute right. This article reads as follows:—

> Subject to the provisions of this special section, any person, firm or company may, during the spring, summer and autumn freshets, float and transmit timber, rafts and craft down all rivers, lakes, ponds, streams and creeks in this province.

It is true that this provision seems to confer an absolute right, and makes no mention of submitting the persons therein mentioned to the obligation of paying damages which they may cause. Nevertheless the article is silent on this point. But it must not be forgotten that the provisions of the statutes 19 and 20 Viet. ch. 40 have not been repealed, and they are reproduced in the Revised Statutes of 1909. Article 7349, R.S.Q., enacts that it shall be lawful to make use of any watercourse for the conveyance of lumber, but only subject to the charge of repairing as soon as possible all damages resulting from the exercise of such rights. Now, as this provision has not been subrogated, and inasmuch as it does not contradict the terms of article 7298, it follows that the anterior law has not been altered. This is not special legislation on a different object, but on a similar object. This being so, it follows that those who make use of watercourses for the conveyance of lumber have no greater rights than those of the riparian owners, but that all of them have equal and concurrent rights.

It was in this sense that Mr. Justice Taschereau interpreted the law in 1906, 16 years after the coming into force of the statute of 1890, in a case between the same parties. He said:—

Considering that, under the circumstances, the defendants who made use of this river for the floating of their logs, in virtue of special rights on them conferred by law, are nevertheless responsible for the damages caused to the plaintiff by the different operations of such floating.

This question came up before the Supreme Court in 1902 in a case of *Ward* v. *Township of Grenville*, 32 Can. S.C.R. 510. Although the judgment only hinged on the question of negligence, Girouard, Davies, and Mills, JJ., expressed their opinion very clearly on this point. At page 526 Girouard, J., discussing the effect of the statute of 1857, said:—

It lays down the rule that the owner of logs or timber floating on a private river is responsible for the damage caused by that passage, whether he is in fault or not, provided, of course, the riparian proprietors are not in fault. It was quite recently applied (1902) by the Superior Court in Sherbrooke (Archibald, J.), confirmed in Review by Tait, A.C.J., Loranger, and Fortin, in *McKelvie* v. *Miller* (not reported).

At page 524:—

We are now brought to face the proposition of law set up by the appellant, that: the use of a river as a highway for logs is the paramount use,—and that the municipal bridge, although lawfully erected, was an obstruction to the river. I cannot assent to that proposition of law. The lumbermen are not the owners of floatable rivers, and no law can be cited which secures them the exclusive use of these streams for the passage of their logs. They enjoy merely a right of servitude for that purpose . . . and must pay the damages caused by their fault, or by the logs and timber under their care.

Davies, J., p. 531:—

The defendants evidently assumed, as in fact they contended at the argument, that their right to float logs down the river was a paramount right to which other rights must yield. I fully agree with my brother Girouard that they have no such paramount right.

Mills, J., concurred in the judgment of Girouard, J., and Strong and Sedgewick, JJ., dissented without any reasons for dissent being given. In the case of *Vezina* v. *Drummond Lumber Co.*, 26 Que. S.C. 492, where a bridge had been carried away by logs, Cimon, J., said:—

The right which the defendant had of floating its lumber on this river imposed duties upon it. The property of third parties had to be respected. It had concurrent rights which had to be conciliated. The bridge should have afforded ample space for the passage of the logs, and this is as a matter of fact what it did afford. There was every facility possible afforded for the passage of these logs under the bridge. But on the other hand the defendant was bound to guide these logs in order that they might not cause damage to third parties.

Even if we were to suppose that no responsibility ensued

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unless negligence on the part of the defendants was proven, then it seems to me that article 1054 C.C. would apply. These logs were under the control of the defendants. They caused the damage and there is a presumption of negligence, a presumption which the defendants must rebut; and this presumption can only be rebutted by proving that the mill constituted an obstruction, and that this obstruction was the sole cause of the damage.

This presumption of negligence is confirmed by the fact that at the spot where the jam occurred none of the defendants' employees were present to prevent it. The gaps were open without any provision being made to prevent the formation of a jam, although the defendants had already been condemned for damages caused to the mill at this spot, and be it noted that in that year a larger number of logs than ever were being floated down, a state of affairs which required additional precautions.

It is true that one of the witnesses states that three or four of the defendants' employees were watching, but it appears that they were on the bridge and not where they should have been. The true version is given by the plaintiff and one of the employees of the defendants, from which it appears that the plaintiff sent a couple of men to advise the defendants that a terrible jam had occurred and to refrain from sending down additional logs.

It is clearly established that the logs were not followed and that no attempt was made to prevent a jam near the mill. In former years there had been jams—there is a curve in the river quite near—and the defendants' employees instead of being at this place to follow the logs and protect the plaintiff's mill, were elsewhere. This lack of precaution is all the more blameworthy inasmuch as there is a fall near this spot, and that a rock from 10 to 12 feet in diameter had fallen into the river obstructing it, which rock was the cause of the accident.

Now this cause was known beforehand, and the defendants should have exercised great vigilance to prevent this jam.

The judgment of the Superior Court states that no damages are due inasmuch as the mill obstructed the going down of the logs. This statement is correct in part only, for it is quite clear that the mill did not obstruct the river completely, and that there remained a sufficient space for the logs to go down.

The estimation of the damages is difficult; the mill was built some forty years ago; certain repairs were made thereto from time to time; the machinery worked very well, thanks to these repairs, but the building threatened to fall into ruins. Two months elapsed between the date of the accident and the date when certain repairs were made to the mill by the defendants. The plaintiff and a couple of witnesses say that the mill

yielded a net revenue of from $12.00 to $15.00 per day, but another of the plaintiff's witnesses states that this figure is exaggerated.

Taking the evidence into consideration I should be inclined to grant under this head $5.00 per day during these two months, a total of $300.00. As to the damages caused to the mill I should assess them at approximately $100.00, making a total of $400.00. From this amount $200.00 must be deducted inasmuch as the mill constituted a partial obstruction. Because it is difficult to appreciate damages is no reason to refrain from awarding them when the proof of record shews that they exist.

The defendants rely on the absence of any putting in default on the part of the plaintiff. The answer to this is that the plaintiff is not claiming damages resulting from the inexecution of a contract, the damages resulting from a *quasi-delict* in which case no putting in default is necessary. The appeal is allowed and the action maintained with costs.

Appeal allowed.

Re CITY OF TORONTO and TORONTO AND YORK RADIAL R. CO.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, Magee and Hodgins, JJ.A. February 13, 1913.

1. APPEAL (§ III A—71*a*)—RIGHT TO—WAIVER—ORDER OF RAILWAY AND MUNICIPAL BOARD.

The right of a municipality to appeal from an order of the Ontario Railway and Municipal Board permitting a street railway to deviate its line, is not lost or waived by the failure of the city to appeal from the mere ruling of the board in favour of the railway company as to the right to deviate when the deviation plan was not approved at that hearing, as it may wait until the making of the formal order and appeal therefrom on obtaining the requisite leave.

2. CARRIERS (§ IV A—519)—BOARD OF RAILWAY COMMISSIONERS—POWER TO PERMIT STREET RAILWAY TO DEVIATE LINE—ABSENCE OF LEGISLATIVE AUTHORITY.

As the Toronto and York Radial Railway Company is not authorized by legislation to deviate its line from Yonge street, in the city of Toronto, to a private right of way, the Ontario Railway and Municipal Board is without jurisdiction to permit it to do so.

Statement

THE Toronto and York Radial Railway Company applied to the Ontario Railway and Municipal Board for the approval of its plan, profile, and book of reference, for the deviation of its line westerly from Yonge street to the southerly end of its Metropolitan division.

The Board, on the 16th October, 1911, after the application had been heard, expressed the opinion that the company had the right to deviate its line, to leave Yonge street, a public highway, upon which it operated, and get on its own right of way (a private way which it was endeavouring to acquire).

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The Chairman then stated that he would put in writing the reasons for the opinion of the Board; and, on the 25th October, 1911, he delivered a written opinion, in which he referred to the statute 56 Vict. ch. 94, secs. 4 and 5 (O.), and said that this legislation had the effect of giving the company the right to run from its then terminus in Toronto, the same as its present terminus, either on a highway or on a private right of way. It also gave the company the right of expropriation. The only limitations placed upon the rights of the company are when the cars run along highways. The clauses of the Railway Act referred to in sec. 5 give the right of expropriation.

The learned Chairman also referred to the company's private Act of 1911, 1 Geo. V. ch. 134, secs. 1, 5, 6 (O.), and to secs. 55 and 99 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, and said that, by reason of the legislation mentioned, the Board came to the conclusion that the company had the right to deviate from the highway to its own right of way; but, when it became necessary to cross public highways, the Board were of opinion that the company should be put upon terms to cross such streets either by tunnel or by viaduct, or by both, if at all possible, and if within the financial ability of the company.

The Corporation of the City of Toronto opposed the application, but did not seek to appeal from this decision or ruling of the Board.

There were further hearings before the Board; and on the 17th June, 1912, the Board made an order approving the plan, profile, and book of reference filed by the company on the 30th May, 1912.

Reasons for the order were given by the Chairman of the Board as follows:—

The Board decided, at the sitting held on the 16th October last, that the company had the right to deviate its line and leave Yonge street and get on its own right of way. The Board's reasons for this finding appear in the written opinion of the Board, dated the 25th October last. There has been no appeal to the Court of Appeal from this decision. The Board were of opinion that the deviation should be on terms to cross streets either by tunnel or viaduct or by both, if at all possible, and if within the financial ability of the company.

We directed our engineer to prepare plans of overhead crossings and give us an estimate of the cost. He reported that the overhead crossings would cost over half a million. The city declined to contribute anything towards the scheme of a grade separation. It was clear to the Board that it was a matter of utter impossibility for this small road, the gross earnings of which only amounted to about $200,000, and its net earnings to about $29,000 per annum, to put half a million into the work of grade

separation. Therefore, the Board regret that their desire for grade separation could not be carried out.

On the 22nd May, we directed the company to file a revised plan shewing the crossing of the streets on the level, with a statement as to how it proposed to protect the public at these crossings, and adjourned further hearing until the 31st. The matter was again adjourned, at the request of the city, to the 11th June, to give the city a further opportunity to file plans with the Board.

The city has filed plans shewing how the company could leave Yonge street about ten feet north of the retaining wall of the Canadian Pacific and Canadian Northern subways, and run direct into its proposed terminal.

Since hearing the evidence of all parties that was adduced on the 11th June, the Board have carefully considered, with their engineer, the company's and the city's plans. The Board have concluded to approve the company's plan and book of reference. The city's plans are designed for the company continuing to run on Yonge street, north of Farnham avenue, and not on its own right of way, and they do not lessen the present dangerous condition of all the company's traffic crossing the sidewalk at Yonge street. In fact, the condition is rendered more dangerous by reason of the subways. If the city's plans were adopted, all the company's traffic would have to go over one track to their terminal. The city's loop plan requires a reversed movement, and their stub plan requires a reversed movement both for incoming and outgoing cars. On our engineer's recommendation, we reject the city's plans, because we are of opinion that, both from an engineering and operating standpoint, they will create a dangerous condition and call for construction unsuitable to the company's traffic.

It was urged on behalf of the city that the company, by getting on its own right of way, was endeavouring to turn a terminable franchise into a perpetual right. We cannot see that such a result will follow. In any event, such a suspicion would be no reason why this Board, by the indirect method of imposing impossible or unreasonable conditions, should prevent the company from exercising its clear statutory right to deviate to its private right of way.

For the protection of the public, the company will require to run its cars each way from Farnham avenue to its terminal not faster than six miles an hour. The cars will require to stop before crossing some of the streets. We will settle definitely, with the assistance of our engineer, the whole question of protection, before the company commences operation on the deviated right of way. We reserve further directions.

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Argument

Upon the application of the Corporation of the City of Toronto, an order was made by the Court of Appeal on the 16th September, 1912, giving the corporation leave to appeal from the order of the Board of the 17th June, 1912, without prejudice to the rights of the company, and reserving leave to the company to urge upon the hearing of the appeal all objections which it could have urged to the granting of this order.

Irving S. Fairty, for the appellant corporation, urged that the Board had no jurisdiction to make an order allowing the respondent company to deviate from its line upon Yonge street, and the respondent company had no right so to deviate: Ontario Railway Act, 1906, sec. 199; 40 Vict. ch. 84; Statutes of Canada, 1859 ch. 66, sec. 8; 1 Geo. V. ch. 134, secs. 1 and 6 (O.); *City of Toronto* v *Metropolitan R.W. Co.* (1900), 31 O.R. 367. Section 55 of the Ontario Railway Act, 1906, does not apply to street railways. On the question as to when the appeal should be taken, he referred to *Thompson* v. *Robinson* (1889), 16 A.R. 175, 184; *Wallace* v. *Bath* (1904), 7 O.L.R. 542.

C. A. Moss, for the respondent company, argued that the appeal should not be heard, as the time for appeal had long since gone by, and it would be inequitable now to permit it. The respondent company had proceeded with the necessary works at great expense; and, if interfered with, it would lose large sums of money. On the merits, the order appealed from was just and right, and should be affirmed. The Act 1 Geo. V. ch. 134, sec. 6, makes all sections of the Ontario Railway Act applicable to the Metropolitan Railway. He referred to the following statutes: 56 Vict. ch. 94, secs. 4, 5 (O.); 40 Vict. ch. 84 (O.); 60 Vict. ch. 92 (O.); secs. 55 and 199 of the Ontario Railway Act, 1906.

Fairty, in reply.

Maclaren, J.A.

February 13, 1913. MACLAREN, J.A.:—The City of Toronto moved this Court for leave to appeal from an order of the Ontario Railway and Municipal Board, of the 17th June, 1912, approving of the plans, profile, and book of reference of the said company filed on the 30th May, 1912; and on the 16th September, 1912, leave was granted; the company to be at liberty to urge upon the hearing of the appeal all objections which it could have urged to the granting of the motion.

At the hearing, the objection was renewed that the city should have appealed from the ruling or opinion of the Board of the 25th October, 1911, which declared that the company had the right to deviate from Yonge street, within the city, near its southern terminus, to its own right of way. I am of opinion that there were no such laches or acquiescence on the part of the

city as would disentitle it to appeal from the operative order of the Board made on the 17th June, 1912, as the city was entitled to wait and see what deviation, if any, the Board would sanction and approve.

The company claimed that it had the right to make the deviation in question under secs. 4 and 5 of the Ontario Act 56 Vict. ch. 94. A reference to these sections, however, shews that the road thereby authorised was an extension from its then northern terminus (which was a considerable distance north of the deviation approved by the order now appealed from) to Lake Simcoe.

The company also relied upon its original Act of incorporation, 40 Vict. ch. 84, upon 60 Vict. ch. 92, and 1 Geo. V. ch. 134; but I cannot find anything in any of these which would authorise or justify the proposed deviation from Yonge street, within the limits of the city, without the consent of the corporation, nor anything that would give jurisdiction to the Railway and Municipal Board to authorise or approve of the company's plans for such deviation, at the southern terminus of the line of the company, within the limits of the city.

Maclaren, J.A.

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

MEREDITH, J.A.:—Questions of much importance are raised by this appeal; and, in the view I take of this case, these two must now be considered: (1) Is this appeal barred by lapse of time? And (2) are the respondents authorised by law to construct their line of railway, as they purpose doing, under any circumstances?

Meredith, J.A.

On the first question my opinion is, that the right of appeal is not so barred; and that leave to appeal was properly granted. I cannot look upon the ruling of the Board, upon a preliminary question, as a decision or order against which an appeal ought to be taken, as if it were final. There was nothing, that I know of, to prevent the Board altering, or disregarding altogether, that ruling before making any more final order such as that in question. It may, no doubt, be very convenient and quite proper to make such a ruling with a view to getting the judgment of this Court upon a vital question which may control largely, or indeed, altogether further proceedings in the matter; but I cannot think that failure so to appeal ought to be made conclusive against an application subsequently made for leave to appeal, though it might very materially affect the terms upon which leave should be granted.

Nor can I think that work done by reason of no such appeal having been taken should, in a case such as this, preclude altogether an appeal. The question is one of jurisdiction. If

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Meredith, J.A.

there be no jurisdiction, it is better to have it determined now than when more work has been done; and, in this Court rather than upon a criminal prosecution or other proceeding, in which the jurisdiction of the Board might be called in question indirectly. I cannot think that an unappealed "decision or order" of the Board, in a matter beyond its jurisdiction, is binding as if it were one within its jurisdiction. And so, notwithstanding the view of the appellant corporation that no appeal lay, and notwithstanding all that has happened in the meantime, it seems to me to be in the interests of all parties that the second of the two questions I have set out should be determined now, by this Court—to be followed, if any of the parties desire it, by such further appeal as the law may allow.

Then, upon the main question: I am unable to find, in any of the enactments relied upon, any authority for the respondent company removing its railway from Yonge street, at the place in question.

It is true that, in the early part of the proceedings before the Board, the appellant corporation more than once expressed the desire to have the railway removed from that part of Yonge street; and it was whilst that state of affairs existed that the ruling in favour of the right of removal was made; but, later on in the proceedings, the appellant corporation appears to have got more light upon the subject; at all events, it more than once objected to the change of situation, and referred to the real cause for the desire to make it.

The case might be very different if the appellant corporation were the owners of the highway, but that is not so; the public have the highest rights in it; the appellant being in the character of conservator of it for the use of the public.

I can, as I have said, find nothing, in any of the enactments to which we have been referred, giving the right to take the railway from Yonge street and place it elsewhere, as the respondent company is substantially seeking leave to do. Such a right, if intended, should, and doubtless would, have been given in reasonably plain language. To the contrary, the whole legislation, up to that of the year 1911, seems to me to point to a railway upon Yonge street only, at the place in question. Giving some power to expropriate lands for the purposes of this railway, and indeed of any street railway, is not at all inconsistent with this view of the legislation in question: roads which run solely upon highways must have land elsewhere for car-sheds and other purposes, and so a need for power to expropriate.

In regard to the Act of 1911, if the respondent company come within its provisions, then the consent of the municipality is required, and has not been obtained; if, on the other hand, because the intention is merely to cross, not to run along, high-

ways, the Act is not applicable, the right to cross is not conferred by it, but must be found elsewhere, and is not.

The Board was of opinion that the enactments in question conferred the right to change now the situation of the railway, apparently in whole or in part; and relied for that opinion upon the Act of 1893. But that Act relates to a railway north of the then northern terminus; and, as I understand it, the place in question was then and is now the southern terminus; and, whether that be so or not, the respondent company exercised its right of selection of the place of its line of railway; and I can find nothing in the enactment permitting it to change, when and how it might choose, a line so laid down; it can hardly be possible that any one ever had such an intention.

It was also contended for the appellant corporation that the proposed new line would "be constructed upon or along a street or highway," and so, under the plain words of the Act, requires the consent of the municipality; but in that I am unable to agree; I cannot consider that merely crossing a street is within the words "upon or along" a street.

The Board also relied upon the power of expropriation, as to which I have already said why I cannot consider the giving of that power evidence of the giving of power to build elsewhere than upon a highway.

They also relied upon the Ontario Railway Act of 1906, sec. 55; but, if there is no power to change the location of the line, that enactment cannot be held to confer the power: a deviation may be permitted, but surely only from one place to another in which the line may lawfully be placed. And there can be really no pretence that this case comes within that section, which allows a deviation for these purposes only: (1) lessening a curve; (2) reducing a gradient; (3) or otherwise benefiting such line of railway, or for any other purpose of public advantage. The plain purpose of the proposed change is, I have no doubt, to make perpetual elsewhere a right upon Yonge street which will in a year or so end. If there is a right to renew life in that way under any other enactment, let it be renewed accordingly; but not under the pretence of a deviation to improve the running qualities of the line, or of being for the public advantage.

Section 199 of the same enactment, of 1906, was also relied upon by the Board; but that section is expressly in accord with the view I have already expressed, that there can be no "deviation" to a place upon which the railway company has not already a right to lay its line; it may deviate from the highway "to the right of way owned by the company."

I do not stop to consider whether all these enactments are or are not applicable to the respondent company; if they are, they do not, in my opinion, support the ruling of the Board.

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Upon the whole case, I am obliged to say that I cannot consider that the Board had the jurisdiction which they exercised in their later order, and asserted in their earlier ruling.

If it be right that the change of location of the line should be made lawful, the Legislature alone can give effect to such right.

The appellant corporation should not have its costs; its vacillation should, at the very least, deprive it of all right it otherwise might have in that respect.

HODGINS, J.A.:—The parties to this application would be bound by any question of fact decided in *City of Toronto* v. *Metropolitan R.W. Co.*, 31 O.R. 367. While they are at liberty to question the view of the learned Judge upon the law, it should be shewn to this Court that his view was erroneous.

The Metropolitan Railway Company, the predecessor of the respondent company, claimed the right to go through and over Yonge street, in the city of Toronto, or to occupy, expropriate, or otherwise force its way across that thoroughfare, without the consent of the corporation, and the Court held that neither as a street railway nor as a railway had it that right.

I accept the construction put upon 40 Viet. ch. 84, at p. 384 of that judgment. By sec. 8, the right of the respondent's predecessor in Toronto upon "streets and highways and railway tracks and lines," is expressly subject to municipal consent; and, by sec. 2, the sections of the C.S.C. ch. 66, as to "powers," "plans and surveys," and "lands and their valuation," apply only to lands outside of Toronto.

On the 25th June, 1884, that company obtained the exclusive right from the County of York to construct a street railway or tramway on Yonge street, from the northern limit of the city of Toronto northward to Eglinton. This agreement assumes, and recites, a power to cross streets; but it expressly provides (sec. 3) that the roadway, track, and rails of the said rail or tramway shall be located and constructed on the west side only of the said street (Yonge street).

On the 20th June, 1886, the franchise given by that agreement was extended till the 25th June, 1915, *i.e.*, the right to construct a street railway or tramway upon Yonge street and on the west side thereof only.

On the 20th August, 1888, as pointed out in the case referred to (pp. 381-2), the County of York transferred 1,320 feet of Yonge street to the City of Toronto, which section of road had been in 1887 brought within the limits of the city. The southern terminus of the respondent's railway and the southern part of its railway thus came to be, in 1888, within the territory of the City of Toronto, who took the road subject to the rights of the company under the agreements quoted and of the public.

In 1893, an Act was passed, 56 Vict. ch. 94, which, by sec. 4, gave the right to extend northerly from the then northerly terminus, and by sec. 5 provided that "all the powers, privileges, rights, and authorities" in the Railway Act and amendments which were set forth and made a part of the Act incorporating the company, "may be exercised in any municipality where the line of the company is constructed or is by this Act authorised to be constructed."

Falconbridge, J. (31 O.R. 367), held that the Act only applied these sections to the extensions. I agree with this, because I do not think its language requires it to be construed as repealing the clause excepting Toronto, nor as completely changing the character and location of the road, or giving power to do so, and particularly because it would enable the respondent company to commit a breach of the agreements quoted, under which its rights were given for twenty-one years, and afterwards extended to thirty-one years, by enabling it, under the cover of most general words, to remove its line from Yonge street, and from the west side thereof, and to operate it elsewhere. This view is confirmed by sec. 11; and see 60 Vict. ch. 92, sec. 6, proviso.

But, if this provision did give the company any additional rights in Toronto, they must be read as subject to the condition on which the original powers were granted to the company, *i.e.*, to construct, maintain, complete, and operate along the streets and highways, only with the consent of the municipality then concerned. The Act of 1897, 60 Vict. ch. 92, by sec. 1, recognises that the agreements made and franchises previously acquired by the company are valid and binding on it.

By 1 Geo. V. ch. 134, sec. 1, the respondent company was given power to survey, lay out, construct, complete, equip, and maintain, between such points as the respondent company and . . . the Metropolitan Railway Company "are now empowered to lay out, construct, maintain and operate railways, extensions and branches, either upon such highways as may be agreed upon between the different municipalities having the respective control thereof, and the company, or upon private right of way, or upon both such highways and such private right of way."

It can hardly be argued that this Act gave the right to build a new line from the present southern terminus to the northern terminus wholly on a private right of way, or, if so, that it involved the right to cross streets without permission; but it is relied on as giving the right to build upon the new right of way, which I do not think is properly covered by the words used. To do so requires the crossing of streets; and, therefore, this Act does not aid much upon that, as it does not deal with it at all.

That right is, however, by sec. 1, expressly made subject to

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the consent of the electorate, under (1909), 9 Edw. VII. ch. 75, and that before any street can be occupied by the company. The repeal of that Act, and its re-enactment with a saving clause as to earlier franchises, need not be further considered.

By sec. 6 of 1 Geo. V. ch. 134, the Ontario Railway Act, 1906, was made to apply to the respondent company and to the railways constructed or operated by it, "except where inconsistent with" 61 Viet. ch. 66, 6 Edw. VII. ch. 124, and with the Act itself.

The sections of that Railway Act relied upon must, therefore, not conflict with anything found in these three Acts. The Board, in the written reasons to be found on pp. 46 and 47 of the appeal-book, rely upon two sections, 55 and 199. If the respondent company is a railway (which I doubt, notwithstanding the use of the word "railway" in some of its Acts)—see *Toronto R.W. Co.* v. *The Queen*, [1896] A.C. 551—and, therefore, able to rely on sec. 55, I cannot see that it has any application, unless "public advantage" covers everything and anything a public utility company may do—a construction which I do not think was pressed before us, and which I do not adopt.

Section 199 refers to a "deviation," but what is proposed here is not a deviation but a diversion of the road, which might as well begin at Newmarket as at Farnham avenue, and is really a stub-line. "Deviation" means a leaving of and returning to the line, and is, I think, well-understood. The provision that the company may at any point or points where its railway may run *along the highway* deviate from such highway to the right of way owned by the company, indicates this. If that is not a correct construction, then any street railway by "deviating" can run off anywhere it likes. See as to the meaning of "deviation," *County of Victoria* v. *Peterborough* (1888), 15 A.R. 617; *Herron* v. *Rathmines and Rathgar Improvement Commissioners*, [1892] A.C. 498; *Doe d. Armitstead* v. *North Staffordshire R.W. Co.* (1851), 16 Q.B. 526.

But the strongest argument against the application of either of these sections is, that, thus construed, they are inconsistent with the confirmation and recognition of the terms of the franchise right obtained by the respondent company's predecessor, and relied upon by the appellant, and are inconsistent also with the liability accompanying that right, and, therefore, with the provisions of 61 Viet. ch. 66 and 6 Edw. VII. ch. 124.

In the former Act, by sec. 6, the respondent company acquired and had vested in it the railway franchises, rights, etc., of the original company, and was "substituted for" and stood "in the place of the vendors in every agreement with every such municipal corporation."

By sec. 23 it is very distinctly set out that the acquisition

of these franchises shall not enlarge or extend them, or enable the appellant company to exercise the powers to any greater extent than under the agreements with municipal corporations, which agreements and any obligations thereunder were not, by that Act, impaired, altered, affected, or prejudiced. The statute 6 Edw. VII. ch. 124, in sec. 3, contains provisions similar in effect.

If, therefore, the company obtained a franchise for twenty-one years, and renewed it for another ten years, upon an agreement to build and operate a street railway or tramway upon the west side only of Yonge street, I am unable to see how the sections referred to in the Ontario Railway Act, 1906, can be relied on to enable it to leave Yonge street, which would be contrary to the original agreement and inconsistent with the Acts which incorporated and dealt with the respondent company. The powers of the Board should be exercised according to the intent and meaning of sec. 12 of the Ontario Railway and Municipal Board Amendment Act, 1910, 10 Edw. VII. ch. 83, added by 1 Geo. V. ch. 54, which was not referred to on the argument.

Hodgins, J.A.

I do not think the appellant can be debarred from an appeal under the circumstances of this case. Manifestly, the original order of the Board intended to permit deviation and require subway or viaduct crossings. The last order completely departs from this, and allows the crossing of the streets on the level.

I think the appellant might fairly wait and see what the Board's order really meant. The first order might have been satisfactory to the city—indeed, it looks as if it would have been, if left alone—but the last order was not.

The power of the Board is permissive. It may grant the order upon such terms as seem just. These terms were not defined until the 17th June, 1912, and then the protection to be afforded to the citizens was not defined.

I think the order from which an appeal lies is the effective and not the tentative order, because very often the practical and not the technical legal result is what determines a party either to appeal or to submit.

The order of the Board should be set aside. There should be no costs.

Garrow and Magee, JJ.A., concurred.

Garrow, J.A.
Magee, J.A.

Appeal allowed.

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June 18.

MONTREAL STREET R. CO. v. BASTIEN.

Quebec King's Bench, Trenholme, Lavergne, Carroll and Gervais, JJ.
June 18, 1913.

1. HIGHWAYS (§ IV B 6—204)—STREET RAILWAYS IN—LIABILITY FOR PROTRUDING RAILS.

Where a city by-law declared that a street railway company should be responsible for all damages occasioned by the construction, maintenance, and operation of its railway, it is answerable for injuries sustained by the plaintiff who was thrown from a vehicle by the striking of a wheel against a rail that was four inches above the surface of the street, notwithstanding the rail had originally been laid flush with the street and its elevation was due to acts of the city in repairing the street.

[*Alldred* v. *West Metropolitan Tramway Co.*, L.R., [1891] 2 Q.B. 398; and *Howit* v. *Nottingham Tramway Co.*, 12 Q.B.D. 16, distinguished.]

Statement

APPEAL by defendant from a judgment for plaintiff in an action for damages for personal injuries resulting from the alleged negligence of defendant.

The appeal was dismissed.

A. R. Holden, K.C., for appellant.

Paul St. Germain, K.C., for respondent.

The opinion of the majority of the Court was delivered by

Carroll, J.

CARROLL, J.:—This is an appeal from the judgment of the Superior Court condemning the appellant to pay respondent $500 damages. The amount claimed was $1,999.99.

Bastien was driving down Papineau avenue on October 13, 1911. He had crossed the C.P.R. tracks which cut through Papineau avenue. A little lower than this railway crossing the appellant has laid rails in Y shape, so as to manoeuvre its cars and turn them around. At this spot Bastien's vehicle struck the rail which was four inches higher than the ground, the seat of his carriage was overturned and the respondent thrown to the ground. His leg was broken. The facts are not contradicted; the case turns entirely on a question of law.

Article 27, of by-law 210, of the city of Montreal, which forms part of the contract between the city and the company appellant, enacts that company will be responsible for all damages occasioned by the construction, maintenance, repairs or operation of the railway. It is admitted that the rails should be laid flush with the ground. The respondent bases his action on this article, and in the common law.

The company, by its plea, avers that it is not liable inasmuch as its rails were originally laid flush with the ground, but that some three months previously the city did some work at this spot requiring the removal of earth near the tracks, and that after the city had refilled its excavations the ground subsided; hence the company concludes that, as it is not bound to main-

tain the streets in order, the respondent or the city is solely to blame for the accident. The company relies on two cases: *Alldred* v. *West Metropolitan Tramways Company*, [1891] 2 Q.B. 398, and *Howit* v. *Nottingham Tramways Co.*, 12 Q.B.D. 16.

I have carefully examined these two cases. There the accidents occurred as a result of the rails emerging above the ground level owing to the failure of the municipality to properly maintain the streets, but the cases were decided under an English statute, the Tramway Act of 1870 (33-34 Vict. ch. 78), which allowed the company to enter into contracts with the municipal corporations for the repairing of the streets and contracts to this effect had actually been entered into between the tramway companies and the corporations. So it was held in these cases that the company was not responsible inasmuch as the accident was due to the defective condition of the street. These two cases did not prevent the Lord Chief Justice from declaring in 1901 (*Barnett* v. *Mayor, etc., of Poplar*, 70 L.J. Q.B. 698), that

> But for the decisions in *Howit* v. *Nottingham Tramways Company, supra*, and *Alldred* v. *West Metropolitan Tramways Company, supra*, there would have been a great deal that could be said in favour of the view that the action should be brought against the Tramways Company.

These two cases were decided on the contract between the parties, but no contract of this kind appears between the city of Montreal and the Montreal Street Railway. As to the damages resulting from the construction and the maintenance of the railway track the city has imposed them on the company by art. 27 of by-law 210. A fairly similar case was decided in 1884: *Parker* v. *Montreal City Passenger Railway, sub nom. Montreal City Passenger Railway* v. *Parker*, 7 L.N. 194, *sub nom. Montreal City Passenger Railway* v. *Parker*, 8 L.N. 393, and Cassel's S.C. Digest, 2nd ed., 731.

Parker sued the company for having been thrown out of his vehicle by the bad state of repairs of the track. Torrance, J., condemned the company in the sum of $2,500 because the rail exceeded the ground by about three inches, contrary to law. His judgment was reversed in appeal, Dorion, C.J., dissenting, but restored by the Supreme Court. I am happy indeed to be able to arrive at this conclusion as otherwise the inconvenience upon injured third parties would be great indeed. Third parties usually look to those who are the direct authors of the tort.

If the company has any rights—and on this point we express no opinion—it may exercise them according to law. The judgment is confirmed.

CROSS, J., dissented. Cross, J.

Appeal dismissed.

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Mar. 3.

MORRISON v. PERE MARQUETTE R. CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 3, 1913.

1. CARRIERS (§ II L—240)—STATION HOUSE—FAILURE TO PROVIDE—EXPOSURE OF PASSENGER TO ELEMENTS—ILLNESS—LIABILITY FOR.

The failure of a railway company to provide a suitable station house at a regular stopping place, as required by sec. 284 of the Canada Railway Act, renders it liable for the resultant illness occasioned a passenger from exposure to the elements while waiting at night for a train.

[*Morrison* v. *Pere Marquette R.R. Co.*, 4 O.W.N. 544, 27 O.L.R. 551, affirmed.]

Statement

APPEAL by the defendants from the order of a Divisional Court, 4 O.W.N. 544, 27 O.L.R. 551, affirming the judgment of Britton, J., 4 O.W.N. 186, 27 O.L.R. 271.

The appeal was dismissed.

Argument

D. L. McCarthy, K.C., and *R. L. Brackin*, for the defendants. The damages claimed are too remote; and the case of *Hobbs* v. *London and South Western R.W. Co.* (1875), L.R. 10 Q.B. 111, as modified by *McMahon* v. *Field* (1881), 7 Q.B.D. 591, relied upon by the plaintiff, is not applicable to the facts of this case. In the *Hobbs* case, the woman caught cold from being put off at the wrong station. In this case, the man caught cold because there was no station. The evidence at the trial being consistent with two theories as to the plaintiff's condition at the time of the trial, one set of medical men suggesting that the catching cold on the night in question might have given rise to his illness, and another set saying that the diagnosis clearly pointed to "walking typhoid," it was the duty of the learned trial Judge to have withdrawn the case from the jury, on the ground that the suggested damages were too remote, and that they were not a natural and probable consequence of the failure to supply a station, nor could it be contemplated by the parties that their failure to supply a station in the month of July would result in persons waiting for the train taking cold. *Toronto R.W. Co.* v. *Grinsted* (1895), 24 S.C.R. 570, was also referred to and distinguished.

J. H. Rodd, for the plaintiff, was not called upon.

Mulock, C.J.

At the conclusion of the argument on behalf of the defendants, the judgment of the Court was delivered by MULOCK, C.J.:—The plaintiff, who resided at Walkerville, on the line of the defendants' railway, bought a return ticket from Walkerville to Marshfield (a stopping-place on the defendants' railway), and proceeded to Marshfield, intending to return by the evening train, which was due at Marshfield shortly before nine o'clock in the evening. There had been a station building at Marshfield, but it had been burnt down a couple of years before, and not rebuilt. The point, however, continued as a stopping-place on the line of railway.

The plaintiff arrived there, to take the return train, shortly before it was due, but the train was late—how late was not made known. There was no place of shelter to which the plaintiff could go in order to await the arrival of the train; accordingly, he was obliged to remain at the stopping-place in question; and, being thus exposed to the weather for a considerable length of time, contracted an illness; and this action is brought for damages because of such illness, caused by the omission of the defendant company to establish a proper building.

It was argued before us that the plaintiff's claim for damages was too remote; and reliance was placed upon claims for damages of that nature arising from breach of contract; but the cause of action here is a statutory one. Section 284 of the Railway Act of Canada declares that "the company shall furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping-places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway;" and sub-sec. 7 of sec. 284 declares that "every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action against the company, from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants."

Here it was shewn that the company had failed to supply adequate and suitable accommodation at Marshfield, the stopping-place in question, whereby the plaintiff was exposed to the weather and contracted the illness complained of.

There was evidence, which could not have been withdrawn from the jury, that the plaintiff's illness was occasioned by the defendants' failure to observe the provisions of the section in question; and we agree with the view of the Divisional Court and of the learned trial Judge that, the plaintiff's cause of action being a statutory one, he is entitled to maintain this action in respect of the injury occasioned to him by the defendants' failure to discharge their statutory duty.

Appeal dismissed with costs.

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April 12.

REX v. BARKER.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, and Drysdale, JJ. April 12, 1913.

1. EVIDENCE (§ VII I—637)—SPEED OF AUTOMOBILE—EVIDENCE BASED ON SPEEDOMETER—OPINION—PREFERENCE.

Evidence of the driver of an automobile and of his wife, as to the speed of the car, based on a shewing of a speedometer, is to be preferred in a prosecution for operating a motor vehicle at an unlawful speed, to mere opinion evidence.

2. APPEAL (§ VII L 5—515)—HEARING—REVIEW OF FACTS—SECOND APPEAL WHERE FIRST IS A TRIAL DE NOVO.

The findings of a county court judge upon an appeal from a summary conviction, where such appeal is in effect a re-hearing of the witnesses, and a trial *de novo* will not be disturbed on a further appeal, unless it appears that the county court judge was clearly wrong on the merits; and this doctrine applies where the county court judge preferred to follow the line of testimony discredited by the magistrate and consequently has reversed the latter's findings of fact.

Statement

APPEAL from the decision of the Judge of the County Court for district No. 5, allowing with costs defendant's appeal from a conviction made by a stipendiary magistrate of the county of Pictou, whereby defendant was convicted and fined, and in default of payment ordered to be imprisoned in the common jail of the county, for operating a motor vehicle on one of the streets of the town of Pictou at a rate of speed greater than one mile in five minutes, contrary to the provisions of the Motor Vehicle Act and Acts in amendment thereof.

The ground upon which the judgment of the learned County Court Judge proceeded was that the evidence of defendant and his wife, substantiated as it was by a speedometer, was to be preferred to the opinions of the informant and another witness not so fortified.

The appeal was dismissed.

J. U. Ross, K.C., for appellant.

R. G. McKay, for respondent.

The judgment of the Court was delivered by

Drysdale, J.

DRYSDALE, J.:—The defendant was convicted by a magistrate for exceeding the speed limit in the town of Pictou. An appeal was asserted and the cause tried *de novo* before the learned County Court Judge for district No. 5. That learned Judge, on the evidence taken before himself, found in favour of the defendant, and set aside the magistrate's conviction; from this finding we have heard an appeal.

Unless the evidence shews that the learned County Court Judge was clearly wrong on the merits, I think we should not disturb his findings. After hearing argument and after a perusal of the notes of evidence taken in the County Court, I am

not satisfied the said Judge was in error. I think I would have come to the same conclusion, at all events I am not satisfied that the evidence warrants a reversal of the learned County Court Judge's finding.

I would dismiss the appeal with costs.

Appeal dismissed.

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PHALEN v. GRAND TRUNK PACIFIC R. CO.

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June 27.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. June 27, 1913.

1. MASTER AND SERVANT (§ II E—114)—DUTY TO INSPECT—NEGLIGENCE—LATENT DEFECTS—ICE IN CAR COUPLER.

The duty of a railway company to inspect cars for defects was discharged, so as to absolve it from liability for an injury to a brakeman through the failure of an automatic car coupler of the best known type to work properly by reason of an accumulation of ice inside it, where the car on its arrival at a station was given the usual inspection, and no practicable system of inspection would have disclosed the presence of the ice.

Statement

APPEAL by the defendants from a judgment in favour of a railway brakeman for injuries sustained by being thrown from a car as the result of the failure of a coupler to work properly by reason of ice forming on the inside of it, which could not have been discovered by any practicable method of inspection.

The appeal was allowed.

R. M. Dennistoun, K.C., and *A. Hutcheon*, for the defendants.
M. G. Macneil and *B. L. Deacon*, for the plaintiff.

Howell, C.J.M. (dissenting)

HOWELL, C.J.M. (dissenting):—It appears that a freight train was brought into the station and the engine was cut off and taken to the round-house. There was a casual inspection with a lantern, and the couplers were casually looked at and the wheels tapped.

There were orders to cut out from the train a Grand Trunk car and put it on a siding, and to do this a yard engine was coupled to the train, head on, and then all the rear-end cars up to the one to be shunted—about ten or twelve—were uncoupled and the yard engine pulled out the rest of the train, having the car to be shunted at the rear end. Having taken these cars near the switch where this one was to be placed, Taylor, the conductor of the freight train, Ault, a switchman, the engineer and the plaintiff, prepared to make a flying switch. To do this it was necessary for the engineer to sharply back the train—"give it a kick"—and this must be followed by Ault lifting the lever to disconnect the coupling to separate this last car from the train, and the plaintiff must, at the same time, climb on this last car so as to apply the brake to stop the car at the proper place on the siding.

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Howell, C.J.M. (dissenting)

It was the duty of the engineer, after giving the train a sharp, quick start, to abruptly stop it so that the car to be shunted would be sent into the siding and the train stop short of the switch. The plaintiff climbed up the ladder at the rear end of the car, and when Ault attempted to uncouple the car properly after they had been pushed together, the lever would not lift the pin or block and the car remained attached to the train, and when the engineer applied the brakes, and perhaps also reversed suddenly to stop the train, this last car was also suddenly stopped, and the plaintiff was thrown off the car at the rear end and his right arm was cut off.

All these men depended upon, and the whole work depended upon, the car being disconnected at the right moment; in other words, all depended upon the lever lifting the pin of this one coupling at the right moment. As I understand this coupling, the cars must be pushed together or "in the slack" before there can be uncoupling. It might be unreasonable to expect an examination of each coupling of a train on arrival, but it does seem to me that where there is to be an uncoupling, as in this case, and where so much depends upon the lever lifting the pin at the right moment, and where it could be so easily tested just before the engineer gives "the kick," it would not be unreasonable to expect an examination or test of the coupling in question to see if it was in working order just before this operation began. Witnesses for the defendants shew that there is a liability to jam by reason of cinders, sand, gravel and ice, and therefore the greater necessity for testing or inspecting.

The coupling was not at that time in working order, and this caused the damage to the plaintiff. The jury say the plaintiff was not negligent. They say the defendants were negligent and that their negligence caused the damage to the plaintiff.

In answer to a question as to the negligence of the defendants, the jury answer: "Through lack of proper inspection." Perhaps the jury thought that just before the final shunting the lever should have been inspected and tried to see if the coupling upon which so much depended was in working order. The train had just come in from a long run, and I would think it reasonable that before the flying switch was attempted there should be a test when the portion of the train was ready to back for that switch, to see if the particular coupling upon which so much depended would operate at the critical moment.

Counsel for the defendants did not argue the question whether an action would lie here for this wrong, and apparently admitted that the law of common employment did not apply.

The majority of the Court differ from me by holding that there was no evidence of negligence upon which the jury could find as they did, and it would be idle for me to follow the question further.

I think there was evidence upon which they might find as they

did. Whether upon that finding an action will lie in this Court need not be discussed, as the decision of the majority of the Court disposed of the case against the plaintiff.

RICHARDS, J.A.:—In reply to the first question, the jury found the defendants guilty of negligence. To the second question asking in what the negligence consisted, they replied: "Through lack of proper inspection."

The use of the word "proper" makes it somewhat doubtful as to what was meant by that answer. If it implied that the jury believed that, on the arrival of the train at the place of inspection, all the couplings in the train should be tested by raising the pins, to shew that the couplings were all in working order, I think they were asking a degree of care that is impossible in practical working. Such an inspection might disconnect the whole train.

But it does not seem necessary to imply that they took that view. The inspector made some sort of an inspection of the train when it came in, and, if he did not, in passing the coupler in question, look carefully enough to see if there was snow or ice visible on its top, then his inspection was not a proper one. It seems to me that that might be the view taken by the jury in answering the question.

Then was such a view justified by the evidence? Neill swore that he did look at the coupler and that there was no ice or snow on it, and his assistant, Couchman, who was a witness for the plaintiff, says there were no visible signs to shew that there was anything wrong with the coupler. But, though he says he inspected the coupler twice, he does not, so far as I can see, say definitely that either of such inspections was made before the accident.

On the other hand, it was sworn by Ault, a brakeman of experience, that, if ice and snow could get into the throat of the draw-bar sufficiently to block the pin, it would leave traces on the outside. Mr. Cowan, a witness called by the defence, and a man of large experience, also swore that if water got into the coupling and froze it must leave traces on the outside. In re-examination he stated that he had known cases where there was ice inside the coupler without traces outside, but that that was of rare occurrence.

It seems to me that, on the above and other evidence adduced as to the likelihood of traces being left outside, the jury would be justified, if they chose to do so, in disbelieving the story that there were no traces of snow or ice on the coupling when the train came in.

Then again, it is sworn by Ault and Couchman that striking the coupler on top and bottom would loosen up any ice in it sufficiently to make the lever work. There was no evidence to shew that that was done in this case before the accident.

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The jury may have thought that, in such cold weather as prevailed at that time, the inspectors should, in passing, not only look carefully at each coupler, but strike it top and bottom with their hammers, or, at any rate, that that should have been done to the coupler in question before cutting out the car. That could easily be done, and I think they would be justified in holding (if they did so hold) that not doing it was an act of negligence.

There was evidence that after the accident the coupler in question would not open after being struck. Perhaps the jury disbelieved that. It was their right to do so if they chose. The failure to so strike the coupler is, perhaps, not strictly covered by the word "inspection" in the answer to the second question, but I do not think the language of a jury's answers should be too closely criticized if we can find a meaning that they might have intended and which they could find evidence to support.

I have felt some doubt whether the defendants were liable because of Neill and his assistant, who are charged with being guilty of the negligence, being, with the plaintiff, fellow servants of the defendants, and acting as such in the matters complained of. But that defence, if it existed, was not raised before this Court, or, so far as I am aware, at the trial, and I do not feel called upon to deal with it now. It may be that that defence was not open to the defendants on the pleadings.

On the whole, I am of opinion that there was evidence from which the jury could find that the inspection before the accident was so insufficient as to shew negligence, and that they could also find that such negligence was the cause of the plaintiff's injuries.

I would dismiss the appeal.

Perdue, J.A.

PERDUE, J.A.:—This is an action brought to recover damages for an injury sustained by the plaintiff in an accident which occurred at Melville, Saskatchewan, in January, 1912. The plaintiff was at the time a switchman in the employ of the defendant company, and he was injured while performing his duties. The action is brought for non-compliance with the Railway Act, and also at common law. The plaintiff alleges that the accident occurred through the failure of the company to supply proper appliances for uncoupling cars, and supplying defective machinery and appliances, neglecting to inspect or repair, employing unskilled persons, etc.

The operation in which the plaintiff and others were engaged when the accident occurred was a simple and ordinary one. A car was to be cut out of a train and switched on to a siding. When the signal was given to uncouple the car from the moving line of cars so that it would move of its own momentum into the siding, the coupler failed to work. The car, instead of being released from the others, was checked suddenly when the brakes were applied from the engine, with the result that the plaintiff fell

from the top of the car upon the tracks, and the car, which had not been completely stopped, passed over his right arm and cut it off. The plaintiff had climbed to the top of the car for the purpose of applying the brake so as to prevent it from colliding with other cars upon the same siding.

The train to which the car in question was attached had arrived at Melville on the same night that the accident occurred. The coupler which failed to work was attached to the car adjoining the one from which the plaintiff fell. Immediately after the accident several of the defendants' employees attempted to move the lever of the coupler, but it failed to raise the pin which unlocks the knuckle. The pin, for some reason which was not visible, remained fast. The car was then uncoupled by using the lever and pin upon the opposite side of the car. The car to which the coupler in question was attached was then taken away to another track, and Neill, the car inspector, took the coupler apart in order to find what was wrong with it. He found that the interior cavity where the knuckle lock rests was filled with ice and snow. He cleaned it out, put the parts together again, and found, as he states, that the coupler then worked well. He states that, apart from the ice and snow in it, the coupler was in first-class condition. Neill's evidence as to the condition of the coupler and the cause of its failure to work is wholly uncontradicted.

When the train in question arrived at Melville on the night of the accident it was inspected by Neill and his assistant. They both state that they looked at all the couplers upon the cars and could see nothing wrong with them. Couchman, who was Neill's assistant, was called by the plaintiff. He did not appear, as far as one can gather from the evidence, to be unfriendly to the plaintiff. He says that Neill and he inspected the train, that they inspected the coupler in question, and found nothing wrong with it. He further says that from the outside one could see nothing wrong with it. He also stated that even if the coupler were opened, the ice and snow in the chamber would not be visible. He says that there was no ice or snow on the outside of the coupler when they inspected it.

Section 264 of the Railway Act compels the company to provide automatic couplers which can be uncoupled without the necessity of men going in between the ends of the cars. The evidence shews that the coupler in question was one of the best, if not the very best, coupler that can be obtained. It, like every other mechanism, is not perfect, and its working may be interfered with by cinders or gravel or ice getting into the interior of the lock. The evidence shews, to my mind conclusively, that when a car is en route in a train the only practical inspection that can be given to the couplers is to examine them from the outside without actually trying if they will work. To try the couplers to see if

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they would work would mean detaching all the cars from each other. This might lead to serious consequences if the train were standing on a grade. To test the coupler of each car about to be shunted would be almost equally as impracticable, as it would mean the premature disconnection of the car and the recoupling of it again, The evidence shews that the inspection made on the night in question was the only practicable one.

In his statement of claim the plaintiff alleged a number of acts of negligence on the part of the defendants as having caused the accident, but it all came down to the failure of the coupler to act. The learned trial Judge said to the jury: "There can be no question that this accident happened and was practically due to that failure of the lever to work." He gave the jury a number of questions to be answered, amongst which were the following, along with the answers given:—

1. Q. Were the defendants guilty of negligence? A. Yes.

2. Q. If so, in what did this negligence consist? A. Through lack of proper inspection.

3. Q. If the defendants were negligent, was the injury to the plaintiff caused by their negligence? A. Yes.

No doubt, in giving these answers the jury had the failure of the coupler in their minds, but they do not find what was the defect in the coupler which inspection would have disclosed. Failure to inspect was not in itself the direct cause of the accident. There must have been something wrong with the coupler which caused it to fail, and the jury made no finding as to this. In the absence of such a finding the verdict cannot stand.

The plaintiff called no evidence to shew any defect in the coupler. He rested his case on the fact that at the critical moment it had failed to act. On the other hand, the evidence of Neill clearly, and to my mind convincingly, shews that the failure of the coupler to work was caused by ice or snow which had filled the chamber so that the pin could not be moved. If this was the true cause, the coupler was not mechanically defective or out of repair. It was temporarily prevented from working through a foreign substance getting into it accidentally. If this foreign substance was ice it must have got there shortly before the accident. The defect, if it can be called a defect, was a latent one which was not discoverable on the inspection made by Neill and Couchman, the only inspection that was practicable, as the evidence shews. If, then, Neill's statement that ice in the coupler caused its failure to work is to be believed (and it is wholly uncontradicted and no evidence is given of any other defect), the defendants cannot, in the absence of proof that they knew or should have known the condition of the coupler, be held liable for the accident.

The trial Judge commented strongly upon the fact that Neill made the inspection alone, without anyone to corroborate his statement as to the condition of the coupler. In effect he told

the jury that they might disbelieve Neill if they chose. Neill was not at the time the trial took place in the employ of the defendants, and seeing that his evidence was absolutely uncontradicted and that no other evidence was given to shew what was wrong with the coupler, the absence of corroboration was not a serious objection. But if Neill's evidence is to be disregarded, what was the actual defect in the coupler? The jury has not found any defect, and there is no evidence, except Neill's, to shew why it failed to act. The only negligence they can find on the part of the defendants was "lack of proper inspection." We are not enlightened as to what a proper inspection would have disclosed or how the lack of inspection caused the injury to the plaintiff. The finding as to lack of proper inspection is directly contrary to all the evidence given upon the question of inspection. The plaintiff's witness, Couchman, gave the following evidence:—

Q. The cars are inspected when they come in to find out if anything of that kind is wrong with them? A. Well, with regard to that locking block it is impossible to do that, because in releasing the block you would set your cars all adrift.

Q. You say you cannot pull these cars apart when the train comes in because you would set your cars all adrift? A. Yes.

Q. So that there is no system that you could have for pulling the pins? A. No, they could hardly inspect them in that way because that would cut your cars adrift.

Q. So that you have to be content with an inspection by the eye from the outside? A. Yes.

This agrees with the evidence given by the defendants' witnesses, and shews that the only feasible inspection of the couplers on cars attached to a train when it arrives at a station is one similar to that made by Neill and Couchman, when the train in question stopped at Melville.

The brakeman Ault, when called by the plaintiff in rebuttal, said that in order to make out his report on the night of the accident, he asked Taylor, the yard foreman, what was wrong with the block, and Taylor said the block was jammed. Taylor denied making that statement. The learned trial Judge said to the jury: "If he did (make the statement) it throws an entirely different reason forward for the failure of that lever to work to that assigned by Neill. It assigns a reason that would shew a defect in that block through wear or tear or accident to it that was not occasioned at all by the elements, as suggested by the defendants." With great respect, I must differ from the trial Judge as to the meaning and effect of the expression attributed to Taylor, supposing the latter made use of it. Taylor was not present when Neill took the coupler apart and examined it. Taylor did not know what was wrong with it. If Ault asked him what was wrong with the block, he might very properly say that it was jammed without meaning that it was defective. The words might bear the meaning that the block was prevented

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from moving by some foreign substance getting in and wedging it tight. But a vague expression used by the yard foreman who had no knowledge as to the real condition of the coupler was not evidence upon which the jury could find that there was an actual defect in the block. In any event the jury has not found that there was such a defect.

The plaintiff had to establish at the trial some act of negligence on the part of the defendants which gave him a right of action against them. "Liability only attaches to negligence which is either the sole effective cause of the injury complained of or is so connected with it as to be a cause materially contributing to it. Negligence is the effective cause of an injury when it has in fact brought about that injury as a direct and natural consequence:" 21 Halsbury, p. 378, and cases cited. Failure to make a proper inspection would not give the plaintiff a cause of action unless it was shewn that the inspection would have discovered a defect in the apparatus which was the direct cause of the accident. Then, the failure of duty to inspect would bring home to the defendants liability for the defect which inspection would have disclosed.

In this case no defect has been found by the jury. The evidence of Neill shewed that the failure of the mechanism to act as it should have acted was caused by the accident of snow or ice getting into it. This was something against which the defendants could not guard and for which they are not responsible. Neill's evidence was uncontradicted. It gives a reasonable explanation, one which was in accordance with the opinions given by the expert railway men called by the defendants.

With all the facts before them, the only negligence the jury found was "lack of proper inspection," a negligence which, of itself, could not have caused the accident. I see no reason for granting a new trial. All the facts seem to have been brought out, and the plaintiff has certainly no reason, from his standpoint, to complain of the manner in which the trial Judge directed the jury. There may, no doubt, be great sympathy for the plaintiff in the severe injury he sustained and a natural desire that he should obtain compensation. But if he had taken advantage of the Saskatchewan Workmen's Compensation Act, he might have recovered reasonable compensation without having to prove actionable negligence on the part of the defendants. He deliberately chose to bring an action in this Province, based upon a common law liability which he has failed to establish.

I think the appeal should be allowed and a verdict entered for the defendants. If the defendants ask for costs they are entitled to them in both Courts.

Cameron, J.A.

CAMERON, J.A.:—The accident in question here took place on January 19, 1912, at the town of Melville, in Saskatchewan, on a dark night, when the temperature was some 20 or 25 degrees below zero. The plaintiff was a brakeman and switchman in the

employ of the defendant company. Freight train No. 91 had arrived about 8.30 in the evening. A switch engine had been attached to the west end of this freight train, and car No. 21852 of the Grand Trunk Railway Company was to be taken out and put on a siding. Immediately next car No. 21852 was Grand Trunk Pacific car No. 357818. Orders to cut out car No. 21852 were given by Taylor, the yard foreman. Ault, a switchman employed by the defendant company, was working with the plaintiff. The plaintiff threw the switch and Ault went to cut off the Grand Trunk car. When the plaintiff threw the switch, the train pulled up, then stopped, then came on, and he got on the Grand Trunk car. The signal to the engineer to stop was given by Ault and the plaintiff. The signal to the engineer to give the train a kick was given, and then the signal to stop by the plaintiff, by Ault and by Taylor. The plaintiff climbed on the Grand Trunk car, and as he was doing this he gave the signal to stop. There was a down grade at the point, and the plaintiff's object in getting on the car was to set the hand brakes, which were at the west end of the car at the east end of which he had climbed up. To reach the brakes he started to go along the running board on the top of the car, and when the jerk came he was thrown off the car backward and came down on the ground with his right arm on the rail. The wheels of the car passed over his right arm. The reason of his fall was that the automatic coupling apparatus between the two cars mentioned had, for some reason, failed to respond to the lever, and held the car on which he was instead of allowing it to proceed. It was Ault's duty to operate this apparatus, and this he tried vainly to do three or four times, but failed, and then he gave the engineer the signal to stop, which he did when he heard the plaintiff's cry. Ault found the plaintiff under the Grand Trunk car, and about twelve feet from the eastern end of the car, in between the two trucks.

Neill, car inspector at Melville, gave evidence that he and his helper Couchman had made an inspection of train No. 91 on its arrival on the evening in question. He made an inspection to see if everything was proper by slipping a lantern in between the draw-bars. "That," he says, "is all that is necessary:" p. 107. He found, immediately after the accident, that the operating lever on the Grand Trunk Pacific car would not work. He pulled the lever and struck the pin underneath with a hammer, but without result. Then he opened the coupling by the lever on the opposite side on the corresponding coupling on the Grand Trunk car. Neill then had the Grand Trunk Pacific car taken to the round-house, where he made a close examination of it, taking the apparatus to pieces, on the inside of which, where the "knuckle lock" (or pin as it is sometimes called) rests, he says he found snow and ice. He cleaned this out, he says, and the apparatus then "worked fine," and the car went out westward

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that night on No. 91. The coupling in question was not produced at the trial, but one of the same design was, and was also placed before us for examination.

With reference to the inspection of the couplings on the arrival of the train, Neill gave this account at pp. 95 and 104:—

Q. We are told that on the evening in question No. 91 came in some time in the evening. Do you know whether she did or not? A. Yes, she did.

Q. Did you have any duty to perform in connection with No. 91? A. Yes, I had to look it over on arrival.

Q. How did you perform that work? A. I went along one side and my helper Mr. Couchman, went along the other, and we made a close inspection to see if we could find any defects.

Q. Did you carry anything in your hands? A. We carried a lantern.

Q. And a hammer? A. Yes.

Q. What inspection did you make of the wheels? A. We see if there is anything wrong and sometimes we tap them.

Q. What inspection, if any, did you make of the couplings? A. We looked at them.

Q. Are you able to do anything more than look at them? A. We tap them and see if they are cracked or not.

Q. Did you go over that train that night? A. We did.

. . . . . .

Q. Would it be practicable for the inspector going through the yard to lift the pin when there is no engine on the train? A. No, it is not practicable.

Q. Is it practicable when you are inspecting a train to pull the pin on the train? A. No.

Q. Why not? A. Because when we pull the pin it is not often you can go and look over the train without there is pressure upon it; it takes very little pressure on the pin to hold it, and you cannot move it if there is any pressure upon it at all.

Q. So that it makes it impracticable to pull the pins in all the cars in the yard? A. Yes.

Couchman's evidence as to the inspection of the train on arrival is given at p. 182. Couchman says that they examined the coupler that night, and he saw no ice or snow upon it. As to the usual method of inspection, he says:—

Q. The cars are inspected when they come in to find out if anything of that kind is wrong with them? A. Well, with regard to that locking block it is impossible to do that because in releasing the block you would set your cars all adrift.

Q. You say you cannot pull these cars apart when the train comes in because you would set your cars all adrift? A. Yes.

Q. So that there is no system that you could have for pulling the pins? A. No, they could hardly inspect them in that way because that would cut your cars adrift.

Q. So that you have to be content with an inspection by the eye from the outside? A. Yes.

Ault also says, at p. 180, that there was no indication of ice on the outside of the coupler. So also Taylor, at p. 126.

Hooper, the car foreman for the defendant company at Winnipeg, of over thirteen years' experience, whose duties comprised the examination of couplers to ascertain defects, says that this coupler was of a kind recognized as standard and adopted by the Master Car Builders' Association. After describing the causes that might prevent such a coupler operating or being operated satisfactorily, he gives the following evidence:—

Q. How can you detect the presence of obstructions of that kind in the couplers? A. It is a pretty hard proposition.

Q. Why so? A. You take a man coming along, his duty is to inspect every visible part that he can see about the coupler, but when he goes to pull and cannot do it, what does that mean, the slack runs out and he cannot pull it, and if he undertakes to go over each lever to see that it works, that is not practicable in railway work.

Q. Can you see the defects that you have mentioned inside the lock, without opening the coupler? A. No.

Q. And in order to do that you would have to uncouple the cars? A. Yes.

Q. Is that a practicable thing to do in railway business? A. No, it is not.

And at p. 154 he says he is unaware of any other system of inspection than that described by the yard foreman Taylor.

McGowan, general car foreman of the Canadian Northern Railway Company at Winnipeg, with an extended experience, gives similar evidence as to the coupler in question, some of which are used on his road. The inspection after the arrival is visual, by the light of lanterns if at night, and he knows of no other or better system, and an uncoupling of the cars separately for purposes of examination would be impracticable.

There is really no evidence on the subject of inspection save that for the defence. Couchman, it is to be noted, was, however, called for the plaintiff.

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

1. Q. Were the defendants guilty of negligence? A. Yes.

2. Q. If so, in what did this negligence consist? A. Through lack of proper inspection.

3. Q. If the defendants were negligent, was the injury to the plaintiff caused by their negligence? A. Yes.

4. Q. Could the plaintiff by the exercise of reasonable care have prevented the accident notwithstanding the defendants' negligence? A. No.

5. Q. If so, in what way?

6. Q. If both parties were negligent whose negligence really caused the accident? A. Defendants' negligence.

7. Q. If you find for the plaintiff at what sum do you assess his damages? A. $6,000. Unanimous vote.

Upon this question the trial Judge entered judgment for the plaintiff for the amount awarded.

The duty of the railway company in this and other like matters is discharged by supplying suitable appliances or apparatus

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and proper supervision of the same. The whole question is discussed in Beven on Negligence, 3rd Can. ed., at 608 *et seq.* The duties of the master are to supply machinery of ordinary character and reasonable safety. "Reasonably safe" means safe according to the usages, habits and ordinary risks of the business. The test is always the same, and even if juries are convinced that there is a less dangerous way they cannot be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way giving rise to a liability: Beven on Negligence (*supra*), 614.

"All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen in a fit and proper manner:" *per* Lord Wensleydale in *Weems* v. *Mathieson*, 4 Macq. (H.L.Sc.) 215, cited Beven on Negligence, *supra*, 613.

"Where a master takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, he is not responsible because he may have omitted some possible precaution which the after events suggest he might have resorted to:" Ruegg, p. 52.

"It is an implied term of the contract of service at common law that a servant takes upon himself the risks incidental to his employment. Apart from special contract or statute, therefore, he cannot call upon his master, merely upon the ground of their relation of master and servant, to compensate him for any injury which he may sustain in the course of performing his duties whether in consequence of the dangerous character of the work upon which he is engaged or of the break-down of machinery or of the negligence or default of his fellow servants or strangers. The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable precautions to protect him against accidents:" Halsbury, vol. XX, pp. 119, 120. This is the doctrine laid down by Lord Watson in *Smith* v. *Baker*, [1891] A.C. 325 at 353, and followed by our Supreme Court in *Webster* v. *Foley*, 21 Can. S.C.R. 580.

In his charge to the jury the learned trial Judge expressly directed their attention to the evidence bearing upon the condition of the coupler, whether in fact it had been maintained in a satisfactory working condition. But the jury declined to find any defect in the coupler itself. They merely found that the negligence, the cause of the accident, consisted in lack of proper inspection, which I take to be the meaning of their answer. It may be suggested that the answer to the question, put as it stands, really presupposes or assumes a further answer, *viz.*, that the coupler itself was defective, a fact which could have been discovered, in the view taken by the jury, had there been a proper inspection. But this is to add to findings of the jury, and it would seem to me we cannot do that. If we did, we would really

be making a finding inconsistent with that made by the jury, which is that the proximate cause of the accident was the want of proper inspection. Thus we would be setting aside that finding and holding that the proximate cause was a defective coupler or some other cause which was not present in the minds of the jury, or they would have stated it.

In *Schwoob* v. *Michigan Central*, 13 O.L.R. 548, the action was brought to recover damages for the death of the deceased by reason of escaping steam from a boiler. Certain questions were asked of the jury, which were answered in such a way as to indicate that the jury considered the defect in the locomotive "occurred by the defendants not supplying proper inspection." The jury were then directed by the trial Judge to return and answer certain other questions, which they did, shewing that the defect was in the way one Jeffers, a fellow workman, had put in a tube in the boiler, which tube was not properly "belled." It was held by a majority of the Court of Appeal that there was no action at common law, but relief was given under the Ontario Compensation Act. But Osler, J.A., who gave the majority opinion, held that "want of inspection, unless there was some existing defect which inspection would have disclosed, is not defect, or, by itself, negligence."

It was only by reading into the original the subsequent answers that there was held to be any liability at all under the Compensation Act. On the other hand, Meredith, J.A., held that the answers to the additional questions meant no more than those to the original questions, and that the effect of all of them, to his mind, was that the jury had found that the proximate cause of the accident was want of proper inspection only, and in that view, I consider his judgment as in point in this action, and amongst other findings, he held that the judgment in question could not be supported at common law, as the finding "not providing proper inspection" was too indefinite, not supported by reasonable evidence, and could not be supported at common law, because there was no finding that the negligence of the workman was the proximate cause of the accident, but an implied finding to the contrary.

Now, there is, in my opinion, no evidence whatever to support the finding of want of proper inspection. Were the jury at liberty to, and did they in fact, wholly reject the evidence of Neill and Couchman that they made any such inspection as they deposed to? Did the jury mean to say that there was in fact no inspection whatever? I take it not so. Their finding involves the idea that there was an inspection, but that it was not proper or sufficient in the circumstances. Yet the whole evidence on this branch is to the effect that the couplings were of the best make, and that the defendant company took the precautions with respect to them in the way of inspection such as are ordinarily

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taken by railway companies, and that such inspection was made as was practicable under the circumstances. It cannot be said, on the evidence as I read it, that there was any lack of exercise of ordinary care and precaution. The only certain method of guarding against defects in couplings not patent to visual inspection would be to uncouple them, take them apart, and operate them separately, a method that would be practically out of the question, as the evidence shews. Unless juries are to be permitted to lay down new methods of conducting such enterprises as that of the defendant as to the operations and necessities of which they necessarily cannot be fully informed, then this verdict cannot stand.

It is impossible not to feel the greatest sympathy with the plaintiff in this case, where he has suffered irreparably and where there has been no fault of his own. But to hold the defendant company liable in the circumstances, I submit, would be contrary to our established jurisprudence.

It was also contended for the defence that in the case of an accident of this kind, due to an exceptional and wholly unexpected occurrence, where it cannot be found that there was a lack of proper care in guarding against it, gives rise to no liability. This contention is based on *Rostrom* v. *Canadian Northern R. Co.*, 3 D.L.R. 302, 22 Man. L.R. 250; *Readhead* v. *Midland R. Co.*, L.R. 4 Q.B. 379; *Ferguson* v. *Canadian Pacific R. Co.*, 12 O.W.R. 943; and *Richardson* v. *Gt. E. R. Co.*, 1 C.P.D. 342.

In the view I have taken, however, of the contention that the defendant company had complied with its responsibilities as to supplying the proper appliances and making inspection thereof, it is not necessary to deal with this point.

Though the accident in question took place in Saskatchewan, this case has been conducted throughout as if it had occurred in this Province.

I have read the judgment prepared by Mr. Justice Perdue, and agree with the disposition of the case made by him.

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

Appeal allowed.

MOFFAT v. MONTGOMERY AND EASTERN TRUST CO., Garnishee.

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June 18.

Quebec King's Bench, Trenholme, Lavergne, Cross, Carroll and Gervais, JJ June 18, 1913.

1. ATTACHMENT (§ IIIA—45)—CONSERVATORY ATTACHMENT—PROCEDURE—SUFFICIENCY OF SHEWING FOR.

Sufficient ground for the issuance of a conservatory attachment is shewn where the facts shewn in the affidavit for the writ were that the plaintiff, as curator of a person *non compos mentis*, had instituted an action to have a transfer of a note by the latter to the defendant annulled for want of consideration, and that the garnishee had become liable to pay the amount of the note to the defendant, and that such payment rightfully belonged to the plaintiff and not to the defendant.

Statement

APPEAL by the plaintiff from an order quashing a conservatory writ of attachment on the ground that the affidavit for the writ and the facts shewn did not warrant its issuance.

The appeal was allowed.

C. H. Stephens, K.C., for appellant.

S. L. Dale Harris, for respondent.

The judgment of the Court was delivered by

Carroll, J.

CARROLL, J.:—This appeal is from a judgment of the Superior Court quashing a conservatory attachment under the following conditions; On January 5, 1912, George Moffat loaned $32,000 to the Montreal General Contracting Company. The latter gave him a promissory note and a mortgage as guarantee. On March 2, 1912, Moffat transferred his claim to the defendant Montgomery for "one dollar and other consideration." In July, 1912, Moffat was interdicted as a result of insanity, and his son, the present appellant, appointed his curator. On April 22, 1912, the Montreal General Contracting Company, being unable to pay Montgomery entered into an arrangement with certain persons, and especially with one Simpson, whereby it was agreed that Simpson would pay into the hands of the Eastern Trust Co. $55,000 for distribution among certain creditors, and amongst others Montgomery's claim. In October Roland Moffat took action against Montgomery praying for the setting aside of the transfer made to him by his father of his $32,000 claim, alleging that at the time such transfer had been made his father was not of sound mind, and that, taking advantage of this Montgomery had obtained the transfer without giving value. On December 28, 1912, the plaintiff caused the issue of a conservatory attachment in the hands of the Eastern Trust Co. to prevent it from dispossessing itself of any moveable effects and moneys that it might owe or be called upon to pay to the defendant.

On January 7, 1913, the manager of the Trust Co. appeared and declared that his company, in virtue of the agreement, would have to pay to Montgomery $32,000, less $6,763.57 already paid him.

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On January 13, Montgomery petitioned to have the seizure quashed, and judgment was rendered thereon on January 24 quashing the seizure. The reasons of judgment are the allegations of the affidavit have not been proven, and that as these allegations were denied, it was incumbent upon the plaintiff to prove them. (Art. 919 C.P., which applies to conservatory attachment.) The judgment declares moreover that the agreement of April 22 between Montgomery & Simpson *et al.* operated novation of the debt, and that the plaintiff did not fall within any of the cases foreseen by art. 955 C.P.

Now par. 3 of this article enacts that a plaintiff may obtain a conservatory attachment whenever "he is entitled, by reason of some provision of the law, to have moveable property placed under judicial custody, in order to assure the exercise of his rights over it."

Are the allegations of the affidavit sufficient and do they disclose some *lien de droit* over these $32,000?

The affidavit alleges the transfer of Moffat's claim to Montgomery, and the institution of an action to annul this transfer because made at a time when Moffat was *non compos mentis*. And it further alleges that this sum is to be paid to Montgomery by the Eastern Trust Company; that the transfer is null, that the moneys are not those of the defendant but the property of the plaintiff.

In my opinion the affidavit alleges not only a privilege over these $32,000, but a right of ownership.

The ground that novation was effected—with all due deference to the learned Judge below—is absolutely untenable. Not only is there no novation, but the position of the parties, according to the affidavit, has never been changed. The party obliged to the payment of the loan is the Montreal General Contracting Co., through the intermediary of the Eastern Trust Co. The plaintiff could not and did not seek the annulment of an agreement which had as its object the payment of the debts of the Montreal General Contracting Co. Such arrangement did not constitute a new contract as regards these $32,000.

As to the evidence in support of the allegation of the affidavit it appears sufficient. The allegation specially denied by the defendant was the one averring that the Eastern Trust Co. owed or would have to pay a sum of $15,000 on account of the loan of $32,000. This allegation is sufficiently established by the declaration of the manager, made in January 7, 1913, filed of record, and, therefore, evidence in the case.

One word more:

Where it clearly appears that rights are imperilled, Courts of justice should interpret the provisions of the law, following and observing the same in a broad spirit so as to safeguard these rights. This is specially true as regards conservatory attachments, which

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are intended to maintain the rights of the parties *in statu quo* until judgment is rendered on the merits. This remedy is becoming more and more useful owing to commercial transactions which are ever on the increase. The appeal is allowed and the seizure maintained.

Appeal allowed.

RIESBECH v. CREIGHTON.

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British Columbia Supreme Court. Trial before Clement, J. January 22, 1913.

1. TAXES (§ III B 1—113)—ASSESSMENT—IN WHOSE NAME—ESTATE OF DECEASED OWNER.

After the death of the owner of land it must be assessed for taxation in the name of the registered owner or occupant and not in that of the estate of the former.

2. TAXES (§ III F—148a)—TAX DEED—SETTING ASIDE—ERRONEOUS ASSESSMENT.

A tax deed will be declared void when issued on a sale of land based on an assessment not in the name of the registered owner or occupant, but in the name of the estate of a deceased owner.

3. TAXES (§ III F—149)—STATUTORY CONFIRMATION—VALIDATING IRREGULAR ASSESSMENT.

A tax deed issued on a sale under a void assessment of land in the name of the estate of its deceased owner is not validated by the curative Act, Statutes of B.C., 1903-4, ch. 53, sec. 153.

Statement

ACTION for a declaration that a tax deed formed a cloud on the plaintiff's title to land.

Judgment was given for the plaintiff.

E. A. Lucas, for plaintiff.

Douglas Armour, for defendant.

Clement, J.

CLEMENT, J.:—The proceedings ending with the tax deed began with the assessment of 1904. At the trial I held on the evidence that in that year the plaintiff occupied the land in question. The assessor making up his roll under sec. 47 of the B.C. Statutes, 1903-4, ch. 53, entered in col. 2 as the taxpayer's name, "Estate of Thomas Yorke." The registered owner was Thomas Yorke, then deceased, and of course not resident on the land, so that under sec. 57 the land should have been assessed "in the name of and against the registered owner and occupant." Under these circumstances I held the assessment invalid, but I reserved judgment to consider the curative effect of sec. 153, which provides:—

> A tax sale deed shall, in any proceedings in any Court of this Province and for the purposes of the "Land Registry Act" and the "Torrens Registry Act, 1899," except as hereinafter provided, be conclusive evidence of the validity of the assessment of the land and levy of the rate, the sale of the land for taxes, and all other proceedings leading up to the execution of such deed, and notwithstanding any defect in such assessment, levy, sale or other

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proceedings, no such tax deed shall be annulled or set aside, except upon the following grounds and no other:

(a) That the sale was not conducted in a fair or open manner;

(b) That the taxes for the year or years for which the land was sold had been paid; or

(c) That the land was not liable to taxation for the year or years for which it was sold.

Were the matter *res integra* I should, as at present advised, hold this section sufficient to cure the invalidity in the assessment as above indicated. But as a Judge of first instance, I am of opinion that I am bound by authority to hold that there never was an assessment of this land to be validated. In *McLeod* v. *Waterman*, 10 B.C.R. 42—which of itself is, I think, clearly distinguishable from the case at bar—Mr. Justice Martin refers to and follows two Manitoba cases in which the question turned upon a statute of that province couched in language "in all essential respects identical as regards the point in question." In the latter of these two cases, *Tetrault* v. *Vaughan*, 12 Man. L.R. 457, the principle enunciated by Mr. Justice Strong in *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420, that all steps prescribed by the statute to be taken in the process either of imposing or levying the tax are to be considered essential and indispensable unless the statute expressly declares that their omission shall not be fatal to the validity of the proceedings, was acted upon and the sale held to be a nullity, incapable of validation.

I must say I find it difficult to suggest any defect which the statute would cure; but I bow to binding authority and give judgment for the plaintiff with costs.

Judgment for plaintiff.

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Jan. 4.

KINMAN v. OCEAN ACCIDENT & GUARANTEE ASSOCIATION.

British Columbia Supreme Court. Trial before Morrison, J., January 4, 1913.

1. INSURANCE (§ III E2—120)—ACCIDENT—MISSTATEMENT OF OCCUPATION OF INSURED BY AGENT OF COMPANY—PREFERRED CLASS—TIMBER CRUISER OR SUPERINTENDENT.

A business manager of a lumber firm whose duties involve occasional travelling to make inspection of logs about to be purchased but whose duties in that regard are not of the continuous and practical nature of an experienced lumberman is not a "timber cruiser" nor an "inspector in woods" nor a "proprietor or manager superintending in woods" within a clause of an accident insurance policy excluding the named occupations from the benefits of the preferred class of rating under which he took out his insurance on a selection made by the agent with full knowledge of the facts.

2. INSURANCE (§ VI C2—364)—ACCIDENT—DOUBLE LIABILITY—INJURY WHILE ON LICENSED PASSENGER VESSEL.

Evidence that an insured person received an injury while travelling as a passenger on a steamship belonging to a passenger fleet plying between certain ports, on which he had frequently travelled, is *prima*

facie sufficient to shew that he was a passenger on a vessel "licensed for the regular transportation of passengers," within the meaning of a double indemnity clause of a policy of accident insurance.

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TRIAL of action on a policy of accident insurance for double indemnity in respect of an injury received while a passenger on a vessel regularly licensed to carry passengers, pursuant to a double indemnity clause.

Judgment was given for the plaintiff.

Douglas Armour, for plaintiff.

S. S. Taylor, K.C., for defendant.

Morrison, J.

MORRISON, J.:—This is an action upon an undated policy of insurance. The obligation arising out of the *uberrima fides* which is required in cases of insurance as to disclosure of all material facts inducing the contract is very great. The peculiar doctrine applicable to contracts of insurance is well established, that all material circumstances known to the insured must be disclosed, though there should be no fraud in the concealment.

The assumption doubtless is that the insured knows and the insurer does not know the circumstances. In this case there were no circumstances inducing the contract of which the insurers were not aware. The element of representation or misrepresentation does not arise. The defendant's agent who knew exactly the plaintiff's occupation and its requirements, found some difficulty in placing the applicant as regards the company's "rate book." However, the plaintiff was finally designated or characterized, not by himself but by the accredited agent of the defendants acting within the scope of his authority as such, and the risk was taken as a business proposition with as full knowledge of its nature as that possessed by the plaintiff who, indeed, was somewhat passive, but the extent of his passivity did not, in my opinion, in any way lead the defendants to the contract. The agent fixed a price which he considered would remunerate the company and they undertook to pay the plaintiff upon certain contingencies.

I find as a fact that the plaintiff was not a "cruiser" in the sense meant by the policy and that he knowingly and properly insured as a "preferred" risk. He was taken as the business manager of a lumber manufacturing concern whose duties involved checking up the quantities and qualities of lumber purchased or intended to be purchased by his company. His duties, if they involved anything, must surely also involve proceeding to and inspecting the materials being dealt with in line of their business. This inspection does not consist in the same somewhat hazardous duties as those required of an "inspector in woods" or of a "proprietor or manager superintending in woods or on river drive." Those are duties of a continuous practical nature performed by experienced lumbermen. The plaintiff, as far as I can gather from the evidence and his appearance in the wit-

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ness box, is not a practical working manager; neither is he a "cruiser" in the technical sense.

He was not injured in the woods nor in or about any of the lumbering operations, but whilst travelling in the course of his business as manager of his company on the steamship "Prince George," one of the Grand Trunk Pacific passenger fleet plying between the United States port of Seattle and the British port of Prince Rupert, via Vancouver. One of the terms of the policy is that if the insured is injured on a steam vessel licensed for the regular transportation of passengers he shall be entitled to double indemnity. The objection was taken at the trial that there was no proof as to the steamship in question being licensed to carry passengers. I suppose the philosophy of that term in the policy is to prevent payment in case the insured chose to travel in some unseaworthy or dangerous craft which frequently are found on inland waters. The plaintiff's evidence material to this point is as follows:

Q. And where did you meet with this accident? A. On the steamer "Prince George."

Q. What is the steamer "Prince George"? A. It is a Grand Trunk Pacific steamship running between Seattle and Prince Rupert.

THE COURT: Seattle, Vancouver and Prince Rupert? A. Yes.

Q. And they ran a line of steamships to your knowledge between here and Prince Rupert? A. Yes.

Q. Have you travelled on the line? A. Frequently.

Q. And it was on the steamship "Prince George" of that line that the accident occurred? A. Yes.

Q. How did this injury affect you? A. Well it affected me that I went to bed first.

Q. On the steamer? A. Yes.

There was no cross-examination on this part of the evidence, which I regard under the circumstances of this case sufficient to establish the necessary proof required under that term of the policy.

I think, therefore, the plaintiff is entitled to succeed on those two points which were the substantial grounds of defence.

I do not accede to counsel's contention that the action is defeated by clause (*d*) of the policy. There will be judgment for two weeks' total and twenty-six weeks' partial disability.

Judgment for plaintiff.

HENRICH v. CANADIAN PACIFIC R. CO.

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Jan. 7.

British Columbia Supreme Court. Trial before Morrison, J. January 7, 1913.

1. RAILWAYS (§ IV A 1—85)—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

A railway company is not answerable for the death of a person who, in possession of his faculties of seeing and hearing, walks along a railway track without looking for an approaching train which he could have seen by the exercise of the most ordinary care.

2. RAILWAYS (§ IV A 1—86)—INJURY TO PERSON ON TRACK—LICENSEE—ASSUMPTION OF RISK.

A licensee who walks along a railway track assumes all risk of injury from being struck by trains.

Statement

ACTION against a railway company for causing the death of a person who was struck by a train while walking on a railway track.

Judgment was given for the defendant.

D. G. Macdonell, for plaintiff.

J. E. McMullen, for defendant.

Morrison, J.

MORRISON, J. :—In the hope of obviating a new trial should I be found to be mistaken in the view I had formed after argument as to plaintiff's case, I reserved my decision on the motion to dismiss and allowed the case to go to the jury. I now dismiss the action.

The locality and conditions in question were familiar to the deceased. On this particular occasion, as appears from the evidence of Thomas, the deceased was with him when he, Thomas, heard a train whistle. They were then standing near the railway track. Shortly after the deceased had left Thomas to proceed on his way, Thomas again heard two short whistles and upon looking saw the train approaching. Thomas says the deceased could not help seeing the approaching train had he looked east. The deceased might have crossed the track immediately instead of proceeding along it. Or he might have kept on what I shall call his own side until he came opposite the point of the foreshore to which apparently he was going. In both of these cases he would not, by the exercise of the most ordinary care, have come in contact with the train. He was a comparatively young man, apparently in possession of his proper faculties of hearing and sight.

I am of opinion that the inference to be drawn—and the only inference to be fairly drawn—from the evidence adduced on behalf of the plaintiff is that the deceased was killed through his own negligence and that there was no evidence to go to the jury which would shew any legal liability.

Counsel for the plaintiff argued forcibly on the assumption that leave and license were given. Even on that assumption

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there was no right created. The grant of the license to go on the company's right-of-way—of which, by the way, there was no evidence sufficient to be left to the jury—would only afford an answer to a claim for trespass: *Bolch* v. *Smith*, 7 H. & N. 736, 745. It is a mere permission and those who take it must take it with all chances of meeting with accidents: *Binks* v. *South Yorkshire R. Co.*, 3 B. & S. 244, 32 L.J.Q.B. 26.

Judgment for defendant.

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June 18.

COLLARD v. ARMSTRONG.

Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Walsh, JJ. June 18, 1913.

1. SEDUCTION (§ I—2)—ACTION BY INJURED WOMAN—LOSS OF SERVICES.
The question of loss of service does not arise in an action brought by an unmarried woman for seduction under the N.W.T. Ordinance (Alta.) 1911, ch. 117, allowing such an action, and the recovery of damages for her personal benefit.

2. SEDUCTION (§ I—1)—STATUTORY ACTION—BREACH OF MARRIAGE ALSO CHARGED.
An instruction to the jury, in an action for breach of promise and for seduction alleged to have taken place in reliance upon such promise, that the plaintiff could not recover unless the breach of promise was shewn, is erroneous; but, since the instruction was more favourable to defendant than to the plaintiff, it forms no ground for an appeal by defendant from the verdict given against him.

3. EVIDENCE (§ XI C—770)—COMPETENCY—CHARACTER OF WOMAN SEDUCED.
Unless the plaintiff's character is impugned by the defendant's pleading in an action for breach of promise and seduction, it is not open to the plaintiff to give general evidence of good character; but if the defendant, without calling witnesses as to general reputation, brings out in cross-examination of plaintiff and of her witnesses, collateral facts which alone might lead to an inference that the plaintiff was of general bad character, it is not error to permit the plaintiff in rebuttal to make explanation of the specific instances, the facts as to which had been brought out only in part on the cross-examinations.

4. NEW TRIAL (§ IV—31)—NEWLY DISCOVERED EVIDENCE — ACTION FOR BREACH OF PROMISE—PLAINTIFF'S MARRIAGE PENDING APPEAL.
The fact that the plaintiff in an action for breach of promise and seduction has married another since the trial is not a ground for granting the defendant a new trial.

5. DAMAGES (§ III U—365)—APPORTIONMENT — BREACH OF PROMISE AND SEDUCTION.
In an action for breach of promise of marriage and for seduction under promise of marriage the jury in finding for the plaintiff need not apportion damages between the two causes of action.

6. APPEAL (§ VIII B—672)—REDUCTION OF DAMAGES—PLAINTIFF'S ABANDONMENT OF EXCESS.
An appellate court has the power without remitting the case to another jury for assessment to award damages at a reduced sum thought to be reasonable, on the abandonment of the excess by the plaintiff, although the original verdict was excessive.

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APPEAL by the defendant from a judgment against him for $20,000, in an action for seduction and breach of promise of marriage. On the argument of the appeal the plaintiff's counsel voluntarily abandoned all claim to that portion of the judgment in excess of $6,000.

The appeal was dismissed.

G. H. Ross, and *J. M. Carson*, for plaintiff.

A. A. McGillivray, for defendant.

HARVEY, C.J.

HARVEY, C.J.:—At the opening of the case at the suggestion of one of the members of the Bench, plaintiff's counsel stated that he abandoned all that portion of the judgment for $20,000 in excess of the sum of $6,000. The defendant's counsel declined to abandon the appeal and based his arguments on the following grounds:—

1. The reception of evidence of good character on behalf of the plaintiff in the absence of evidence of bad character.

2. Misdirection by the trial Judge that the fiction of service had been abolished in Alberta.

3. Misdirection that a cause of action for seduction was alleged by the statement of claim.

4. Misdirection that the claim for seduction must rest on the breach of promise.

5. Excessive damages.

The evidence which is complained of as evidence of good character is not general evidence but relates to particular acts or relations and arises chiefly in cross-examination and appears to be in answer to evidence by suggestion or otherwise brought out by the defendant's counsel partly in cross-examination. I can see no valid ground of objection to it.

On the second ground I am of opinion that the Judge's charge was correct.

The Ordinance of the Territories in force in Alberta permits the woman seduced to bring an action for seduction in her own name, and recover damages for her personal benefit. [Ch. 117, sec. 4, Ordinances N.W.T. (Alta. 1911).]

As the woman could not lose her own services as her parent or master could, it must necessarily follow that when the action is brought by her as in the present case there can be no question of loss of services. As to the third objection, I am of opinion that the statement of claim does sufficiently allege a cause of action for seduction. All that is necessary is to set out such facts as would shew a cause of action.

The claim sets out a promise to marry and a breach. It then sets out facts shewing seduction, but precedes the statement by the words, "Relying on the defendant's promise to marry the plaintiff."

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Under the English practice such an allegation would be permissible not for the purpose of supporting a claim for the seduction which the plaintiff could not have, but in aggravation of the damages for the breach of promise, and the precedent in the English form appears to have been followed.

I am unable to see why that fact should in any way affect the right to take advantage of the allegation for the consequence which is given by our law. If the preceding allegation of the breach of promise were not there, there can be no doubt that no objection could be taken to this allegation in support of the claim for seduction alone. Possibly if an application had been made in the pleadings for the purpose of having it made clear which was intended the plaintiff might have been called on to amend to make her intention clear, though even then the answer might have been made that there could be no substantial objection to the form, for whether the plaintiff should recover the damages for seduction independently of the damages for breach of promise, or as added to these damages the result would be the same.

The learned trial Judge did direct the jury that unless they found the breach of promise they could not find for seduction, evidently considering that the plaintiff having alleged that she permitted the seduction in reliance on the promise to marry, she must fail unless she proved the correctness of the allegation.

I am of opinion that this was not correct but it appears to me that, while the plaintiff might have complained of this direction, there is no ground of complaint by the defendant as it was all to his benefit. It is suggested, however, that a jury might be satisfied of the seduction, but not of the breach of promise, and, disregarding the substance of the direction and their oath, find against the defendant on the breach of promise in order to support the damages they wished to give for the seduction. Even if the Court of Appeal could consider such a suggestion, of which I have grave doubt, it would simply mean that the jury had brought in the verdict they would have brought in if they had been told they could bring it in for seduction alone. It is also urged that the damages should have been divided between the two causes of action, but I can see no good reason why this should be so. Under the practice above referred to of proving seduction in aggravation of damages for breach of promise there can, of course, be no division of the damages into two parts and I see no reason why there should be, simply because it is possible to separate the two causes of action.

On the last ground, that the damages are excessive, I think that the defendant should fail. The judgment now, by reason of the plaintiff's voluntary relinquishment of part is $6,000, and

that is the judgment which is therefore now to be considered. It is true that the Court of Appeal cannot give a plaintiff an option to reduce the verdict or take a new trial, but where the plaintiff has himself irrevocably reduced his judgment it appears to me that the only judgment which the defendant can complain of is the judgment that exists. But even if this were not so, I am of opinion that the verdict of $20,000 cannot be said to be one that six reasonable men could not honestly give on the facts of this case.

It is not fair to argue that the reduction by plaintiff's counsel is an admission that the verdict as rendered was excessive, for there may be other considerations moving him. The defendant might possibly have his assets in such a position that he could effectually frustrate all attempts to enforce the judgment, but he might consider it worth his while to pay a judgment of $6,000, when he would not one for $20,000.

But even if it is considered as an admission, the Court is, nevertheless, entitled to an opinion of its own. The defendant gives evidence shewing that he is a man of considerable means. He states that he has a credit at the bank of $25,000. Now, everyone knows that a bank will not give a man credit for anything like what it believes he is worth financially. If the plaintiff had married him she would have been entitled to her fair share of the defendant's means and to the comforts and luxuries which they would provide, and if he had died without a will she and the child which she will have to support if it lives, would, in the case of the child living, and in the event of its death, she alone would be entitled, under our law to all of his property. If he should, by will, leave her less she could apply to the Courts for relief, and they would have power to give her what she would have received in the absence of a will.

It appears to me that our law in this respect is important in determining what would be a fair amount of damages for the breach of promise of marriage alone, and that a fair proportion of the defendant's wealth may quite properly be given to the plaintiff. Then coupled with that she has to bear the indignity and disgrace of the seduction, for which money alone cannot furnish adequate compensation, accomplished under circumstances which might fairly be considered as grounds for having exemplary damages. Under these circumstances I am quite unable to see how it can be said that a jury could not reasonably give the amount they did.

The only other ground to consider is the defendant's application for a new trial on the ground that the plaintiff is alleged to have married since the trial of the action.

New trials are granted when it is shewn that evidence not adduced at the trial has been discovered if it is of such a char-

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acter that the verdict would, if it had been produced, almost certainly have been otherwise than it was. See *Knight* v. *Hanson*, 3 W.L.R. 412. But this it appears to me is not evidence of such a character in either of two respects, viz., it is not of the conclusive character which would almost necessarily lead a jury to a different conclusion, and it is evidence of something which did not exist, and therefore, could not have come before the jury under any circumstances.

On all the grounds I am of opinion that the defendant fails and the appeal should therefore be dismissed. As there is some difference of opinion among us I would give no costs to either party.

Scott, J.

SCOTT, J., concurred in the result.

Beck, J.

BECK, J.:—The plaintiff's claim in this case is for damages on what, in my opinion, must be taken to be two distinct causes of action, breach of promise of marriage and seduction, the latter under Ordinance 1903, 2nd sess., ch. 8, sec. 4.

The jury gave a verdict for the plaintiff with $20,000 damages.

The important grounds of appeal were:—

1. The admission of improper evidence in that the plaintiff was allowed to give evidence of good character, and to prove certain letters written by the defendant before the alleged promise or seduction which were, it is said, irrelevant and which tended to prejudice the jury against the defendant.

2. Misdirection of the learned trial Judge in that he directed the jury that unless they found a promise of marriage and a breach, claim for damages for seduction failed.

3. Excessive damages.

As to the evidence of the plaintiff's good character. Assuming it to be the law that in an action for breach of promise of marriage or seduction, unless as in the case of *Jones* v. *James*, 18 L.T.N.S. 243, the plaintiff's character is put in issue by way of a general charge it is not open to the plaintiff to give general evidence of good character, unless the defendant has first impugned the plaintiff's character by general evidence, it is quite clear to me from the evidence that defendant counsel's method of cross-examination of the plaintiff and of witnesses on her behalf was such that, while in each instance the implied charges of which admission was sought were perhaps specific, the result of them all if admitted would have led to the inference of her general bad character. Again, as far as I can see, the evidence of good character was that of the personal knowledge of the witness with regard to the plaintiff and not her general reputation, which, perhaps, is the only general evidence of character which is properly excluded.

In any case, objection to the character evidence given, even if inadmissible, cannot now be taken unless not only it was objected to at the trial, but also the precise and proper ground was at the same time stated: *Williams* v. *Wilcox*, 8 A. & E. 314; *Ferrand* v. *Milligan*, 7 Q.B. 730; *Bain* v. *Whitehaven R. Co.*, 3 H.L.C. 1. Although to some of the evidence, objection was taken, no ground for the objections appears to have been stated. As to the letters, to me they appear to be quite relevant to the question of the promise of marriage.

As to the misdirection of the learned trial Judge, it seems there was a misdirection inasmuch as it appears that he instructed the jury to the effect that if they failed to find a promise of marriage and a breach of the promise, the action in so far as it related to seduction must fail. He, no doubt, did this for the reason that he was of opinion that the seduction was alleged not as an independent and distinct cause of action, but merely by way of aggravation of damages for breach of promise of marriage. In my opinion, the learned Judge made a mistake in so reading the statement of claim and consequently was wrong in his charge. Such a charge was, however, it seems to me, not against the interest of the defendant; but certainly against the interest of the plaintiff. It is suggested that in view of this instruction the jury might have found a promise and a breach without sufficient evidence for the sole purpose of giving damages for the seduction. This cannot be presumed, and, besides, there is ample evidence of the promise and the breach. Even if the jury actually did what it is suggested they may have done, by the same hypothesis the damages they awarded would be solely for the seduction, so that the plaintiff is not hurt in any case.

As to the damages being excessive. The plaintiff before the argument of the appeal unconditionally and definitively remitted $14,000 of the damages, thus leaving the damages at $6,000. It is impossible to argue that this latter amount is excessive. Indeed, I am not at all sure that the verdict for $20,000 was excessive, in view of the defendant's own statement of his means. The defendant did not consent to the reduction of the damages, and a question is raised, whether the plaintiff can remit them in the manner in which he did so as to avoid a new trial, if the Court should be of opinion that $20,000 was excessive, but that $6,000 was not so. The question is raised, of course, by reason of the decision of the House of Lords in *Watt* v. *Watt*, [1905] A.C. 115. The headnote which correctly epitomizes the decision is as follows:—

When, in an action of tort, the jury find a verdict for the plaintiff for a sum which the Court of Appeal considers unreasonable and excessive

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that Court has no jurisdiction, without the defendant's consent, to order that unless the plaintiff consents to reduce the damages there shall be a new trial.

That, however, is not what was done in the present case. In the case cited, the Court of Appeal made an order for a new trial unless the plaintiff should consent that the verdict for five thousand pounds sterling should be reduced to fifteen hundred pounds sterling. The plaintiff did consent, and a new trial was refused. There was no consent on the part of the defendant. On appeal by the defendant to the House of Lords, it was held as I have stated. What the Lords discuss in their judgment is the practice of *Courts* making such *conditional* orders as the Court of Appeal had made, *not* the question of the *plaintiff unconditionally remitting* a part of the amount of the verdict at such a stage as *to admit of the defendant contending before the appellate Court that even the residue was excessive.* See *Watt* v. *Watt*, [1905] A.C. 115, *per* Lord Davey, at 123. I do not think the decision cited deals with this state of things at all. Furthermore, it seems to me to be a question merely of the practice of this Court which this Court should be permitted—as I think is recognized by the Supreme Court of Canada and the Judicial Committee of the Privy Council—to settle for itself.

The question whether the reduced amount of damages was excessive or not was argued before us. We agree that it is not. We have power to refuse a new trial and to remit the case to another jury on the question of the amount of damages only (Jud. Ord., 1898, rule 651; Eng. O. 39, rule 7; *Watt* v. *Watt* (*supra*), *per* Halsbury, L.C.). This is what we should do, if what has taken place did not, in our opinion, make it unnecessary. It was contended that, on request of plaintiff's counsel, the jury should have severed the damages on the two causes of action alleged in the statement of claim. It seems quite clear that the jury may, in such a case, either give one sum in respect of all causes of action or assess the damages severally in respect of each: Mayne on Damages, 8th ed., 669-671. I think counsel's request has no compulsory effect. I would dismiss the appeal with costs.

Walsh, J.

WALSH, J.:—I find myself unable to agree with the other members of the Court in the view which they take of one feature of this case. Without having had the benefit of hearing argument upon the point from the defendant's counsel, I am of the opinion that the award of damages made by the jury is very excessive. The only remedy for that is a new trial. What has been done here is that, upon the suggestion of the Court, counsel for the plaintiff expressed their willingness to reduce

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the verdict from $20,000 to $6,000, and, as I understand it, this sum of $14,000 has been actually abandoned by them. Now, if I am right in my view that the jury erred in awarding so large a sum to the plaintiff, I do not think that its error has been or could be cured by this voluntary abandonment of so considerable a portion of this amount. I quite agree that the amount at which, in my understanding of it, the verdict now stands, is an entirely reasonable sum, and I would readily concur in fixing it at that figure if I thought that this Court had the power to so fix it. But in the face of the decision of the House of Lords in *Watt* v. *Watt*, [1905] A.C. 115, I am quite unable to see that such a power exists. A jury has been chosen by one of the parties, I do not know which, nor is it material, as the tribunal to decide what damages, if any, should be assessed against the defendant. *Watt* v. *Watt*, [1905] A.C. 115, decides as plainly as the English language is capable of expressing anything, that, under such circumstances, there is no power in any Court without the consent of both parties to substitute something else for the verdict of a jury. I can see no difference in principle between what is being done here and what the House of Lords in the *Watt* case said, could not be done. Without the consent of the defendant, the error of the jury is being remedied by the fixing of a smaller sum which this Court and the plaintiff say is a proper sum and the right of the defendant to have the amount which he is to pay determined by another jury is being denied him.

If there is power to do so I would limit the question for the jury on the second trial to the amount of the damages which the plaintiff is entitled to. I see absolutely nothing in the case to justify any interference with the findings of the jury against the defendant as to the promise to marry and the seduction. The only quarrel that I have with the verdict is the amount of it. Rule 509 of the Judicature Ordinance provides that

> a new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the decision or finding upon any other question.

I am not taking time to consider whether or not this rule would justify a remission of the case to another jury simply for the assessment of damages as in view of the opinion of the other members of the Court upon the main question, it is unnecessary that I should do so.

I content myself, therefore, by saying that if the rule justifies it, this is, in my opinion, pre-eminently a case for so applying it.

Appeal dismissed.

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June 11.

THE EDMONTON CONSTRUCTION CO., Ltd. v. MAGUIRE.

Alberta Supreme Court, Harvey, C.J., Scott, and Walsh, JJ. June 11, 1913.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—WHEN GRANTED—CONTRACT FOR SALE OF LAND—ABANDONMENT—OVERHOLDING TENANT.

Specific performance of a parol contract for the sale of lands, which had been sufficiently performed so as to take it out of the Statute of Frauds, will be denied where the vendee, by payment of rent and otherwise, abandoned all rights under the contract and became merely a tenant.

Statement

THIS is an appeal by the defendant from the judgment at the trial in the plaintiff's favour. The plaintiff's action was against the defendant as an overholding tenant. There had been a verbal agreement of sale with part performance, but the defendant by estoppel (payments, letter and conduct) was held to be merely a tenant and not a purchaser.

The appeal was dismissed.

H. H. Parlee, for plaintiff.

Alex. Stuart, K.C., for defendant.

Harvey, C.J. Scott, J.

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

Walsh, J.

WALSH, J.:—The trial Judge has found that there was in fact a verbal agreement made between the parties for the sale of this property by the plaintiff to the defendant, and that there was such part performance of the same as takes it out of the Statute of Frauds. With these findings I am in thorough accord. With every disposition, however, to do so, I am unable to see how we can now compel specific performance of this agreement by the plaintiff.

Under its terms the defendant was to have paid, by January 12, 1912, at the latest, $1,000 on account of the purchase money. She should have paid $50 a month following her taking of possession on September 12, 1911, and enough with these payments to make $1,000 by January 12, 1912. On that date all that she had paid was $140. She had then been living in the house for four months, and I think on the evidence that $50 a month was its fair rental value, so that she had then actually paid $60 less as a purchaser of this property than she would have paid as a tenant of it at a fair rental. The receipts for these payments are for rent, but no importance is to be attached to that in view of the fact that the defendant was entitled to credit for them on the purchase money and in view of her understanding of these earlier payments that they were to be "like rent." Dalton, an officer of the plaintiff, had called at the house for the two payments aggregating $140 which the defendant had made, and she says that she expected that he would call for the balance of the $1,000 payment on January 12, and would bring with him the

agreement of sale for execution by her. He did not come, however, and she was ill, and the matter therefore stood without any action on the part of either of them until about February 20, when two of her friends interviewed Eaton, another officer of the company, at her request, to find out what was delaying the closing of the deal. They were informed then that the plaintiff took the position that it was not bound by the agreement in view of the fact that the time limited for the payment of the balance of $1,000 had gone by without the same being made. I have not been able to find anywhere in the record that these men reported to her the result of their interview, but the fair inference is that they did, as they undertook it at her request and they would undoubtedly advise her of the position taken by the plaintiff. I think, therefore, that she knew by February 20 that it was the intention of the plaintiff to take advantage if possible of her default to free itself from this bargain. Under the agreement she was to have paid the balance of the purchase money over $1,000 by monthly payments of $100. On March 5, two weeks after she learned of the company's attitude, she sent it a cheque for $200, which was the first payment made or attempted since the preceding November. This cheque was delivered by her maid. No letter accompanied it, and the cheque itself was not produced at the trial. She says that she sent it, as she could not bear to live in the house without having it paid for. Dalton, the officer of the company to whom it was handed, says that it read, "Payment for rent for 735—13th street in full to April 12." Nothing more than this appears with respect to it. Dalton at once returned the cheque to the defendant by her servant with a covering letter addressed to her stating simply that

> the cheque you sent is $10 short of being in full till April 12. I am returning the cheque. Please forward one for the full amount and oblige.

The explanation of the shortage of $10 is that in November she only paid $40 instead of $50. On March 11 she sent the plaintiff a cheque for $210 marked "rent to April 12, 1912," in a covering letter in which she said:—

> I understood you were allowing me the $40 on rent and $10 allowed on repairs. I see you have not allowed me anything. I send the full amount of repairs and rent also.

McLean, one of the men who had in February interviewed the plaintiff's officer for the defendant, says that he wrote in this cheque without her knowledge the words, "rent to April 12, 1912." The covering letter, however, was admittedly written by her. The only thing that this remittance could have been in full of to April 12 was rent. It could not have been in full of the purchase money to that date, for it was short by $850 at least of the amount then payable as such. By letter dated on the same day the plaintiff notified the defendant,

> on account of your being so far behind with the rent I will have to ask

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you to vacate the house, so please vacate house No. 735 13th St., on or before April 12, 1912, and oblige.

Dalton, who signed this letter, swears that it was sent before the receipt of the defendant's letter of the same day with the $210 cheque, which seems probable. An undated reply to this was sent by the defendant in the following words:—

I submit to your unjust request and will quit house No. 735, 13th, as requested. Thanks for all your kindness during past 8 months.

On April 30 a tender of $1,150 was made to the plaintiff on account of the defendant, which was refused, and on May 3 these proceedings were commenced against the defendant as an overholding tenant. She resists the plaintiff's claim to possession on the ground that she is in as purchaser under the agreement to which I have referred, and of which she asks specific performance.

In view of these facts, none of which are disputed and most of which are established by the defendant's own evidence, I am at a loss to know upon what principle specific performance of this agreement can be decreed her. Apart entirely from her default with respect to the $1,000 payment, I think that her subsequent conduct evidences a clear abandonment of her position as a purchaser and her acquiescence in the creation of the relation of landlord and tenant between her and the plaintiff. Her monthly payments of purchase money after January 12 were to be increased from $50 to $100, but the only payment which she made after that date was on the basis of $50 per month, which was unquestionably nothing but a fair rent for the property. The total sum paid by her under the agreement is $350, which represents exactly seven months' rent of the house, from Sept. 12 to April 12, at $50 per month. What she should have paid to the same date under her contract to purchase was at least $1,200. I do not attach so much importance to the use of the word rent in the correspondence and on the cheques in March as I would under other circumstances. She had grown used to that word in her early payments, and it no doubt conveyed to her nothing more than the understanding that she says was given to her when the matter was under treaty that these payments would be the same as rent. At the same time, in the light of the knowledge that she had obtained from the interview between Eaton and her emissaries in February that the plaintiff no longer regarded her as a purchaser, the use of the word is not entirely without significance. Her submission to the notice to quit given on the 11th of March amounts in my opinion not only to an admission of the plaintiff's right to possession, but an abandonment of her rights under the contract of purchase. And having not only failed to shew that constant readiness and eagerness to perform her contract which in some recent judgments of this Court have been declared to be essential in one seeking such relief, especially on a speculative purchase such as she admits this to have been, but having also expressly

abandoned her right to it, I feel constrained with great reluctance to conclude that the judgment against her must stand.

I would dismiss the appeal with costs.

Appeal dismissed.

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STOKES v. B. C. ELECTRIC RAILWAY CO.

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British Columbia Supreme Court. Trial before Morrison, J. February 25, 1913.

1. COSTS (§ II—40)—STAY OF PROCEEDINGS—TEST CASE—ABIDING RESULT—BENEFIT.

Where an action is stayed by order until the disposal of another independent action against the same defendant upon the same state of facts, with the result of which action the plaintiff in the stayed action was to be bound, but no stipulation was made in the order as to payment of costs in the contested action, a summary order cannot be made, on the dismissal of the latter, for payment of defendant's costs by the plaintiff in the stayed action on the ground that the former had been carried on for his benefit.

2. CHAMPERTY AND MAINTENANCE (§ I—2)—SUPPORTING TEST CASE—ASSISTING IN SIMILAR INDEPENDENT ACTION.

Champerty or maintenance is not shewn by an agreement of a plaintiff in a similar action against the same defendant to pay the costs of another plaintiff's solicitor in proceeding with a test action in the name of such other plaintiff, leaving the action of the person so paying the solicitor in abeyance under an order of stay to abide the result of the contested action, even although the plaintiff in the contested action had no means to carry on the litigation alone, if the latter's cause of action was an independent one and the other plaintiff had no share in the possible proceeds of the contested action.

Statement

APPLICATION for an order requiring the plaintiff in one of several actions that were stayed to abide the result of the trial of another suit, to pay the costs of the latter action on judgment being given for the defendant.

The application was dismissed.

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

Cecil Killam, contra.

Morrison, J.

MORRISON, J.:—Six actions were commenced on the same date, one of them being the present action. The cause of the action was the same in each and against the same defendant.

In due course by an order of Clement, J., all the said actions were with the exception of this stayed until final determination of this action and the parties to the other actions were to abide by the result. It was further ordered that the costs of the application upon which the above-mentioned order was made be costs in the cause. The action in which Mrs. Stokes was plaintiff came on for trial and a verdict for the defendant was given.

This is an application for an order that Andrew Smyth, the plaintiff in one of the other suits, be ordered to pay the defendant's costs therein. The grounds upon which counsel bases his con-

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tention for those costs appear in the cross-examination of the plaintiff before trial and in her cross-examination at the trial. Substantially she said as follows: "Of course, I am not bringing this action. It is just Mr. Smyth that is bringing it." "I did not have no money to taken an action out myself and Mr. Smyth he offered to do it for me." "I did not have no money to do this. He is bringing the action for me. He is paying the counsel and solicitor. I am not responsible for the debt."

The order staying proceedings is extremely vague and does not follow with any degree of particularity any of the accepted forms. Apart from the extracts from the plaintiff's evidence above set out there is nothing on the face of the order in question to support the present application, nor do I think this evidence helps. The plaintiff has an independent cause of action. She had no money. It does not appear that the other plaintiff, Smyth, had any interest in the outcome except that which appeared upon the application to stay, when his cause of action was disclosed to the Court. I do not think the element of maintenance or champerty enters at all into consideration. There is no agreement or undertaking by Smyth to pay the costs in the circumstances, other than that of which a proper construction of the order in question admits, namely, that upon the failure of the test action in the plaintiff's favour the other actions also fail with the usual result. The application is therefore dismissed with costs.

Application dismissed.

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June 17.

TUXFORD v. TUXFORD.

Saskatchewan Supreme Court. Trial before Johnstone, J. June 17, 1913.

1. DIVORCE AND SEPARATION (§ VIII A—82*c*)—DEED OF SEPARATION—RESCISSION.

A deed of separation between husband and wife cannot be attacked by the latter six years after its execution, on the ground that she signed it by reason of undue influence and without independent advice, where, before executing it, she had the draft deed in her possession for some time and made suggestions as to alterations, and also consulted her solicitor and the Bishop of her church regarding it.

2. DIVORCE AND SEPARATION (§ VIII B—85)—DEED OF SEPARATION—VALIDITY—RELINQUISHMENT BY A FATHER OF CUSTODY OF CHILD—ENFORCEMENT OF VALID PORTION.

Since the enactment of the Imperial Statute, 36 Viet. 1873, ch. 12, deeds of separation between husband and wife are not invalidated by a provision whereby a father surrenders control of his children, since the valid portion of the agreement will be enforced.

[*Besant* v. *Besant*, 12 Ch.D. 605; *Vansittart* v. *Vansittart*, 27 L.J. Ch. 289, and *Hamilton* v. *Hector*, L.R. 13 Eq. 511, specially referred to.]

3. DIVORCE AND SEPARATION (§ VIII A—82*c*)—DEED OF SEPARATION—SETTING ASIDE—INADEQUACY OF WIFE'S ALLOWANCE—FAILURE OF WIFE TO OBSERVE COVENANTS—EFFECT.

A deed of separation between husband and wife will not be set aside

on account of the inadequacy of the provision for the wife's support, where the latter, who deserted her husband in the first instance, after accepting such payments for six years, violated her covenant not to molest her husband or attempt to set aside the deed and be restored to her conjugal rights.

ACTION by the plaintiff to set aside a deed of separation executed by herself and husband.

Judgment was given for the defendant.

J. E. Chisholm, for plaintiff.

W. B. Willoughby, for defendant.

Statement

JOHNSTONE, J.:—The plaintiff is the wife of the defendant, and they were married at the city of Regina in the year 1900. The defendant then and now, was and is, the owner of land at Tuxford, in the judicial district of Moose Jaw, where the plaintiff and the defendant lived together as man and wife until the year 1905. Later in this year the plaintiff, with two boys, the issue of the marriage, without his knowledge surreptitiously deserted her husband and returned to England with the intention of residing there with her people. Some little time after reaching England, through the intervention of friends of both parties and of the solicitors of the plaintiff and of the defendant respectively, negotiations took place which resulted in the execution of a separation deed, containing the arrangement arrived at between the husband and wife in which they agreed to live separate and apart. This document bears date November 12, 1906, and was executed by the wife in person in England, and by the husband by his English solicitor under power of attorney. After reciting that unhappy differences had arisen between the plaintiff and the defendant, and that they had agreed to live separate from each other in future, it was therein provided and agreed amongst other things, that the parties would henceforth live separate from each other, and that neither would take proceedings against the other for restitution of conjugal rights, nor molest, nor annoy, nor interfere with the other in any way whatsoever, nor take any proceedings against the other to obtain a divorce or judicial separation in respect of anything which had theretofore taken place. The husband contracted to pay to the wife during the separation a weekly sum of one pound, the same to be paid every Saturday; that the defendant should have the custody and control of the son Canice, who at the time of the execution of the deed was in the custody of the mother in England; that Canice should be sent from England to Canada in charge of a Roman Catholic nurse and should be brought up and educated by a Roman Catholic nurse or governess in the Roman Catholic faith. The deed also contained provisions that in case the plaintiff should at any time take proceedings against the defendant for restitution of conjugal rights or otherwise to compel him to cohabit with her or

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should at any time directly or indirectly molest the defendant then in such a case the said weekly sum should cease to be payable; that the plaintiff should have the custody and control of the other son James Donovan Tuxford. The parties have lived separate and apart since entering into the said arrangement until about the year 1909 when she returned to Canada and took up her residence for a time in the vicinity of the defendant's home. She thereupon made several attempts through her own efforts and those of others to effect a reconciliation with the defendant, but without avail. The plaintiff now seeks in this action to set aside the separation arrangement, and to be restored to her conjugal rights, and to have the custody and control of the said children, one of whom, Canice, has been with the father since 1906. The plaintiff claims in the alternative to be paid $100 a month together with $1,000 arrears. The grounds upon which the plaintiff claims to be entitled to this relief are: That Canice was not brought from England to Canada in charge of a Roman Catholic nurse, nor was he brought up or educated as a Roman Catholic as provided in the said agreement; that the defendant refused the plaintiff access to Canice; and she further claims that she executed the separation deed by reason of undue influence and without independent advice; and that the provisions of the agreement are unreasonable, unjust and inequitable.

Taking the latter ground first, I am free to admit that the arrangement in respect to the allowance to the plaintiff for her maintenance and that of her infant son is as to this province inadequate, but it must be borne in mind that the plaintiff at the time of her marriage was a professional nurse, and was apparently at the time of entering into the deed of separation earning her own livelihood as well as that of her children—which fact she no doubt took into consideration at the time. The evidence which would be required to set aside this deed would have to be clear and convincing, but there is a total absence of evidence of fraud, duress or undue influence. The plaintiff did not execute the document in question immediately upon the receipt of the same from the defendant's solicitors, but executed it after due deliberation and after she had consulted a solicitor and her friends, including the bishop of her own church. The draft deed submitted to her had, at her own suggestion, been altered in many respects before execution. One duplicate was prepared by or in the office of solicitors who were reputed to be acting for her in the preparation of the separation deed. She has been regularly receiving the payments provided for by the deed since its execution, a period of over six years; and she cannot now in my judgment succeed in setting aside the settlement on the ground of fraud, or duress or undue influence: *Ditch* v. *Ditch*, 19 W.L.R. 497; *Clark* v. *Clark*, 10 P.D. 188.

As to the custody of the children; although by a long line of cases this arrangement between husband and wife to live apart has been recognized to be a good and valid arrangement in law, and one which the Courts will enforce, it has been equally well settled that up to 1873 in England, a provision in a separation deed in which the father disposes of the custody of his child or children was invalid. Bearing in mind the law of England on the 15th July, 1870, is the law of this province, such a provision would be invalid according to the law of Saskatchewan: *Barrett* v. *Barrett*, 6 Terr. L.R. 274. By the common law the wife, in all that relates to the education of the child, is completely subordinated to the husband. His authority in all cases is paramount, and it is contrary to the policy of the law that he should bind himself to relinquish any of his authority. Now subject to the rights of the Courts to adjudicate in certain cases under peculiar circumstances, the common law with regard to this question is the law of Saskatchewan as it was the law of England until the passing of 36 Vict. ch. 12, assented to 24th April, 1873. A number of cases might be referred to, but I shall refer only to one, a case often cited, of *Besant* v. *Besant*, 12 Ch.D. 605. At page 626 Jessel, M.R., said:—

> I am not going through the long series of cases which finally settled that a father had not the power—here again public policy is invoked—to give up the custody of his children . . . The result was that those covenants and agreements contained in deeds of separation relating to the custody by which the father gave up the custody, care, and education of infant children to the wife, were held to be void, and consequently the instrument founded upon them was held to be void also. This was considered a hardship, and the Legislature ultimately took a different view of public policy from that taken by the judicial decisions, and it ended by the Act of Parliament, 36 Vict. ch. 12, which received the royal assent on the 24th April, 1873, by which it was enacted that no separation deed made between the father and mother of an infant should be held to be void by reason only of its providing that the father of such an infant should give up the custody or control thereof to the mother, provided always that no Court should enforce any such agreement, unless the Court should be of opinion that it would be for the benefit of the infant or infants to give effect thereto.

In practice therefore, even in England, the common law, notwithstanding this statute, still controls the custody of the child unless it is made apparent that it would be for the benefit of the child that the custody should be handed over to the mother. The deed in question here would not, I apprehend, be now held to be void because of the objectionable clause even in the absence of the Act. It is the law as submitted by Courts of equity both in England and here that if any provision of an executory contract is contrary to public policy or otherwise illegal, specific performance will not be granted of any part of it, but if some of the clauses of a deed, for instance, a separation deed, are legal and others illegal, those which are legal

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will be enforced by the Courts: *Vansittart* v. *Vansittart*, 27 L.J. Ch. 289, at page 291; *Hamilton* v. *Hector*, L.R. 13 Eq. 511. The defendant cannot under ordinary circumstances be divested of his common law right to the custody and control of his children. The other provisions of the separation deed in question, that is those of them which are legal can be specifically enforced here, but enforced according to the laws of Saskatchewan. When a contract is entered into in one country and is sought to be enforced in another country, the question is not only whether it is a valid contract according to the laws of the country where it is entered into, but whether it is or is not in accordance with the laws of the country in which it is sought to be enforced: *Hope* v. *Hope*, 26 L.J. Ch. 417. The plaintiff claims that provided the separation deed should not be held to be invalid because improvidently entered into, that she is under the circumstances entitled to an increased allowance and that such should be ordered accordingly. I have already expressed the opinion that the amount for maintenance which she received under the deed was inadequate, but she having deserted her husband in the first place, then having by deed for good consideration agreed upon, and having accepted a fixed amount for her maintenance and that of her child—which she has since the execution of the deed been paid and has acted under the said deed for years; and having broken as well the covenant in the said deed not to molest the husband or bring an action for restitution of conjugal rights, I am restrained from granting this relief as well as other relief. The cases in which an increased amount has been decreed are cases where circumstances have arisen since the entering into of the agreement which were not contemplated at the time of the arrangement—mostly in cases of adultery, and the question has arisen as incidental to divorce. A fixed and permanent allowance is then made as well as an order for the dissolution of the marriage; but no such allowance is ever made in actions for judicial separation or for restitution of conjugal rights: *Bishop* v. *Bishop*, 76 L.T. 409; *Judkins* v. *Judkins*, [1897] P. 138.

The plaintiff therefore fails on all grounds, and the action will be dismissed.

As to the question of costs: cases of this class are governed, not by the ordinary principle or rules in awarding costs, but by a peculiar principle or rule of their own. Generally, costs are given to the plaintiff unless for some special reason the plaintiff should be held not entitled thereto. As the bringing of this action was contrary to, and a breach of, a covenant in the separation deed, the granting of an order for costs would be under the circumstances nothing more or less than creating a premium for breach of contract. There will therefore be no costs to either party.

Judgment for the defendant.

INDEX OF SUBJECT MATTER, VOL. XII., PART 3.

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

CASES REPORTED, VOL. XII., PART 3.

NEOSTYLE ENVELOPE CO. v. BARBER-ELLIS, Ltd.

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July 8.

Ontario Supreme Court. Trial before Falconbridge, C.J.K.B. July 8, 1913.

1. CONTRACTS (§ I C 1—15)—CONSIDERATION — FAILURE.

There was a total failure of consideration for a contract made with reference to an article supposed to answer the requirements of the Post Office Department so as to carry printed matter with greater security at a lower rate of postage, where such device failed to accomplish its purpose, and its use was not permitted by the Post Office authorities.

Statement

ACTION for damages for breach of a contract.

The action was dismissed.

C. S. MacInnes, K.C., and *Christopher C. Robinson*, for the plaintiffs.

G. F. Shepley, K.C., and *G. H. Kilmer*, K.C., for the defendants.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—This is an action brought on an agreement dated the 26th September, 1910, whereby the plaintiffs granted to the defendants a license for eighteen years for the manufacture and sale of envelopes said to be covered by a certain patent of the Dominion of Canada, and, in consideration thereof, the defendants agreed to pay to the plaintiffs a certain royalty on a minimum quantity to be manufactured by the defendants—the quantity running into the millions, and increasing year by year up to a certain period.

The patented envelope was alleged by the plaintiffs and was supposed to be so constructed that circulars and other printed matter, within the classification of third-class postal matter, enclosed therein, were secured from falling out of the envelope and were secret, but that, the end of the envelope being open, the rate of postage would be that payable in respect of third-class matter, which was much less than the usual letter rate.

Section 82 of the Postal Regulations of the Dominion of Canada provides as follows: "Every packet of printed or miscellaneous matter must be put in such a way as to admit of the contents being easily examined. For the greater security of the contents, however, it may be tied with a string. Postmasters are authorised to cut the string in such cases if necessary to enable them to examine the contents; whenever they do so, they will again tie up the packet."

It is claimed by the defendants, and I find to be proved, that the envelope in question, when in use and in transit through the mails, cannot be opened so as to allow the contents to be examined and replaced without destroying the envelope. The vice-president of the plaintiff company, H. A. Swigert, made a demonstration of the envelope in the witness-box, and, manifestly somewhat to his own surprise, did succeed in opening one

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without destroying the envelope; but no unskilled person could possibly do so, and no postmaster or post-office clerk, endeavouring to open it in accordance with the regulations, could do so without destroying the envelope, except occasionally and by accident. . . .

The defendants, who manufacture and sell envelopes on a very large scale, submitted a sample of this envelope to the post-office authorities, viz., to Mr. Ross, Chief Post Office Inspector, who condemned the device, and held that the proposed use of that envelope, at the rate of postage for third-class matter, would infringe the Postal Regulations. Apart from any rule of the department, I find as a fact that it does infringe the regulations, for the reasons I have stated above.

A great deal of correspondence ensued, the defendants claiming to rescind the contract altogether; and the plaintiffs made a modification of the envelope above-described, and secured from the post-office department the privilege of enclosing printed matter in it to be mailed at one cent for two ounces. . . .

It is claimed by the defendants that this is not what they bought; and this I find to be the case. It is true that it is easier to get at the contents, but it presents very little, if any, advantage over the old "sealed yet open" envelope, exhibit 10. . . .

This is not what the defendants bought. I doubt very much whether it would be held to be covered by the plaintiffs' patent, although this is not before me for decision, in view of my opinion on the main issue. . . .

I find that the consideration of the contract has wholly failed, and that the plaintiffs cannot recover. Apart from any question of representation or misrepresentation by the plaintiffs' agent, the parties were contracting with reference to an article which would answer the requirements of the Canadian Post-office Department, so as to send the matter enclosed therein at the lower rate of postage; and this article failed to answer them.

There is another element in the case which I am also about to pass over, but it might present a serious difficulty in the plaintiffs' way, if I had otherwise taken a favourable view of their case; and that is, the effect of the license granted by the plaintiffs to the W. Dawson Company on the 10th August, 1911, for the manufacture and sale of the envelope east of Kingston, and the privilege of selling in Manitoba and Western Canada. This is relied upon by the defendants either as an adoption of or acquiescence in the defendants' attempt to rescind the contract, or as an act in direct violation of the contract and so working a rescission.

The action will be dismissed with costs.

Action dismissed.

BALDWIN v. CHAPLIN.

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June 30.

Ontario Supreme Court. Trial before Lennox, J. June 30, 1913.

1. INJUNCTION (§ III—150)—LOCAL JUDGE—INTERLOCUTORY INJUNCTION—GRANTING EX PARTE.

Under Con. Rule 357 an interlocutory injunction may be granted by a local judge on an *ex parte* application only when delay may entail serious mischief.

[*Thomas* v. *Storey*, 11 P.R. 417; *Capital Manufacturing Co.* v. *Buffalo Specialty Co.*, 1 D.L.R. 260, 3 O.W.N. 553, specially referred to.]

2. INJUNCTION (§ II—134)—INTERLOCUTORY — CONTINUANCE — BALANCE OF CONVENIENCE—COMPENSATORY DAMAGES.

An interlocutory injunction will not be continued where the balance of convenience, as well as avoidance of loss by both parties, does not require it, and any injury may be remedied by an award of damages, and the *status quo* of the parties restored when the case is tried.

Statement

MOTION by the plaintiff for leave to amend the proceedings by the addition of co-plaintiffs and to continue an interlocutory injunction granted ex parte by the Local Judge at Chatham.

W. M. Douglas, K.C., and *J. G. Kerr*, for the plaintiff.

J. W. Bain, K.C., and *Christopher C. Robinson*, for the defendants.

Lennox, J.

LENNOX, J.:—The plaintiff's application to amend is granted, upon the condition agreed to in Court, namely, that the added plaintiffs will be in the same position as to liability for costs and damages as if they had been originally made parties.

Aside from the amendment, the motion is to continue an interlocutory injunction order granted ex parte by the Local Judge at Chatham.

Consolidated Rule 357 applies to all Judges, and ex parte orders are only to be granted when the Judge is satisfied that the delay caused by notice of motion might entail serious mischief. In *Thomas* v. *Storey*, 11 P.R. 417, it was said that no order of any moment should be made ex parte except in a case of emergency. In a recent case (*Capital Manufacturing Co.* v. *Buffalo Specialty Co.*, 1 D.L.R. 260, 3 O.W.N. 553), Mr. Justice Middleton reports Lindley, J., as saying ([1876] W.N. 12): "*Primâ facie* an injunction ought not to be granted ex parte. In cases of emergency it will be granted, but an injunction is rarely granted without hearing both sides." See also Kerr on Injunctions, 4th ed., p. 555. This, as I say, applies to all Judges; but there is more than this to be considered when the application is to a Local Judge of the High Court, under Con. Rule 46. The Local Judge has no jurisdiction unless the extra time required to apply in the regular way "is likely to involve a failure of justice." With very great respect, I am

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of opinion that this is a case in which the learned County Court Judge should not have acted.

This does not, however, necessarily determine the question of whether or not the injunction should be continued until the trial. This is a case involving the determination of important and conflicting questions of fact, and numerous, unusual, and exceptionally difficult questions of law. It is not a case of apparently unquestionable rights on the one side and apparently flagrant and impudent disregard of these rights by the other; it is rather a case of two parties bona fide asserting opposing rights, of a character so exceptional and intricate that even after a trial it may be difficult enough for the Court to determine them.

The plaintiff is the owner of land adjoining a lake, and asserts that the defendants' works obstruct him or will obstruct him in the exercise or enjoyment of his riparian rights—that the works of the defendants not only interfere with the general right of the public in navigable waters, but that he suffers or will suffer special and peculiar damage, and that he is the owner of the land upon which the works are being built. These are all disputed questions of fact to be determined at the trial: *Bell* v. *Quebec*, 5 App. Cas. 84. And, on the other hand, it is not the case of a palpable trespasser coming in to rob and run, for the defendants claim as licensees for value under a lease from the Ontario Government, expressly providing for the erection and operation of these works. Whether right or wrong in their claim of title, they are giving earnest of good faith by the expenditure of large sums of money, and their readiness to conform to the navigation laws and regulations of the Dominion Parliament.

The question then for me to decide is, not the many and involved questions which will arise at the trial—of fact and of law—but the balance of convenience, the avoidance of loss to either party as far as may be. Would damages compensate the plaintiff? Can the status quo be restored after the trial if the plaintiff succeeds? I think so.

"A man who seeks the aid of the Court by way of interlocutory injunction must, as a rule, be able to satisfy the Court that its interference is necessary to protect him from that species of injury which the Court calls irreparable, before the legal right can be established upon trial:" Kerr on Injunctions, p. 14.

It is not right that I should discuss the remedy in case it is found at the trial that the defendants are in the wrong—it is enough for me to say that the rights of the parties are by no means clear—that there are bona fide questions to be tried—that, so far as appears, both parties are honestly asserting what they think are legal rights—that complete justice can be done at or after the trial, and the best interests of all parties will be conserved, not by a quasi-adjudication of the rights of the parties now, but by leaving them in abeyance until the case is heard.

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The trial Judge can best deal with the question of costs, and they will be reserved for him.

Except as to the amendment above provided for, the motion will be dismissed and the injunction dissolved.

Injunction dissolved.

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Re Applications to Close Highways at Various Railway Crossings.

Board of Railway Commissioners for Canada. May 10, 1913.

1. HIGHWAYS (§ V A 1—245)—CLOSING—POWER OF RAILWAY COMMISSION.

The jurisdiction of the Board of Railway Commissioners as to the closing of a highway is limited to the extinguishment of the public right to cross the railway; and this power is ordinarily exercised by first granting permission to divert the highway and afterwards making the order to close the road allowance within the limits of the company's right-of-way after the construction of the new grade crossing on the diverted highway.

CHIEF COMMISSIONER DRAYTON:—Many applications are made by railway companies to have highways closed. Some orders have in the past issued closing highways in so many words, and these orders are referred to by the railway companies in support of their requests for similar orders. In no instance, however, that I have been able to discover has any street been closed except where some highways forming part of a general scheme of rearrangement have been diverted. Applications for orders closing highways come in in varying forms, and it has become necessary to rule on the Board's jurisdiction in connection with the matter.

The Board has no jurisdiction to close highways. The Board has the right to divert. Diversion implies two things, firstly, laying out of a new right-of-way for the public, that is, a highway across the railway company's right-of-way; secondly, closing of the previous highway. The Board's jurisdiction, so far as closing is concerned, is confined entirely to the extinguishment of the public right to cross the railway company's right-of-way. It can go no further.

The appropriate order to be applied for and to be drawn by the law clerk, if the application is granted, is an order authorizing the road diversion and the construction of a grade crossing on such diversion in accordance with the standard requirements of the Board and as shewn on the proper plan and profile, filed. Secondly, that, after the diversion is made and grade crossing constructed thereon in accordance with the Board's standard regulations, the railway company may close that portion of the existing road allowance, authority for the diversion of which is granted, within the limits of the railway company's right-of-way.

Ruling accordingly.

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TOWN OF WATERLOO v. CITY OF BERLIN.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 14, 1913.

1. COURTS (§ I D—124b)—JURISDICTION — MATTERS UNDER JURISDICTION OF RAILWAY AND MUNICIPAL BOARD.

The courts will not entertain a suit for an accounting of profits from the operation of a railway by two municipalities under a formal agreement executed not voluntarily but in conformity to an order of the Ontario Railway and Municipal Board, since the matter was one exclusively within the jurisdiction of the Board.

[*Town of Waterloo* v. *City of Berlin*, 7 D.L.R. 241, affirmed.]

Statement

APPEAL by the Corporation of the town of Waterloo, from the dismissal of an action against the city of Berlin to enforce a proper accounting under clause 20 of an agreement between the two corporations, dated the 18th January, 1910, *Town of Waterloo* v. *City of Berlin*, 7 D.L.R. 241, 28 O.L.R. 206.

The appeal was dismissed.

Argument

M. K. Cowan, K.C., for the plaintiff corporation:—The electric railway between Berlin and Waterloo has been taken over by Berlin, subject to an agreement under which Berlin is bound to pay to Waterloo one-fourth of the net annual profits, which agreement was confirmed by an order of the Ontario Railway and Municipal Board, dated the 2nd September, 1910. The main question between the parties is, whether Berlin is entitled to deduct the taxes levied by itself from the profits before paying over the one-fourth to Waterloo. The objection was taken by Berlin that the Court had no jurisdiction to deal with the matter, as it belonged exclusively to the Railway Board. It is submitted that the learned Chancellor erred in acceding to this view. Counsel referred to *Re Town of Sandwich and Sandwich Windsor and Amherstburg R.W. Co.*, 2 O.W.N. 93, at p. 98, where it is said that "the Board, it must be remembered, is not a Court;" and, while it would properly deal with matters of administration, a point of this kind did not come within its jurisdiction. He also referred to *Re Port Arthur Electric Street Railway*, 18 O.L.R. 376, 382.

E. E. A. Du Vernet, K.C., and *H. J. Sims*, for the defendant corporation, argued that the view of the trial Judge was right; and that, when once the Board had jurisdiction in the matter, it had full and exclusive jurisdiction. If its judgment is erroneous, an appeal can be taken. They referred to *Re Town of Orillia and Township of Matchedash* (1904), 7 O.L.R. 389; and also relied on the *Port Arthur* case, *supra*.

Cowan, in reply.

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MULOCK, C.J.

February 14. MULOCK, C.J.:—This action is brought by the Town of Waterloo to enforce a stipulation contained in a certain agreement entered into between the two corporations, whereby the defendant agreed to pay to the plaintiff a portion of the annual net profits arising from the operation of the Berlin and Waterloo Street Railway. The case was tried by his Lordship the Chancellor, who gave effect to the defendant's objection of want of jurisdiction in the Court, and dismissed the action with costs. From this judgment the plaintiff appeals.

From the statements of counsel at the trial, it would seem that those bearing on the question involved are as follows. The Berlin and Waterloo Street Railway was an incorporated street railway company, whose franchise, which expired in 1906, entitled it to operate a street railway in the then two adjoining towns of Waterloo and Berlin. In 1906, Berlin acquired the road, and, under statute 7 Edw. VII. ch. 58, its management was placed under the control of the Berlin Light Commission, a municipal body elected by the ratepayers of Berlin, and this Commission has ever since been in possession of and operated the railway. A portion of the line is situate within the limits of the Town of Waterloo, and, on the 18th January, 1910, the Ontario Railway and Municipal Board made an order directing the City of Berlin to pay to the Town of Waterloo one-quarter of the net yearly profits from the railway, in return for the privilege of operating the system within the municipal limits of Waterloo. Thereupon the two municipalities entered into a written agreement, clause 20 of which provided that Berlin should pay to Waterloo on the 1st day of January of each year one-quarter of the net profits; and on the 2nd September, 1910, the Board made an order approving of the said agreement.

In this action Waterloo complains that Berlin has in two respects failed to comply with this provision: one being that there has been charged against the total profits of the road a certain sum paid by the Commission to the Municipality of Berlin for taxes against the railway, which Waterloo contends is exempt from taxation; and the other ground of complaint being that there have been charged against the annual profits certain sums expended on capital account, and not properly chargeable against the annual profits.

At the threshold of the case, it is necessary for the Court to determine whether it has any original jurisdiction in respect of the matters complained of.

The Ontario Railway and Municipal Board is a body created under the authority of the Ontario Railway and Municipal Board Act, 1906, being 6 Edw. VII. ch. 31; and sub-sec. 3 of sec. 17 of that Act declares that "the Board shall have ex-

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clusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by the special Act or by the said Act, and save as herein otherwise provided 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."

Section 16 of the said Act declares that "the Board shall have all the powers and authority vested in it by the Ontario Railway Act, 1906, and shall also have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested; (*a*) complaining that the company, or any person or municipal corporation, has failed to do any act, matter or thing required to be done by this Act or the said Act or the special Act, or by any regulation, order or direction made thereunder by the Lieutenant-Governor in Council, the Board, or by any inspecting engineer, or by any agreement entered into by the company with any municipal corporation, or has done or is doing any act, matter or thing contrary to, or in violation of, this Act, or the said Act, or the special Act, or any such regulation, order or direction, or any such agreement."

If the matter in issue in this action is one in respect of which, by sec. 16, the Board has jurisdiction conferred upon it, then, by virtue of sub-sec. 3 of sec. 17 (above quoted), such jurisdiction is exclusive original jurisdiction.

Thus, the simple question involved in this appeal is, whether the obligation of the City of Berlin to pay to the Town of Waterloo one-quarter of the net yearly profits of the railway, is included in the list of subjects enumerated in sec. 16.

Section 192 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, enacts that "the company and the council of any municipality in which a railway or part of a railway is laid, may, amongst other things, enter into any agreements they think advisable, relating to . . . the amount of compensation (if any) to be paid by the company annually or otherwise."

The word "company" here includes the Corporation of the City of Berlin, because of its assuming the ownership of and operating the street railway in question (sec. 207 of the Railway Act).

Thus, under these two sections, it was competent for the two municipalities to enter into the agreement in question; and for the Board, if it saw fit, which it did, by order dated the 2nd September, 1910, to approve of the same.

I am, therefore, of opinion that, the Board having jurisdiction to deal with the subject-matter involved in this action, the Court possesses no jurisdiction to entertain this appeal.

and should make no order except that the appellant pay the costs of the appeal.

RIDDELL, J.:—The defendant corporation became the owner of an electric railway between and within the two towns. By an agreement of the 18th January, 1910, the net profits of the railway were to be divided, one-fourth to Waterloo, three-fourths to Berlin. Both towns taxed that part of the railway within their borders; Berlin, which owns and operates the railway, deducted the amount of taxes levied by itself from the gross profits of the road; Waterloo complains that this should not be done, and brings an action accordingly. The Chancellor decided that the Court has no jurisdiction; and Waterloo appeals.

Considerable rhetoric is indulged in in the statement of claim, and it seems to me proper to determine, first, precisely what it is that the plaintiff can complain of.

What Berlin may do in the way of assessing, so long as it is not upon Waterloo's property, Waterloo cannot complain of—the assessing does no harm. That the management of the railway pay to the Town of Berlin any sum of money is not material, so long as sufficient remains to pay Waterloo the fourth. Whatever the form may be, the railway is the property of Berlin, and the management the town's statutory or other agents: *McDougall* v. *Windsor Water Commissioners* (1900), 27 A.R. 566; *S.C.* (1901), 31 Can. S.C.R. 326; *Ridgway* v. *City of Toronto*, 28 U.C.C.P. 579; and what was done when the form was gone through (if it was gone through at all) was, that the agents paid to the principal some of the principal's own money. There was no payment out by Berlin to any third person of any of the profits of the railway—no harm could thereby be done to the plaintiffs; and, so far, Waterloo could not complain of any injury.

The damage began when the owner of the road attempted to charge the amount mentioned in this banking transaction—a purely domestic transaction as it was—against the profits and thereby diminish the net profits. In other words, the real cause of complaint by Waterloo is the proposed allowance of a certain sum as properly chargeable against the profits—that sum never having been in law paid out.

Such a question would be determined by the Master in the taking of partnership accounts; and, under the very wide jurisdiction given to the Board by the Act of 1906, I cannot see that the Board could not pass on such a matter. That the Board would have to determine a question of law is no objection—the Board are doing that every day—and, if their decision should be wrong, an appeal is provided for.

I am of opinion that the appeal should be dismissed with costs, without prejudice to an application to the Board.

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SUTHERLAND, J.:—I think it clear that the Ontario Railway and Municipal Board have jurisdiction to deal with the questions in dispute between the two municipalities, and that, under the statute of 1906, 6 Edw. VII. ch. 31, sec. 17, sub-sec. 3, its jurisdiction is exclusive.

I agree that the appeal should be dismissed with costs.

LEITCH, J., concurred.

Appeal dismissed with costs.

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GOWER v. GLEN WOOLLEN MILLS, Limited.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 14, 1913.

1. MASTER AND SERVANT (§ II A 4—71)—LIABILITY FOR INJURY TO SERVANT—FAILURE TO GUARD SHAFT.

Where the direct and proximate cause of an accident was the neglect of the employer to guard a shaft, an injured employee himself free from negligence, may recover under either the Factories Act, R.S.O. 1897, ch. 256, or the Workmen's Compensation Act, R.S.O. 1897, ch. 160.

[*Gower* v. *Glen Woollen Mills, Ltd.*, 9 D.L.R. 244, affirmed.]

2. MASTER AND SERVANT (§ II A 1—30)—LIABILITY FOR INJURY TO SERVANT—DEFECTIVE SYSTEM AND EQUIPMENT OF FACTORY—COMMON LAW LIABILITY.

A common law action will lie for an injury occasioned an employee by defects generally in the system and equipment of a factory.

[*Gower* v. *Glen Woollen Mills, Ltd.*, 9 D.L.R. 244, affirmed.]

3. MASTER AND SERVANT (§ II A 1—43)—LIABILITY FOR INJURY TO SERVANT—FAILURE TO GIVE NOTICE OF INJURY—CONDUCT OF EMPLOYER—WAIVER.

The failure of an employee to give notice of an injury as required by sec. 9 of the Workmen's Compensation Act, R.S.O. 1897, ch. 160, will not avail an employer who was not prejudiced by the want of notice, and who, with full knowledge of the injury, by his conduct and representations led the employee to neglect to give such notice.

[*Gower* v. *Glen Woollen Mills, Ltd.*, 9 D.L.R. 244, affirmed; *Armstrong* v. *Canada Atlantic R. Co.*, 4 O.L.R. 560, and *O'Connor* v. *City of Hamilton*, 10 O.L.R. 529, followed.]

Statement

APPEAL by defendants from the judgment at trial, *Gower* v. *Glen Woollen Mills, Ltd.*, 9 D.L.R. 244, 4 O.W.N. 467.

The appeal was dismissed.

The action was for damages for injuries sustained by plaintiff while working for the defendants in their mill, by reason, as the plaintiff alleged, of the negligence of the defendants or their servants and workmen.

Argument

G. H. Watson, K.C., and *B. H. Ardagh*, for the defendants:—The plaintiff's act which caused the injury was voluntary on his part, and outside of the line of his duties. Schofield, the mechani-

cal superintendent, was on the premises, and gave no order to the plaintiff, who had no knowledge of the machinery employed, to put on the belt. The evidence shews that the injury was caused by a sudden jar or some such accident, or from some mistake of the plaintiff, for which the defendants were not responsible. Even if the system was defective, which is not admitted, the defect must be brought to the knowledge of the defendants, which is not the case here. If there is any liability at all, it is under the Workmen's Compensation for Injuries Act, upon which the case fails for want of the requisite notice. They referred to the following cases: *Clark* v. *Loftus* (1912), 4 D.L.R. 39, 3 O.W.N. 1027, 26 O.L.R. 204, 212; *Lappage* v. *Canadian Pacific R.W. Co.* (1908), 13 O.W.R. 118; *Mercantile Trust Co.* v. *Canada Steel Co.* (1912), 3 D.L.R. 518, 3 O.W.N. 980, in which case Riddell, J., refers to many additional cases—see *Deyo* v. *Kingston and Pembroke R.W. Co.* (1904), 8 O.L.R. 588; *Corea* v. *McClary Manufacturing Co.* (1912), 3 D.L.R. 323, 3 O.W.N. 1071; *D'Aoust* v. *Bissett* (1909), 13 O.W.R. 1115; *Quebec and Levis Ferry Co.* v. *Jess* (1905), 35 Can. S.C.R. 693; *Thompson* v. *Ontario Sewer Pipe Co.* (1908), 40 Can. S.C.R. 396.

T. J. Blain, for the plaintiff, argued that, under the circumstances of the case, the plaintiff had a reasonable excuse for not giving the notice, and that the defendants had not been prejudiced by its absence. The only real defence is, that the plaintiff was a volunteer, and on that point the findings of fact of the learned trial Judge were justified by the evidence and by the demeanour of the witnesses. It is also shewn that the construction of the jack-staff was faulty, causing the belt to fly off frequently. This is evidence of a defective system, for the consequences of which the defendants are responsible. He referred to Kingsford on Evidence, ed. of 1911, pp. 328-334, and cases there cited; *Haight* v. *Wortman and Ward Manufacturing Co.* (1894), 24 O.R. 618, 619, 622; *Canada Atlantic R.W. Co.* v. *Hurdman* (1895), 25 Can. S.C.R. 205, applying *Smith* v. *Baker & Sons,* [1891] A.C. 325; *Rodgers* v. *Hamilton Cotton Co.* (1893), 23 O.R. 425; *Canada Foundry Co.* v. *Mitchell* (1904), 35 Can. S.C.R. 452; on the question of notice, *O'Brien* v. *Michigan Central R.R. Co.* (1909), 1 O.W.N. 7, 19 O.L.R. 345, at p. 348.

Watson, in reply, argued that no case had gone the length which was contended for by the plaintiff, and that, on the evidence, it appeared that the learned trial Judge had "run away with the bit," so to speak. As to the notice, there is no valid excuse for the failure to give it, and *Giovinazzo* v. *Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 325, is a direct reply to the plaintiff's claim in this regard. He also referred to *Moyle* v. *Jenkins* (1881), 8 Q.B.D. 116; *Keen* v. *Millwall Dock Co.* (1882), 8 Q.B.D. 482; *Carter* v. *Drysdale* (1883), 12 Q.B.D. 91.

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Blain referred to *O'Connor* v. *City of Hamilton* (1905), 10 O.L.R. 529, at p. 536.

February 14. The judgment of the Court was delivered by SUTHERLAND, J.:—An appeal from the judgment of Latchford, J., awarding the infant plaintiff, suing by his next friend, judgment for $2,000 against the defendant company for injuries caused to him owing to their alleged negligence.

In the plaintiff's statement of claim, damages were claimed at common law and under the Workmen's Compensation for Injuries Act and the Ontario Factories Act. The plaintiff, who was, at the time of the accident, nineteen years of age, had been in the defendant company's employ about two months, but had had experience in England in operating machines in woollen mills for about five years. He had not, however, there had any previous experience in putting belts on and taking them off machinery.

The injuries suffered by the plaintiff were severe, resulting in the loss of an arm. The accident occurred while the plaintiff was attempting to place a belt upon a pulley. The course pursued in the factory was to rest a ladder, about twelve feet long, against the end of a revolving shaft, which projected beyond the pulley in question. The ladder did not have clamps on the top or spikes at the bottom to hold it securely, and was not long enough to go up to the rafters. Also, the floor of the room was greasy.

There were three storeys in the factory building, and an elevator was used to take materials up and down. The facts are fully and clearly set out in the judgment.

[The learned Judge then quoted portions of the judgment of LATCHFORD, J., in the judgment appealed from, *Gower* v. *Glen Woollen Mills, Ltd.*, 9 D.L.R. 244, 4 O.W.N. 467.]

One Schofield was the overseer in the factory of the shafting and belting. The evidence, however, discloses that the oversight of the work of putting on and off this belt and other belts was apparently lax. The plaintiff himself testified that any person put on the belts in the mill, and that "he had seen others," and that "it was supposed to be done by anybody that works at that mill." Louise Preston, another employee, said that she had seen the belt off the pulley in question, and that "anybody puts it on."

Of the comparatively few men employed in the factory, the evidence discloses that five or six at different times had put this belt on the pulley in question. While Schofield was nominally in charge, it had apparently become the custom for employees, as the elevator was from time to time required to carry materials up and down, to put the belt on the pulley for the purpose of operating it. The trial Judge gave full credit to the evidence of the

plaintiff when he testified that, some little time before the accident, another employee, named Bierman, told Schofield, in the weaving-room, that the elevator belt was hot, and that thereupon Schofield directed the plaintiff to take a pole, go down, and throw the belt off the pulley on to the shaft; that he did as directed, came back, and reported; and, a few minutes later, was told by Schofield to go down and put it on again, which he did.

On the day the accident occurred, namely, the 15th December, 1911, the same boy, Bierman, required, in connection with the work of the defendants, his employers, to bring some yarn down from the upper storey, and at about the same time Gower wanted to have some "spools" taken up.

Under these circumstances, Bierman went to the plaintiff, where he was working, and asked him to come and put the belt on. He accompanied Bierman, and, finding the ladder already placed against the shafting, went up and attempted to put the belt on. It ran over to the other side so that it hung on the shaft between pulley "A," the pulley in question, and the hanger on the other side. He then attempted to reach over and take hold of the belt for the purpose of trying to put it on again; but, in doing so, pushed the ladder off, fell on the shafting, was caught and whirled around and injured, finally falling to the floor below.

Bierman had apparently been holding the ladder for him, but when it was pushed was unable to keep it firm.

The defendants had immediate notice and knowledge of the accident and of the injuries resulting to the plaintiff. The plaintiff was conveyed from the village of Glen Williams, in the county of Halton, where the defendants' mills are operated, to a hospital at Georgetown, where he remained for about ten weeks, when he returned home and continued for a number of weeks longer to be under medical treatment.

It is clear, from a letter written by the defendants to the plaintiff's solicitor, on the 1st May, 1912, that the question of compensation for the injuries was a matter of discussion between the plaintiff's parents and themselves soon after the accident. I quote from the letter: "This matter was taken up with the insurance company within fourteen days after the accident occurred. We had repeatedly informed the parents that they had this matter in hand and could do nothing until Gower was dismissed by the medical authorities. This was only done last Thursday, April 25th."

The Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 9, provides: "An action for the recovery, under this Act, of compensation for an injury shall not be maintainable against the employer of the workman, unless notice that injury has been sustained is given within twelve weeks, and the action is commenced within six months from the occurrence of the accident causing the injury."

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The accident occurred on the 19th December, 1911, and the writ was issued within the six months, namely, on the 13th May, 1912. No notice, under the terms of the Act, was given by or on behalf of the plaintiff within the twelve weeks; and the defendants in their statement of defence plead "that they were not served with any notice of injury or any sufficient notice, as required by the provisions of the said Act."

The Statute Law Amendment Act, 1903, 3 Edw. VII. ch. 7, sec. 46, provides: "In all cases between employer and employed or their representatives where liability for damages arises by reason of any violation of the Ontario Factories Act, the liability shall be subject to the limitations contained in section 7 of the Workmen's Compensation for Injuries Act;" which section (7) also limits the amount of compensation recoverable under the last-mentioned Act to "such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment within this Province, or the sum of fifteen hundred dollars, whichever is larger."

The Statute Law Amendment Act, 1908, 8 Edw. VII. ch. 33, sec. 52, enacts: "Section 46 of the Statute Law Amendment Act, 1903, is amended by striking out the word and figure 'section 7' in the fourth line and substituting therefor the words and figures 'sections 7 and 9.'"

The trial Judge was of the opinion that "negotiations regarding a settlement were entered into, and protracted—deliberately, I think—until six months had expired." It is contended on the part of the defendants that, as no notice, as required by both of the said Acts, had been given within the twelve weeks, the plaintiff is not entitled to recover under either. Section 9 of the Workmen's Compensation for Injuries Act is subject to the provisions of secs. 13 and 14 thereof; and sec. 13, sub-sec. 5, is as follows: "The want or insufficiency of the notice required by this section, or by section 9 of this Act, shall not be a bar to the maintenance of an action for the recovery of compensation for the injury if the Court or Judge before whom such action is tried, or, in case of appeal, if the Court hearing the appeal, is of opinion that there is reasonable excuse for such want or insufficiency, and that the defendant has not been thereby prejudiced in his defence."

It seems to me that, where the defendants had an immediate knowledge of the accident and the injuries of the plaintiff, and were from time to time informing his parents, who were apparently asserting a claim for compensation and negotiating with them for a settlement, that the insurance company had the matter in hand and could do nothing until the plaintiff was dismissed by the medical authorities, this should form a reasonable excuse for

any want or insufficiency of a notice such as contemplated by the Act.

The defendants were, in effect, suggesting to the parents of the plaintiff to do nothing about the claim in the meantime. It was in the nature of a waiver of the notice. The defendants rely on the case of *Giovinazzo* v. *Canadian Pacific R.W. Co.*, 19 O.L.R. 325, in support of their contention that no reasonable excuse is offered by the plaintiff for his failure to give the notice required by the statute.

In *Armstrong* v. *Canada Atlantic R.W. Co.* (1902), 4 O.L.R. 560, it was considered that "what constitutes reasonable excuse must depend upon the circumstances of each particular case, and such may be inferred where there is the notoriety of the accident, the knowledge of the employers of the injury which resulted in death, and its cause, and of a claim having been made on them by the deceased's representative." Osler, J.A., who delivered the judgment of the Court, says, at p. 567: "The object of the notice is to protect the employer against stale or manufactured or imaginary claims, and to give him an opportunity while the facts are recent of making inquiry into the cause and circumstances of the accident. The several clauses which bear upon the subject are very loosely fitted together, but the stringency of the original provision has been much relaxed, and the injured workman is evidently the first object of the Legislature's care." And again, at p. 568, he says: "I cannot but think that reasonable excuse for want of notice may be very slight indeed where the occurrence of the accident appears to have been well known to the employer, and a *bonâ fide* claim for compensation therefor has been made, inasmuch as the Judge has power under section 14 in the alternative, and simply in his discretion and on such terms as he may think proper, to adjourn the trial of the action to enable notice to be given."

And the same learned Judge in *O'Connor* v. *City of Hamilton*, 10 O.L.R. 529, where the question of the statutory notice of the accident under section 606 of the Municipal Act, 3 Edw. VII. ch. 19, was in question, said, at p. 536: "In the present case it is enough to say that the plaintiff was not misled by any one into not giving notice and was under no disability except that of ignorance (of the law), which can hardly be invoked as excuse for omitting to observe the requirements of the Act. I have not thought it necessary to refer to the provisions of the Workmen's Compensation Act which were considered in *Armstrong* v. *Canada Atlantic R.W. Co.*, 4 O.L.R. 560. They probably admit of a more elastic administration than does the section of the Municipal Act."

It seems to me that the effect of the defendants' representations to the plaintiff's parents was to mislead them so that they

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delayed taking action. The trial Judge thinks that this course was taken deliberately by them. I am, therefore, of opinion that there was reasonable excuse, on the part of the plaintiff, for not serving the notice.

I cannot see how the defendants were in any way prejudiced in their defence by any lack of formal notice.

It was their representations to the parents from time to time that apparently prevented them from consulting a solicitor, giving notice, and proceeding with the action sooner.

The trial Judge has found, and rightly so, I think, that "the plaintiff was not a mere volunteer. His very work in the weaving-room made spools necessary, and the elevator was the only means of bringing them up. In putting on the belt, he was doing work identical with that which the foreman had, at least upon one occasion, ordered him to do, and was doing it in the only way the system of the defendants rendered possible, and without knowledge of the risk he was running. The system of the defendants was defective in the respect I have mentioned. The plaintiff was not himslf negligent, and, apart from his rights under any statute, is entitled to damages."

I agree with him that the plaintiff is entitled to recover at common law, owing to the defective system. It is also plain from the evidence that, with the shaft projecting as it was and revolving, it was the duty of the defendants, knowing that the belt was in the habit of slipping off the pulley and had to be replaced from time to time and in the manner mentioned, to guard it. It was, under the circumstances, a dangerous part of the machinery, and, under the Factories Act, should have been guarded.

In the opinion of an expert machinist, on whose evidence the trial Judge placed reliance, it was practicable to guard the pulley and shaft. The finding of the trial Judge is, that, "if the shaft had been so guarded, the accident would not have happened. Want of a guard was the direct and proximate cause of the accident; and the plaintiff is, accordingly, in my judgment, entitled to recover under the Factories Act."

I agree with this finding and conclusion. I am also of opinion that, as indicated, there was a defect in the machinery of the defendants' shaft in the way it was hung, which caused the belt to slip off the pulley. It was this defect which, at the time of the accident, when the plaintiff took hold of the belt and attempted to put it on the pulley, caused it to run over to the other side. It was in attempting to reach over and take hold of it to try and put it on again that the accident occurred.

I am of opinion, therefore, that, under the Workmen's Compensation for Injuries Act, also, the plaintiff is entitled to succeed.

Appeal dismissed with costs.

Re WESTERN COAL CO. Ltd.

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July 11.

Alberta Supreme Court. Trial before Beck, J. July 11, 1913.

1. CORPORATIONS AND COMPANIES (§ VI F—345)—WINDING-UP—PREFERRED CREDITORS—WAGE-EARNERS.

One employed without a definite term of hiring, to haul coal with his own waggon and team, at a fixed sum per ton, who works under the direction and control of his employer, is working for wages so as to make him a preferred creditor under the Companies Winding-up Ordinance of the Northwest Territories, Alta. 1911, ch. 111, sec. 10.

Statement

APPLICATION by workmen for preference as wage-earners in the winding-up of a corporation.

The application was granted.

A. C. Grant, for applicants.

E. A. Wright, for the company.

Beck, J.

BECK, J.:—Two men, John White and Alexander Sutherland, claim to rank as preferred creditors under the Companies Winding-up Ordinance, in respect of wages. Sec. 10, ch. 111, Ordinances of Northwest Territories, 1911.

They were each employed to haul coal from the company's mine to Edmonton at a certain fixed sum per ton hauled. In doing so it was intended that they should use each his own waggon and team, and they did so. Neither was under obligation to haul any specified quantity. They could stop work or be discharged at any time. The question is whether what they earned in this way is "wages." I think it is.

The company and these men were in the relation of master and servant. The men were in the employment of the company. They were not independent contractors, that is, they had not contracted to do a certain specified work which, once the contract was made, they could do in their own way without interference by the company, and which, when completed, they could demand to be paid for notwithstanding they had refused to obey the orders of the company. I presume that they were hauling the coal for delivery to individual customers. If so, they were subject to the direct orders of the company as to the place and time and quantity of delivery. If they were to deliver to a warehouse only, their employment—which was to last only so long as both parties were satisfied—still left them subject to the direct orders of the company as to the time and precise place, and the order among themselves and others of getting and delivering their loads. There were, no doubt, other respects in which they were subject to the orders of the company, such as the weighing of their loads, or the use of delivery tickets.

The extent of the right of control seems to be the important question in distinguishing between the position of a servant and that of an independent contractor, rather than the question

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whether, in addition to the personal services of the servant, he employs property of his own to aid him in his services. There seems no more reason for refusing to recognise as holding the legal position of servant, and to recognise his compensation as wages—a teamster using his own waggon and team—than a carpenter using his own tool, or a labourer his own spade.

The predominant and prevailing element in each case is the personal service, and a personal service which is subject to the direct control of the employer. Reference may be made to 26 Cyc. tit. "Master and servant;" 40 Cyc. tit. "Wages;" Stroud's Jud. Dict. tit. "Wages."

So I hold that these two men are entitled to rank as preferred creditors in respect of their wages in accordance with the section of the Act which deals with this matter.

Judgment for applicants.

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June 9.

GREENLAW v. CANADIAN NORTHERN R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 9, 1913.

1. RAILWAYS (§ II D 6—70)—LIABILITY FOR DAMAGES—KILLING ANIMALS—DEFECTIVE FENCE—ANIMALS AT LARGE UNDER BY-LAW.

Cattle turned out to graze on the highways as authorized by a municipal by-law are not "at large through the negligence or wilful act or omission of the owner" so as to relieve a railway company, under sec. 294 (4) of the Railway Act, R.S.C. 1906, ch. 37, as amended by 10 Edw. VII. ch. 50, sec. 8, from liability for running down animals that came upon its right-of-way at a place other than a highway crossing, by reason of defects in the fencing which the railway company was under a statutory obligation to maintain.

Statement

THE plaintiff, a farmer, residing in the municipality of Clanwilliam, brought this action to recover $150 for two head of cattle which were killed on the defendants' line by a train, having got on the track, as plaintiff alleged, owing to defective fencing and the absence of cattle-guards and gates.

The case was tried before Judge Mickle, when a verdict was entered for the plaintiff for $150, and defendants appealed.

The appeal was dismissed.

O. H. Clark, K.C., for the defendants.

C. L. St. John, for the plaintiff.

Richards, J.A.

RICHARDS, J.A.:—In the municipality in which the plaintiff resides, and in which is that part of the defendants' line of rail in question, there is a by-law (pursuant to sec. 643 (*b*) of the Municipal Act) allowing cattle to run at large in the municipality.

The plaintiff had, for nine years, been in the habit of driving his cattle, at the proper season of the year, to pasture on section

9, which is unfenced, and leaving them there. The cattle strayed from section 9 up to section 15, crossing, necessarily, road allowances, none of which, however, had been opened up, and, owing to what is admitted by the defendants to have been an imperfect fence along the defendants' right-of-way, got on that right-of-way and were killed by one of the defendants' trains at a place which was not the intersection of the right-of-way with a highway.

It appears that the part of section 15 from which they got onto the right-of-way was unfenced, and its owner had for years tacitly acquiesced in other people's cattle (including the plaintiff's) grazing on it.

The plaintiff sued the defendants in the County Court of Minnedosa, and the learned trial Judge gave judgment in his favour for $150, the value of the cattle killed.

The defendants, in appealing, admit that the fence in question was defective, but claim that the cattle got at large through the negligence, or wilful act, or omission of the plaintiff, as contemplated by sub-sec. (4) of sec. 294 of the Railway Act.

Though I think he has done so, I do not think it was necessary for the plaintiff to shew that his cattle were rightfully upon section 15. Sub-section (4), above referred to, provides that where cattle, 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 provided for in sec. 295, be entitled to recover the amount of such damage against the company; unless the company establishes that such animals got at large through the negligence or wilful act or omission of the owner or his agent, or the custodian of such animal or his agent.

The case does not come in any way within sec. 295, and the killing was not at the intersection of the right-of-way with a highway, so that all that remains is to consider whether the cattle got at large through the negligence or wilful act or omission of the owner.

Section 643 of the Municipal Act, sub-sec. (*b*), permits the passing of by-laws by a municipality for *allowing*, restraining and regulating the running at large or trespassing of any animals.

The by-law in question says that, subject to the restrictions as to breachy animals and entire animals imposed by any statute of Manitoba, or by any by-law of the municipality, cattle may run at large at all times.

There is no suggestion that these cattle come within the exception as to breachy, or entire, animals.

But it is contended that, notwithstanding the provisions of the Municipal Act and of the by-law, the liability is just the same as in a case where there was no such by-law; as that liability is fixed by Dominion statute.

There is no provision in the Railway Act, or in the Dominion

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Interpretation Act, defining what is meant by the words "negligence" or "wilful." We are, therefore, obliged to look for definitions to the common law in force at the place where the damage arose, and, as that is within the powers of the provinces as to property and civil rights, it is surely controlled by the statutes of those provinces.

I think the intention of the Dominion Legislature was to leave the expression "negligence or wilful act or omission" to be interpreted by the provincial law in force where the killing occurred, and it would follow that, where they were so lawfully at large under the provincial law, the mere letting them at large should not, in itself, be a defence.

If that were not so, the privilege of allowing cattle to be at large under such a by-law as the one in question would be of little value in a municipality through which a railway ran, and the railway would in such case incur an at least greatly lessened liability for not keeping its fences in repair.

I take the result to be that, irrespective of whether the cattle were, as between their owner and the owner of the land from which they got onto the track, lawfully upon that land, yet, where they were lawfully at large under the provincial law, the railway is, by sub-sec. (4), liable, if they are killed on the railway's property by that railway's train, in cases that do not come under sec. 295, and where the killing is not at the intersection of a highway with the railway.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—The cattle in respect of which this action is brought got upon the defendant's right-of-way, not at a highway crossing, but at some distance therefrom. It is admitted that they got upon the company's property by reason of a defect in the company's fence, a defect of which the company had notice, and which it neglected to repair. The cattle were killed by a train belonging to the defendants. The defendants are therefore liable for the loss of the cattle under sub-sec. 4 of sec. 294 of the Railway Act, unless it can establish that they "got at large through the negligence or wilful act or omission of the owner."

The plaintiff had turned the cattle out to graze on vacant land some distance away from the railway. A by-law of the municipality where the plaintiff resided and where the injury occurred, passed in pursuance of sec. 644 of the Municipal Act, permitted cattle to run at large. The by-law, duly passed, as we must assume it was, under the authority of the Act, had the same effect as a statute within the boundaries of the municipality.

The plaintiff contends that he was not negligent in doing what the law permitted him to do. The word "negligence," as used in the above section, must be interpreted in accordance with the laws of this province, there being no special meaning put upon it by the Railway Act. To do something permitted and

authorised by law, something ordinarily done in the municipality by reasonable and prudent men, can surely not be held to be an act of negligence. The other words in sub-sec. 4, "wilful act or omission," give more difficulty. The word "omission" means the failure to do something which it is one's duty to do, or which a reasonable man would do. The word "wilful" used in the expression "wilful default" has been defined as meaning that the person acting is a free agent, and that what has been done arises from the spontaneous action of his will: *per* Bowen, L.J., in *Re Young & Harston*, 31 Ch.D. 168, at 174-175. But to ascertain the meaning of the expression "wilful act," as used in sec. 294 of the Railway Act, it is necessary to consider the context and the purpose of the enactment.

The intention of sub-sec. 4 of sec. 294 is to make the railway company liable where cattle get upon the property of the company and are injured by a train, unless the company can shew that it is excused because the owner let his cattle get at large by his negligence or by some act or default akin to negligence. I think the whole expression "wilful act or omission" means doing something which a reasonable man would not do, or failing to do something which a reasonable man would do. The plaintiff's action in turning his cattle out to graze a mile or two away from where they got upon the railway was legalized and encouraged by the law in force in the municipality. He acted reasonably in taking the benefit conferred by the by-law. If the meaning I have placed on the words used in sub-sec. 4 is correct, the cattle were not at large through the plaintiff's negligence or wilful act or omission.

I think the appeal should be dismissed with costs.

HOWELL, C.J.M., CAMERON, and HAGGART, JJ.A., concurred.

Appeal dismissed.

DISHER v. DONKIN.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. June 11, 1913.

1. PARTNERSHIP (§ I—1)—EXISTENCE—INFERENCE OF.

The existence of a partnership may be inferred from the failure of the defendant, who admitted a profit-sharing agreement, to deny the existence thereof in a temporizing answer to a letter from the plaintiff, wherein the latter had asserted the partnership and demanded that a written agreement be executed.

Statement

APPEAL by the plaintiff from a judgment in favour of the defendant, in an action for the dissolution of a partnership, the

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existence of which was denied by the latter, although a profit-sharing agreement was admitted.

The appeal was allowed.

S. S. Taylor, K.C., for plaintiff, appellant.

A. H. MacNeill, K.C., for defendant, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be allowed, and an order made for the taking of the partnership accounts on the basis claimed by the plaintiff.

I should be very loth to reverse the judgment of the learned trial Judge on any question of fact, but it is the duty of the Court, as has several times been pointed out, to review the whole case, on the facts as well as on the law; but there is a very salutary rule in regard to reviewing cases on the facts, that the Court ought to give due weight to the finding of fact of the learned trial Judge. In this case we are relieved from any embarrassment with respect to that, because, as it appears to my mind the case can be settled in the plaintiff's favour on the defendant's own letter dated February 12, 1912 (ex. 5). When it is borne in mind that that letter is written in answer to the plaintiff's letter of a few days earlier (ex. 4), of February 3, 1912, in which the plaintiff all through is asserting a partnership —not claiming that a partnership ought to be entered into, but asserting that a partnership actually existed between the plaintiff and the defendant since January 1, 1911, and insisting that it should be evidenced by writing, it cannot be doubted that he was assenting to the position taken by the plaintiff, that such a partnership did exist—I say under circumstances of that kind, it is not sufficient for the defendant now to come to the Court and say, I wrote that letter under pressure—that is, under this pressure that the demand was only made upon me to sign the partnership articles on the eve of my departure for the Orient, and I could not very well dispense with the plaintiff's services at that time, and the plaintiff knew this, and therefore insisted upon forcing this partnership upon me, because he knew he had me in a difficult place. I say I do not think the defendant can successfully make any such excuse for writing a deliberately misleading letter. And if we take that letter at its face value against this defendant, then it means that there was a partnership such as the plaintiff alleges. In connection with this it is also proper to remember that the defendant gave a regular notice of dissolution of that partnership, in which he calls it a partnership, and in which he refers to the Partnership Act of this Province. Further, there is the evidence of Branch and of Miss Copp. If it were clearly a case of conflict between witnesses, I perhaps would not refer to the evidence of these two witnesses, because the learned trial Judge may not have placed as much

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reliance upon it as we might, sitting here, without seeing the witnesses; but there is evidence to be taken into consideration in connection with the other evidence in the case, evidence of the defendant himself, contained in the letter, and contained in the notice of dissolution of partnership.

Irving, J.A.

IRVING, J.A.:—I think the appeal must be allowed. I have some doubt whether we have reached the right solution of this case, but to my mind the case must be determined by the letter that the defendant himself wrote. Had he denied there was any partnership, and said, what we were talking about was simply a division of the profits, I should have accepted his statement without hesitation. He can only thank himself for his loss, if our decision is not right.

Martin, J.A.

MARTIN, J.A.:—I concur in allowing the appeal. The crux of the case is the defendant's letter, the effect of which has been explained or excused by the learned counsel on his behalf, as being a "temporising" one. All that it is necessary to say on that point is, that the time had arisen in the relations of these two parties when a temporising letter was one that ought not to have been written, it was incumbent upon the defendant to define his position and write a frank, fair letter, in order to protect himself, instead of an indefinite one.

Galliher, J.A.

GALLIHER, J.A.:—I would allow the appeal.

Appeal allowed.

UPLANDS, LIMITED v. GOODACRE.

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British Columbia Supreme Court. Trial before Gregory, J. January 13, 1913.

1. CONTRACTS (§ II D 4—188) CONSTRUCTION—BUILDING CONTRACT — ABANDONMENT—TAKING OVER WORK—TRANSFER OF PERSONAL RIGHT TO USE PLANT AND MATERIALS LEFT BY CONTRACTOR.

A contract right, merely personal to the plaintiff, on the abandonment of work by a contractor to himself finish it, employing for that purpose the plant and materials left by the contractor, or to employ another contractor to do it, cannot be transferred by the plaintiff to one employed by him to complete the job.

[*Baker* v. *Gray*, 17 C.B. 462, 25 L.J.C.P. 161, specially referred to; *Hawthorne* v. *Newcastle, etc., R. Co.*, 3 Q.B. 734, 9 L.J.Q.B. 385, distinguished.]

Statement

TRIAL of an interpleader issue to determine the respective rights of the parties in certain goods, materials, etc., left by a contractor on abandoning work under a contract permitting the completion of the work by the plaintiff (who was given the right to use the plant and materials left by the contractor) or to employ another contractor to finish the job, which the plaintiff did, and to whom he sought to pass his right to the plant and materials.

There was judgment in favour of the execution creditor.

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E. V. Bodwell, K.C., and *H. W. R. Moore*, for Uplands, Ltd.
H. A. Maclean, K.C., *F. Higgins* and *W. H. Bullock-Webster*, for judgment creditor.

GREGORY, J. :—This is an interpleader issue brought about through the seizure by the sheriff of certain goods of the Anderson Co., which was building roads, etc., for the plaintiff. By agreement between the parties the goods claimed by both plaintiff and claimant were sold by the sheriff.

There has been some discussion as to the sufficiency of the issues as drawn up, but I understand it has been agreed by all parties that I shall determine the real issue, namely, who is entitled in the circumstances to the proceeds of the sale by the sheriff?

In the plaintiff's contract with the Anderson Co. it is provided that upon abandonment of the contract by the company, etc. (which contingency has happened) "then the company . . . may enter upon the said works and may *itself use the material and plant* upon the premises *for the completion of the works* and employ any other contractor to complete or may itself complete the works," etc.

This is the only clause in the contract in which the word "material" is used, and it seems clear to me that materials must mean materials which could be used in the actual work of the Anderson Co., and can in no way apply to kitchen plant and supplies which the company for its own convenience had in connection with its business of carrying on a boarding house for its own men. However, it seems unnecessary in the view I take to make any special finding on this point.

The Uplands Co. could have no better right to any materials than the language of the contract gives it, and it seems to me that the contract itself limits the right of the Uplands Co. to the use of materials and plant by itself, for the contract says "may itself use the materials and plant." The words following appear to me to give it a right to have the work completed by another company or contractor, but do not in any way give it the right to pass to such company or contractor the right to use the materials and plant of the company. If this is so, what right can the plaintiff now have to the proceeds of sale? The plaintiff at best had an option to use or not to use the materials, etc. It exercised that option when it let a new contract, which it did as soon as it possibly could after the abandonment of the contract by the Anderson Co. and the sheriff actually sold the goods to the new contractor after he had made his contract with the plaintiff company.

It is evident, therefore, that the plaintiff does not itself seek or intend to use the materials, and if the materials were back in place to-day, it would, I think, in the circumstances, have no

right to retain them as it has already let a contract for the same work to another company. The plaintiff's contention really amounts to this, that it has the right to let the contract to a new contractor, then itself sell the plant and materials and bring the proceeds into its account with the Anderson Co. I cannot see that the language of the contract gives them any such privilege. It falls far short of the clause usually inserted in such contracts.

In *Hawthorne* v. *Newcastle, etc., R. Co.*, 3 Q.B. 734, 2 Ry. & C. Cas. 288, 9 L.J.Q.B. 385, referred to in the brief at p. 732 of 3 Q.B., it is clear that the company itself undertook to use the materials and the language of the contract in that case was very similar to the one now under consideration. While in that case the defendant succeeded entirely on its claim, it is only by reason of the particular form on the pleadings that it succeeded as to some of the plant, etc., in dispute. The case of *Baker* v. *Gray*, 17 C.B. 462, 25 L.J.C.P. 161, referred to by Mr. Maclean, seems to me to be very much more in point.

Mr. Bodwell's criticism of that case is that it is merely an interpretation of the statute, 12 and 13 Vict. ch. 106, sec. 144, but that statute does no more for an assignee in bankruptcy in passing on a bankrupt's right to any property passing to him than a judgment creditor receives when he obtains judgment. It is true that the title does not actually pass, but the judgment creditor can in such case seize every interest in the property the judgment debtor had at the time. In this case it appears that the sheriff seized more than he was entitled to. On the other hand, the plaintiff company apparently claimed more than it was entitled to, one seizing and the other claiming the entire property, but in view of what I have already stated, it is unnecessary to consider the effect of these respective claims. Judgment will therefore be for the execution creditor, and, as to the question of costs, I will hear the parties, unless they can agree that in the circumstances they should follow the event.

Judgment for execution creditor.

HARMONY PULP CO. v. DeLONG.

Nova Scotia Supreme Court. Trial before Russell, J. June 11, 1913.

1. CO-TENANCY (§ III—18)—ACCOUNTING—USE OF PROPERTY BY CO-TENANT.

One co-tenant is not answerable to another co-tenant for profits from the operation of a mill, where the latter, who was not prevented from using the mill to the same extent as the defendant had be so desired, would not contribute towards the cost of putting the mill in order so that it could be used.

[*Henderson* v. *Eason*, 17 Q.B. 701, referred to.]

ACTION to require a co-tenant to account for profits from the use of property held in common. Statement

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Russell, J.

Judgment was given for the defendant.

V. J. Paton, K.C., and *R. B. H. Robertson*, for plaintiff.

W. L. Hall, for defendant.

RUSSELL, J.:—In this case the defendant and the plaintiff company became equally entitled as tenants in common of a sawmill. Their title is defective and it is not certain that they have anything beyond the right to have the mill on the stream and use it there subject to an indefinite obligation to do certain sawing for the owners of the fee simple from whom they are unable to obtain a deed of the land.

The way the plaintiff company came into the business was that they desired to procure certain flowage rights from the brother of the defendant who was a part owner with the defendant of whatever property had been conveyed in the mill. This brother would not convey the flowage rights unless the company would take the mill or rather the rights that their grantor had in the mill, but the company had no use for the mill and no desire to be concerned in it. The defendant made considerable expenditures—quite heavy expenditures—in putting the mill in order and proceeded to use it sawing lumber for himself and others and receiving pay for his services, of which the plaintiff company now demands an accounting.

I think it is very probable that an accounting would shew that the defendant had not received more than a fair remuneration for his work. But I do not think the plaintiffs are entitled to any account. They had no use for the mill and made no demand for the opportunity to use it. They declined to contribute anything to the cost of putting it in order to be used. They had the same right to use it as the defendant had, and if they had used it would have been under no obligation to account to him. They have not been ousted and have not been prevented by the defendant from using the mill to the same extent that he had used it himself.

In *Henderson* v. *Eason*, 17 Q.B. 701, it is said that if there are tenants in common and one tenant alone occupies the property he is answerable as bailiff to his co-tenant in an action of account if he receives more than his share, but not otherwise.

> He does not receive more than comes to his just share if he merely has the sole enjoyment of the property, even though by the employment of his own industry and capital he makes a profit by the enjoyment and takes the whole of such profit.

I quote from Mews' English Digest, vol. 6, pp. 340, 341.

There is a claim for partition of the property, and to this I think the plaintiff company is entitled.

The costs of the partition will be equally divided between the parties, and the defendant will have the costs of his defence to the claim for an account.

Judgment for defendant.

WORTH v. YORKSHIRE INSURANCE CO.

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Nova Scotia Supreme Court. Trial before Russell, J. July 15, 1913.

1. INSURANCE (§ III E—100) — CONCURRENT INSURANCE — NOTICE AFTER PLACING SECOND POLICY.

Notice that additional insurance has been placed on insured property is a sufficient compliance with a condition of another policy that notice should be given of the insured's intention or desire of effecting further insurance.

Statement

ACTION by plaintiff to recover the amount of loss on a fire insurance policy issued by the defendant company.

The main defence was that the policy was avoided by a subsequent insurance effected by plaintiff with another company without notice of intention to effect such insurance as required by the conditions of defendant's policy.

Judgment was given for the plaintiff.

C. J. Burchell, K.C., for the plaintiff.

H. Mellish, K.C., for the defendant.

Russell, J.

RUSSELL, J.:—The plaintiff was insured by the defendant company against fire for $500. The policy was subject to the following statutory conditions:—

> The insurerer is not liable for loss . . . if any subsequent insurance is effected by any other insurer, unless and until the insurer assents thereto, or unless the insurer does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected.
>
> Any written notice to an insurer for any purpose of the statutory conditions, when the mode thereof is not expressly provided, may be by letter delivered, etc., or by such written notice given in any other manner to an authorized agent of the insurer.

The plaintiff was subsequently insured for $300 in the Palatine Insurance Company and a notice in writing was sent by O'Connell & McNeil, general agents, to the agent at Glace Bay of the defendant company in the following terms:—

> Please note that we have placed $300 on stock of Mrs. A. Worth, New Waterford, which amount is concurrent with your policy 1574278 $500 July 5th, 1912.

It is admitted that this notice was given under instructions from the plaintiff, but it is contended that this is not such a notice as is required by the condition and that the notice to be given must be notice of an intention or desire to effect the subsequent insurance, whereas the notice given in this case was notice of the fact that an insurance had actually been effected. The concluding words of the condition are pressed as indicating this meaning.

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I think this construction is too narrow. The insured does give notice of her intention or desire to effect insurance when she gives notice that insurance has been effected. The greater includes the less. She must have intended to insure when she did actually insure, and notice of the fact of such insurance is, therefore, notice of such intention. The insurer had two weeks in which to express his dissent, in which case he would not have been liable on a fire subsequently occurring. In the case of a subsequent insurance which is only desired or intended, and not actually effected, the insurer's period for dissenting is extended indefinitely, provided it is given before the insurance is actually effected. I think this construction gives full effect to the expressions on which reliance is placed by the defendant and that it is a fair interpretation of the condition.

I also think that the insurer received written notice in one of the modes prescribed by the condition relating to the manner of notification, *i.e.*, by a written notice to an authorized agent of the insurer.

Judgment for plaintiff.

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DECREAN v. VANCANNEYT.

Alberta Supreme Court. Trial before Beck, J. July 15, 1913.

1. DEPOSITIONS (§ III—12)—IRREGULARITIES—OBJECTIONS—TIME TO MAKE—DELAY.

Two months' delay in moving to suppress a deposition for harmless irregularities in taking is fatal.

Statement

MOTION to suppress a deposition for irregularities in taking the deposition not going to the substance thereof, made more than two months after it was filed.

The motion was denied.

E. B. Edwards, K.C., for plaintiff.

Frank Ford, K.C., for defendant.

Beck, J.

BECK, J.:—This case came on for trial by Simmons, J., without a jury. Mr. Edwards, K.C., for the plaintiff moved in pursuance of a notice of motion served on the defendant's solicitor on June 23, 1913, to suppress the depositions of the defendant and his son, taken under an order dated December 23, 1912, and returned and filed with the clerk on April 15, 1913. The notice is that the plaintiff will object to the evidence of Charles Vancanneyt and the defendant, purporting to have been taken under the commission or order herein dated December 23, 1912, being read at the trial of this action, and will apply before the Judge presiding at the trial to have the same set aside on the ground that the return to the said commission or order

does not shew that the terms of the said commission or order have been complied with, and amongst other things the same is defective in the following particulars:—

1. The same does not shew that the order, together with the certified copy of the pleadings, was translated from the English language into the Belgian language as by the said order provided.

2. The return does not shew that the evidence was taken in the French language, or in the language of the witness in shorthand by some competent person named by the commissioner, and the said evidence has not been transcribed and certified as by the said order required.

3. The said return does not shew that the said transcription has been translated from the Belgian language into the English language by some competent person named by the commissioner, and has not been certified as to the correctness of such translation, or certified by the commissioner as by said order required.

4. The said evidence and the evidence in the Belgian language, and the documents therein referred to, were not sent by the said commissioner enclosed in a cover to Alex. Taylor, Esq., clerk of the Supreme Court of Alberta, under the seal of the said commissioner, as required by the said order.

5. The said return does not shew that the oath was administered to the stenographer as by the said order required.

6. The said return does not shew that the oath was administered to the translator as required by the said order.

7. The said return does not shew that the said commissioner took and subscribed the examiner's oath as required by the said order.

As far as appears the return of the commissioner or examiner consisted of the following papers enclosed in an envelope bearing the inscription: "Envoi de Mr. Octave Desmarez, Avocat, Courtrai:—Registered, Mr. Alex. Taylor, clerk of the Supreme Court of Edmonton, Edmonton, Alta., Canada, Papiers d'affaires," namely, first, depositions, undoubtedly, the originals, in French, by way of question and answer of each of the two witnesses; second, two papers intended to be mere translation into English of these depositions, and of the certificates and signatures attached, but certified only as follows: "For a true copy; (signed) J. Chas. Waernepoet,"—with nothing to indicate the capacity in which Mr. Waernepoet certified; third, two exhibits referred to in the depositions, and identified by number and a memorandum signed by the examiner; and, fourth, a covering letter from the examiner.

A careful examination of these papers, and a comparison of them with the order, leaves all the objections taken well founded in fact. The plaintiff was not represented on the examination, but it is not suggested that this was owing to any default on the

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defendant's part. Should I give effect to them? The settled practice seems to be:—

1. Objections to the method of executing a commission or order for examination or to the form of its return by reason of non-compliance with the directions of the commission or order which result in mere irregularities, will not be given effect to, except upon a substantive motion to suppress the depositions: *Grill* v. *General Iron Screw Colliery Company*, L.R. 1 C.P. 600; *Claverie* v. *Gory*, 4 Terr. L.R. 470.

2. Generally speaking, taking part in the irregularity without them taking and persisting in the objection, will be deemed a waiver of the irregularity: *Whyte* v. *Hallett*, 28 L.J. Ex. 208.

3. Even on the motion to suppress it is not every irregularity that effect will be given to. Directions in the commission or order as to the mode of procedure are to be looked upon as directory only, and if it does not appear that harm may have been done by non-compliance with the directions, the depositions will not be suppressed; but if it appears that non-compliance has worked an injustice, either they will be suppressed or some other suitable remedy supplied: *Hodges* v. *Cobb*, L.R. 2 Q.B. 652, 36 L.J.Q.B. 265, 16 L.T. 792, 15 W.R. 1038, 8 B. & S. 583.

4. The application to suppress on the ground of irregularity must be made within a reasonable time, and before the party applying has taken any fresh step after knowledge of irregularity: rule 539, Eng. O. 70, rule 2.

5. Though a motion to suppress is proper, it is not necessary where the objection is one of substance and not merely of form; as for instance, where the person taking the evidence is not authorised by the commission or order to take it: *Grill* v. *Gen. Iron Screw Colliery Co.*, L.R. 1 C.P. 600; *Wilson* v. *Wilson*, 9 P.B. 8, 49 L.T. 430, 32 W.R. 282; *Claverie* v. *Gory*, 4 Terr. L.R. 470, or where, owing to the omission of notice of the examination, a party has not had an opportunity of cross-examining the witness: *Scott* v. *Van Vandau*, 8 Jur. 1114.

Applying these rules to the matter in hand, I am of opinion that the objections relied on are based only on irregularities, and not on matters of substance; that it does not appear that any harm has been or may have been done by non-compliance with the directions of the commission or order; that the delay in moving to suppress has been unreasonable; and I therefore hold that, as against the objections raised on the motion to suppress, the depositions of the witnesses are admissible. I will, therefore, fix a day for proceeding with the trial of the action upon application by either party.

Motion denied.

CHIPMAN v. TOWN OF YARMOUTH.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, and Drysdale, JJ. April 12, 1913.

1. PARTIES (§ III—120)—ACTION AGAINST TOWN—REFUSAL OF COUNCIL TO DEFEND—INTERVENTION BY RATEPAYER.

The mayor, as such and as a ratepayer, may properly be given leave to intervene for the purpose of defending an action against a town where it is a reasonable assumption that the council's refusal to defend is not a *bonâ fide* exercise of discretion.

[*MacIlreith* v. *Hart*, 39 Can. S.C.R. 657, applied.]

Statement

APPEAL from the judgment and order of Russell, J., made February 1, 1913, by which Samuel C. Hood, mayor of the town of Yarmouth, was given leave to intervene on behalf of himself and dissenting ratepayers and defend the action.

The action was brought by plaintiffs to recover from the town the amount of an account for professional services rendered in connection with the enforcement and carrying out of the provisions of the Canada Temperance Act. Plaintiffs' account was passed for payment by the town council, but payment was refused by the mayor on the ground the town was not liable for the account, among other reasons, because it was incurred without the authorization of a vote of the town council.

The appeal was dismissed.

The judgment appealed from was as follows:—

Russell, J.

RUSSELL, J.:—When I dismissed the application of the mayor to be permitted to defend this action, I felt that the situation was a hard one for the ratepayers, if any, who were objecting to the proceedings of a majority of the council. The legal adviser of the town is interested adversely to the defendant in the action and is driven to the position, for which, of course, no blame attaches to him, that he is obliged to advise on both sides of the case. The town as a party to the suit is in fact without counsel. If a judgment by default had been entered up, it seems pretty clear to me that I could entertain a motion properly launched to set aside the default at the instance of any ratepayer shewing himself to be aggrieved. Hawkins, J., in *Jacques* v. *Harrison*, 12 Q.B.D. 136, 141, said that the rule giving power to set aside a judgment by default had no limitation as to the persons who might apply to set it aside. The obligation to pay a proportion of the amount involved is under the case of *MacIlreith* v. *Hart*, 39 Can. S.C.R. 657, such a special interest as would give him a *locus standi* without the intervention of the Attorney-General. It seems to me to follow from this that if after a judgment by default I could open it up and allow the present applicant to intervene it must be a regular procedure to allow him to intervene now, and not wait till the horse is stolen before locking the stable door.

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It must certainly be better for the interests of all concerned to contest the questions at issue in the present suit than to drive the parties to an injunction and involve them all in unnecessary expense. There are some items in the account sued for that are fairly open to the challenge that they are *ultra vires*. I understand it to be conceded that if these items are *ultra vires* they do not come within the principle that the discretion of the town council must be a finality. This in fact had to be conceded, but it was suggested that if necessary the plaintiff would abandon those items rather than have the whole account delayed. But the difficulty here is that they have not been abandoned, and the onus is thrown upon me of deciding whether they are *ultra vires* or not. Mr. Ralston, for the town council, contends that they may fairly, under the circumstances, be considered *intra vires* as expenditures properly incurred in the enforcement of the Act. And I am not prepared to say that they may not be, nor do I wish to pronounce any opinion adverse to any part of the plaintiff's claim. In view of the fact that the town, as a town, is in his particular case *inops consilii*, from the circumstances already referred to, I think that the mayor should have leave to intervene as proposed on behalf of himself and the dissenting ratepayers, if any, of course at the peril of costs.

The costs of the application will be for the present reserved, and I assume that they can be best dealt with after the trial.

W. E. Roscoe, K.C., for appellant.

S. Jenks, K.C., Deputy Attorney-General, for respondent.

The judgment of the Court was delivered by

Drysdale, J.

DRYSDALE, J.:—This appeal involves an application by Samuel C. Hood, as mayor and a ratepayer of the defendant town, to intervene and defend the action brought by plaintiff against the town. The town council refuses to defend, and Mr. Hood applied at Chambers to Mr. Justice Russell to be allowed to intervene, and that learned Judge on February 1, 1913, granted an order permitting the said Hood to intervene, and, upon putting up security for costs, to defend the action in the name of the town on behalf of himself and other ratepayers. From such order an appeal was taken and argued before us.

The action is upon a bill of costs rendered by the town solicitor for services in respect of which the town is said to be liable. The town council, by a majority vote, admit the claim and refuse to defend. It was argued that if the town council exercised a *bonâ fide* discretion in respect to the payment of said bill, and as to the amount thereof, such discretion should not and could not be interfered with. The whole question turns upon the *bona fides* of the council's action. If an outside solicitor rendered a bill such as we see in this case, a council doing its duty would,

I think, refer the bill to its own solicitor for examination and report. Here we have the town council, if a reference at all took place, referring the solicitor's bill to himself, and when the mayor desires to intervene and contest the account, or portions of it, objecting to any defence or judicial determination of the various amounts claimed.

It is contended by Mr. Hood, on behalf of the ratepayers, that some of the items claimed for are *ultra vires* of the council, even if authorized, that others come within the ordinary duties of the town solicitor, and should not properly be the subject of a special charge against the town, and that, at least, there should be some judicial determination before the account is made the subject of a resolution for payment.

I am of opinion these questions should not be determined on this motion, but should be settled in the action. The questions raised are very arguable, and I think should be determined upon trial of the action. The mere fact that the plaintiffs should not occupy a double capacity, namely, that of plaintiffs and of advisers of the council, taken together with the items of the account, and the action of the council thereon, raises a just, and, I am obliged to say, a well-founded suspicion that the action of the majority of the council in refusing to defend was not a *bona fide* exercise of discretion of a matter within their control.

It is apparent, I think, that there ought to be a judicial adjustment of the claim, and I am of opinion that Hood, as a ratepayer, has standing to intervene under the circumstances disclosed in this case. *MacIlreith* v. *Hart*, 39 Can. S.C.R. 657, seems to me to settle the ratepayer's right to so intervene.

I think the order of Mr. Justice Russell was properly made, and that the appeal should be dismissed with costs.

Appeal dismissed.

KIDD v. NELSON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. June 5, 1913.

1. FRAUD AND DECEIT (§ IV—15)—SALE OF MERCANTILE BUSINESS—INNOCENT MISREPRESENTATIONS—RELIANCE ON EFFECT.

Misrepresentations, although innocently made by the seller of a mercantile business, as to the volume of business done in the past, and as to the probable future increases, will vitiate the sale, if the purchaser relied thereon.

Statement

APPEAL by the defendant from a judgment against him in an action for the specific performance of an agreement to transfer company shares to the plaintiff in consideration of the sale of a business to the defendant, which he claimed was induced by the plaintiff's false representations as to the volume of business

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done in the past, and as to the probable future increase of the trade.

The judgment appealed from was varied.

E. P. Davis, K.C., for defendant, appellant.

Housser, for plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The Court is unanimous in thinking that the contract ought not to stand because of the misrepresentations of the plaintiff; and that the judgment below, which held that the contract had been broken by the defendant is erroneous. The present situation has been brought about by the plaintiff's own misrepresentations, which we will assume, for the purposes of this discussion, were innocent misrepresentations.

The only other question then is what directions ought we to give to the Registrar, to whom it should be referred to ascertain what, if anything, ought to be paid by the defendant to the plaintiff by reason of deliveries of tea, or of transactions between them while the arrangement lasted. There is to be no delivery or transfer of the shares, and there is to be a release from the obligation to take over orders which were given by the plaintiff to persons supplying the tea. As to the third point, there should be a reference.

The appeal will be allowed with costs, and the order below varied in the manner indicated. The question of the costs of the trial will be left to the Judge of the Court below, to be fixed after the reference, that is the question of the costs below, including the costs of the reference.

Judgment varied.

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FRY v. YATES.

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British Columbia Supreme Court. Trial before Clement, J. June 19, 1913.

June 19.

1. PRINCIPAL AND AGENT (§ III—34)—LIABILITY OF AGENT TO PRINCIPAL FOR FRAUD.

One employed to ascertain the lowest price for which property may be purchased, who deceives his principal and induces him to pay more than the owner of the property was willing to accept, is answerable to his principal for the difference.

[*Hutchinson* v. *Fleming*, 40 Can. S.C.R. 134, followed.]

Statement

ACTION by a principal against an agent to recover for fraud in inducing him to pay a greater price for property than its owner was willing to accept.

Judgment was given for the plaintiffs.

W. B. A. Ritchie, K.C., and *W. C. Brown*, for the plaintiffs.

W. S. Deacon, for the defendant.

Clement, J.

CLEMENT, J.:—I find as a fact that the defendant agreed to act as agent for the plaintiffs in ascertaining the lowest price at

which the property in question could be bought from the owners, and agreed in effect to afford them an opportunity to buy at such lowest price. I further find that he deceived the plaintiffs in this respect, and upon the representation (false in fact) that $90 per foot was such lowest price, induced them to pay that price, instead of $75 per foot which was in fact the price the then owners were willing to accept.

On these facts it seems to me that *Hutchinson* v. *Fleming*, 40 Can. S.C.R. 134, is authority for the proposition that the plaintiff's claim to recover the extra $15 per foot from the defendant is well founded, "either on the ground of agency, or of deceit:" *per* Idington, J., at p. 136.

There will be judgment, therefore, for the plaintiffs for $7,211.25, with costs.

Judgment for plaintiffs.

DOUGLAS BROS. v. THE ACADIA FIRE INS. CO.

Nova Scotia Supreme Court. Trial before Russell, J. July 16, 1913.

1. PRINCIPAL AND AGENT (§ III—36)—COMPENSATION—BASIS—GENERAL INSURANCE AGENT.

Only losses paid during the year for which settlement is made, and not those sustained but not yet paid, are within the purview of a contract of agency providing that the general agent of an insurance company shall receive a percentage of the net annual profits from business in his territory, to be ascertained by deducting losses paid and expenses from the gross income from such business, where it appears that the agreement contemplated a conventional net profit as a convenient basis of computation and adjustment.

Statement

ACTION by plaintiffs to recover an amount claimed as commission for services rendered as agents for the defendant company, tried before Russell, J., at Halifax.

Judgment was given for the plaintiffs.

T. S. Rogers, K.C., for the plaintiffs.

J. L. Ralston, for the defendant.

Russell, J.

RUSSELL, J.:—The plaintiffs entered into a written agreement with the defendant company to act as sole agents of the company for the United States, excluding San Francisco, to accept proposals for insurance, etc. They were to open an office in New York and promptly report all policies issued and all renewals by daily report through the Amherst office. The question in this case is as to the remuneration for their services, the provision as to which is as follows:—

"Said Douglas Brothers to receive as compensation 25% of the gross premiums received by them, less return premiums and rebates and an additional 15% on the annual net profits arrived at by deducting from the gross premiums all return premiums,

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rebates, losses and loss expenses paid and all commission (including profit commission) and any other allowances made said Douglas Bros."

The defendant company contends that the additional 15% on the amount of net profits, payable to the plaintiffs is subject to a deduction for all losses incurred in respect of the policies issued during the year for which the net profits are to be computed. Plaintiffs on the other hand contend that defendants can only deduct the amounts of losses paid by the company during the year for which the net profits are adjusted; though they suggest the possible extension of the term "paid" so as to cover all losses incurred during the year although the same may not have been paid until after the end of the year.

Plaintiffs' and defendant's views are both reasonable and I find it difficult to choose between them. I incline to think that the key to the solution is found in the word "annual." It seems to me that the parties contemplated an annual adjustment of the plaintiffs' remuneration and therefore an annual ascertainment of the net profits on which the 15% was to be allowed. This would not be possible under the defendant's construction, as there might be outstanding liabilities—indeed there would always be outstanding contingent liabilities on unexpired policies, and it would never be possible to adjust the 15% on the net profits until all the current policies had run out. Some of these would be three year policies or policies for longer periods and the ascertainment of the plaintiffs' remuneration would therefore be impossible until the latest period of expiration. And it must also be remembered that the parties were providing for an indefinitely long engagement and under such an engagement the results would be the same in the long run whichever way the provision should be read. If the plaintiffs received in one year their 15% in respect of policy on which there was an eventual loss, that loss would have to be deducted from the profit column in the adjustment of the next year's business, or rather the business of the year in which it occurred.

The defendant's method of arriving at the compensation is the same as if the word "annual" had not been used, and it seems to me, therefore, that this word would not have been used by the parties if an annual ascertainment, adjustment and payment of the 15% had not been intended.

I have said that the parties contemplated an indefinite continuance of the engagement. If the engagement should continue until all the policies had run out the remuneration provided for under this term—I mean the 15%—would be a percentage on the actual net profits. But I think it is also a fair argument that the parties did not have in mind the actual net

profits but a percentage on a conventional net profit to be computed in the particular manner pointed out in the agreement, that is, by deducting from the gross premiums for the year all return premiums, rebates, losses paid, etc. Among the items to be deducted is the profit commission if any allowed to the plaintiffs. It is contended by defendant's counsel that this very 15% is itself a profit commission and among the things to be deducted in ascertaining the net profits. I thought at the argument that this could not be possible—that the defendant's proposition involved a contradiction in terms. But on further reflection I see no difficulty. It certainly does come within the fair definition of a profit commission. True enough it is an unknown quantity, but I think it is not unknowable. I think it can be ascertained in the manner following: We will assume the gross premiums and the deductions to be made as follows:—

Gross premiums	$30,000
Return premiums	$ 4,000
Commissions	6,000
Losses paid	10,000

We do not know the profit commission and will therefore represent it by x; and we will then have the following equation: $30,000—($4,000 + $6,000 + $10,000 + x)= net profits.

Fifteen per cent. of the net profits is the amount of plaintiffs' profit commission. Therefore fifteen hundredths of the above sum will be equal to x. The ascertainment of the value of x from the equation is the work of a schoolboy and therefore I should probably not be able to do it correctly. Simplifying the figures, they would stand thus:

$30,000 — $20,000 — x = net profits.

Therefore

15/100 of ($10,000 — x) = x.

Reducing the fraction to its lowest terms and clearing the equation of fractions we have:—

$30,000 — 3x = 20 x

or 23x = $30,000

x = $ 1,305 profit commission.

If the actual losses paid and the other actual sums admitted are used in this way I think there need be no difficulty in arriving at the profit commission that must be allowed to the plaintiffs.

The conclusion I arrive at, not without serious doubts, is that the 15% is to be computed annually on an amount to be ascertained by deducting from the gross premiums the rebates and losses paid during the year and the profit commission being the 15% of the net profits.

I had some doubts whether the term "paid" should not be extended to cover losses incurred during the year although paid

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at a later date, but I think that if the parties had meant this they would have said it. I think they had it in mind that in the case of a loss incurred during one year and paid the year after the company would get the benefit of this credit in the following year, and they did not consider or provide for the contingency of a termination of the agreement before they could state an account into which such a loss would enter.

Judgment for plaintiff.

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WHARTON v. JOHN DEERE PLOW COMPANY, Ltd.

British Columbia Supreme Court, Gregory, J. May 26, 1913.

1. INJUNCTION (§ I G—60)—EXTRA-PROVINCIAL CORPORATION DOING BUSINESS WITHOUT LICENSE—RIGHT OF SHAREHOLDER TO ENJOIN.

A shareholder of an incorporated company organized under the Companies Act, R.S.C. 1906, ch. 79, has a right of action to enjoin it from doing business in British Columbia without having been licensed or registered in that province as required by R.S.B.C. 1911, ch. 39, as so doing would constitute an illegal act on the part of the company.

Statement

ACTION by plaintiff, a shareholder of the defendant company, for an injunction restraining the defendant company and its directors, agents or representatives from carrying on business in the Province of British Columbia without a license as required by part VI. of the Companies Act, R.S.B.C. 1911, ch. 39.

The action was tried by Gregory, J., on May 26, 1913, on the admissions in the pleadings.

The defendant company was incorporated by letters patent issued by the Secretary of State of Canada under the authority of the Companies Act of Canada, R.S.C. 1906, ch. 79, with head office at Winnipeg in the Province of Manitoba; and was authorized *inter alia* to carry on throughout the Dominion of Canada the business of dealers in agricultural implements, carriages, waggons and machinery and a general agency, commission and mercantile business.

The Companies Act of Canada provides that:—

5. The Secretary of State may by letters patent under his seal of office, grant a charter to any number of persons not less than five, who apply therefor, constituting such persons and others who have become subscribers to the memorandum of agreement hereinafter mentioned and who thereafter become shareholders in the company thereby created, a body corporate and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, except the construction and working of railways or of telegraph or telephone lines, the business of insurance, the business of a loan company and the business of banking and the issue of paper money.

29 (3). The company shall forthwith upon incorporation under this part, become and be vested with all property and rights, real and personal, theretofore held by it or for it under any trust created with a view to its incorporation, and with all the powers, privileges and immunities, requisite or incidental to the carrying on of its undertaking, as if it was incorporated by a special Act of Parliament, embodying the provisions of this part of the letters patent and supplementary letters patent issued to such company.

It was admitted that the company had been and was carrying on a part of its business in the Province of British Columbia and had been selling and dealing in agricultural machinery through persons residing and carrying on business in the province of British Columbia acting as agents of the company.

The plaintiff alleged that such business was illegal as coming within the prohibition of part VI. of the Companies Act of British Columbia, R.S.B.C. 1911, ch. 39. The sections in question of which Act were as follows:—

2. Extra-provincial company means any duly incorporated company other than a company incorporated under the laws of British Columbia, or the former colonies of British Columbia and Vancouver Island.

139. Every extra-provincial company having gain for its purpose and object within the scope of this Act is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company, within the province until such extra-provincial company shall have become licensed or registered as aforesaid.

167. If any extra-provincial company other than an insurance company, shall, without being licensed or registered pursuant to this or some former Act, carry on in the province any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business.

168. So long as any extra-provincial company remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit or other proceeding in any Court in the province in respect of any contract made in whole or in part within the province in the course of or in connection with its business, contrary to the requirements of this part of this Act.

Provided, however, that upon the granting or restoration of the license or the issuance or restoration of the certificate of registration or the removal of any suspension of either the license or the certificate, any action, suit or other proceeding may be maintained as if such license or certificate had been granted or restored or such suspension removed before the institution of any such action, suit or other proceeding.

170. If any company, firm, broker or other person acting as the agent or representative of or in any other capacity for any extra-provincial company not licensed or registered under this or some former Act shall carry on any of its business contrary to the requirements of this part of this Act, such company, firm, broker, agent or other person

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shall be liable to a penalty of twenty dollars for every day he or they shall so carry on such business.

Section 18 of the Act also provides that: —

Statement

A company or society may not be incorporated nor may an extra-provincial company be licensed or registered by a name identical with that by which a company, society or firm in existence is carrying on business or has been incorporated, licensed or registered, or so nearly resembling that name as in the opinion of the registrar to be calculated to deceive, except where such company, society or firm in existence is in the course of being dissolved or has ceased to carry on business, and signifies its consent by resolution duly passed and filed with the registrar.

The defendant company alleged that it had duly applied for a license in accordance with the provisions of the Act and had tendered payment of the prescribed fees but that the registrar of companies had refused to issue the license. The defendant company pleaded that the provisions of the Act, in so far as they purported to prevent the company from carrying on business in the Province of British Columbia in accordance with its letters patent and the Companies Act of Canada, were *ultra vires* of the legislature of the Province of British Columbia and of no force or effect.

The action was set down for trial on a motion for final judgment on May 26, 1913, on the admissions in the pleadings, the letters patent incorporating the company being admitted as an exhibit. By reason of the constitutional question involved, notice of the hearing was given by direction of the Court to the Attorney-General of British Columbia, but he did not appear.

H. S. Wood, for plaintiff.

Sir Charles Hibbert Tupper, K.C., for defendant.

Gregory, J.

GREGORY, J., at the close of the trial gave judgment restraining the defendant company and its directors, agents and representatives from carrying on or continuing to carry on its business in the Province of British Columbia and from expending moneys in connection with such business until the company should have become licensed in pursuance of part VI. of the Companies Act (B.C.). Costs to the plaintiff. No written opinion was handed down.

Injunction granted.

[N.B.—An application is pending for leave to appeal direct to the Judicial Committee of the Privy Council from the above reported judgment.]

KERR v. CANADIAN PACIFIC R. CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, and Galliher, JJ.A. April 11, 1913.

1. RAILWAYS (§ II D—75)—FIRES—ORIGIN FROM LOCOMOTIVE—INFERENCE.

The fact that no fire was seen at or near a railway track until twenty minutes after the passage of a railway locomotive which had not been recently inspected, justifies an inference that the fire originated from sparks from such locomotive.

[*Farquharson* v. *Canadian Pacific R. Co.*, 3 D.L.R. 258, followed; see also Railway Act, R.S.C. 1906, ch. 37, sec. 298, as amended.]

Statement

APPEAL by the defendant from a judgment against it for a fire set out by sparks from a railway locomotive.

The appeal was dismissed.

E. V. Bodwell, K.C., and *J. E. McMullen*, for defendant, appellant.

W. A. Macdonald, K.C., and *W. G. Anderson*, for plaintiffs, respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal. I do not see any real distinction between this case and *Farquharson* v. *Canadian Pacific R. Co.*, 3 D.L.R. 258, that we have had before us. The only suggestion of difference in the evidence that is of material difference, which would justify us in interfering with the judgment of the learned trial Judge, is in connection with the condition of the engine. The *Farquharson* case did not depend very much on that.

I think, under the circumstances of the case, having regard to the fact that persons were passing up and down very frequently, and no fire had been seen by anybody until about 2 o'clock on the afternoon of the 15th of June, at that spot or anywhere near it, having regard also to the fact that neither the engineer nor the fireman, nor any of the train crew of the train that is supposed to have set this fire, that is, the one drawn by engine 1401, had seen it, and the fact that twenty minutes afterwards, when the next train came by, there was a fire which was noticeable and seen by the engineer of that train, that the learned trial Judge was justified in drawing the inference that this fire originated from a spark from engine 1401.

I do not know whether any evidence was given as to the varying currents of wind there. It is somewhat difficult for persons living in a level country to realise the frequent shifting and varying currents and cross-currents of the winds in localities where there are mountains, valleys, streams, canyons and that sort of thing.

Irving, J.A.

IRVING, J.A.:—I am of the same opinion. On the appeal from the learned trial Judge to this Court we have got to try the case

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just as it was tried by him. I think that rule is well laid down in *Beal* v. *Michigan Central R. Co.*, 1 O.W.N. 80, 19 O.L.R. 502.

There was apparently no fire before 2 o'clock. There was no fire before the 13.45 train passed the place. Twenty minutes or half an hour later there was a fire.

Evidence as to the wind is always very unsatisfactory in a case of this kind. It is a difficult subject to remember. There are varying currents in different places, and I do not think you can attach very much importance to that. I do attach a good deal of importance to this fact, however, that it has not been shewn that engine 1401, which passed that place at 13.45, and which is suspected of having emitted the sparks, had been examined at Crow's Nest.

I am satisfied with the decision of the learned trial Judge.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal.

Appeal dismissed.

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TYTLER v. GENUNG.

Manitoba King's Bench. Trial before Galt, J. June 11, 1913.

1. ESTOPPEL (§ III J—120)—BY INCONSISTENT ACTS—CONTRACT FOR SALE OF LAND—NON-PAYMENT — FORECLOSURE — IMPOSSIBILITY OF PERFORMANCE.

A vendor who has put it out of his power to deliver possession of land he contracted to sell, and who refused to accept the remainder of the purchase money except on conditions he could not rightfully impose, cannot foreclose the contract for non-payment of the purchase money.

[*Hipgrave* v. *Case*, 28 Ch.D. 356, and *Ellis* v. *Rogers*, 50 L.T.N.S. 660, referred to.]

2. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR THE SALE OF LAND —NON-PAYMENT — BETTERMENTS—READINESS TO PAY.

Where a vendee, who had greatly increased the value of land by his labour and expenditures, although he had not met his stipulated payments, was excluded by the vendor from the land because of such default, specific performance will be decreed, although the time for payment may not have arrived, where the vendor, who had received a substantial portion of all the crops raised on the land, refused to accept payment for the land, which the vendee was ready and willing to make, except on conditions he could not rightfully impose.

3. VENDOR AND PURCHASER (§ I B—5)—CONTRACT FOR THE SALE OF LAND —EJECTMENT JUDGMENT AGAINST VENDEE—TIME OF PAYMENT — ACCELERATION.

The exclusion by a vendor of the vendee, by obtaining a judgment for possession in an ejectment action amounts to a demand for payment of the entire purchase money sufficient to permit the vendee to redeem without notice, and to pay the balance of the purchase money, although instalments of same had not yet matured under the terms of the contract.

[*Bovill* v. *Endle*, [1896] 1 Ch. 648, referred to.]

Statement

TRIAL of action and counterclaim in respect of an agreement for sale of land.

A. B. Hudson and *G. A. Eakins*, for plaintiff.
H. F. Maulson, for defendant.

GALT, J.:—This action was tried before me at Minnedosa on May 21st. The plaintiff claimed foreclosure of the agreements in question, while the defendant counterclaimed for specific performance. At the conclusion of the trial I expressed the view that the plaintiff was entitled to the usual judgment of foreclosure, giving the defendant three months within which to redeem the property, and directing a reference to ascertain the amount payable by the defendant.

I did this upon the understanding that the plaintiff had expressed her willingness to treat all of the instalments provided for in her agreements with the defendant as being now due and payable, and that complete possession could be given by the plaintiff upon payment of her money. Mr. Hudson, senior counsel for the plaintiff, then returned to Winnipeg.

On May 23 this action was again mentioned in Court by Mr. Eakins, junior counsel for the plaintiff, and Mr. Maulson, counsel for the defendant, Mr. Eakins stating that there was a misapprehension as to the consent supposed to have been given by the plaintiff to accept payment of instalments which had not yet fallen due. The plaintiff herself, being in Court at the time, stated that she was not willing to accept any of the instalments which had not yet matured, unless accompanied by payment to her of incidental expenses she had been put to for some years past in travelling from Guelph, Ontario, to Minnedosa, and otherwise, in protecting her rights under the agreements. This conditional consent of the plaintiff was further verified by the reporter. The agreements did not contain any acceleration clause.

Counsel for the defendant objected to any such indemnity being imposed upon his client, and in the result I ruled that any directions for judgment which had been pronounced on May 21st should be withdrawn, and, as Mr. Hudson was absent, the parties might put in brief written arguments dealing with the new aspect of the case.

It was also brought to my attention by counsel for the plaintiff, that, under the terms of a lease made by the plaintiff of the farm in question for the season of 1913, one Wilson had put in his crop for this year, and that it would be unjust that the defendant should get the benefit of the crop in case he were found entitled and able to redeem the property. Mr. Maulson, on behalf of the defendant, consented to waive any claim to the crop, but in all other respects the rights of the parties hereto *inter se* remained unaffected.

In the written argument now furnished me by Mr. Hudson, I find the following statement:—

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The plaintiff recognizes the equitable power of the Court and is willing to carry out the contract according to its terms, provided the defendant pays up the arrears with interest and costs, and subject to the rights of the tenant whom she has placed in possession. The defendant is not entitled to force the plaintiff to accept payment of the future instalments before maturity because the agreement contains no such provision and the authorities so establish. The plaintiff is willing to give a conveyance and take payment in full (providing this payment is made with interest, costs and incidental expenses), that is, moneys that she has actually expended in consequence of the failure of the defendant to carry out the terms of his agreement.

The defendant, on the other hand, contends that the plaintiff, by forcibly taking possession of the land and by leasing it, has repudiated her contractual liabilities, and that the Court has power under such circumstances to order the plaintiff to accept payment in full. The defendant also objects to pay the "incidental expenses" above referred to. I am, therefore, obliged to consider the rights of the parties as they appear on the pleadings and evidence.

The case of the plaintiff, set up in the statement of claim, may be briefly outlined as follows:—

3. On August 17, 1906, the plaintiff sold to the defendant the north half of section 19, in township 15, range 21, west of the first principal meridian, except a portion conveyed for a school site, for the price or sum of $6,000, payable in ten equal annual instalments of $600 each on the 1st day of October in each year, the first of such instalments to be paid on October 1, 1908, together with interest at the rate of 7% per annum from September, 1, 1906.

4. The said agreement provided that time should be of the essence thereof, and that on breach being made of all or any of the covenants, the said agreement should, at the option of the plaintiff, be void, and all payments made by the defendant should be retained by the plaintiff as and for liquidated damages and not as a penalty.

5. That defendant should be permitted to occupy and enjoy said lands until default; but that in the event of any breach of covenant it would be lawful for the plaintiff to proceed against the defendant for recovery of possession of said premises.

6. The defendant made default in payment of both principal and interest maturing under said agreement, and on November 2, 1908, another agreement (agreement No. 2) was made between the parties, whereby the defendant acknowledged that the sum of $7,126.45 was due from him to the plaintiff, and the plaintiff agreed to extend the time for payment, and that the same should be payable in instalments of $500 each, on the 1st day of October in each of the years 1909 to 1922 inclusive, and the balance on the 1st day of October, 1923; but that in other respects the provisions of agreement No. 1 should continue in force.

8. That defendant made default under agreement No. 2, and on April 5, 1910, the parties entered into a further agreement (agreement No. 3) by which the defendant was continued in occupation of the land upon the terms that on or before the 1st day of October in each year he would deliver at an elevator at either Cardale or Bromley in the name of the plaintiff, all the crop grown upon the said land forthwith after the threshing thereof.

9. The defendant failed to carry out the terms of said agreement No. 3 and on June 15, 1912, the parties entered into a further agreement (agreement No. 4) reciting, amongst other things, that whereas the party of the second part (the defendant) has failed to carry out the terms and conditions of both the said last mentioned agreements and the party of the first part (the plaintiff) is entitled to cancel the sale to him of the said land; and whereas the party of the second part has requested the party of the first part to give him further time. Now therefore this agreement witnesseth that the party of the first part doth hereby agree with the party of the second part that she will give him till July 1, 1912, to pay to her the sum of $800 on account of the arrears due under said agreement, and that in the event of said payment being made, the party of the second part may continue to occupy and enjoy said land until further default is made. The said party of the second part covenants with the said party of the first part that in the event of his failing to pay the said sum of $800 upon said 1st day of July, 1912, as hereinbefore set forth, he will forthwith peaceably and quietly give up possession of the said land and all claim thereto.

13. The plaintiff sets out an account of all moneys claimed by her down to October 1, 1912, amounting in all to $2,553.10, leaving the sum of $5,126.45, as being the amount still to mature under the agreement of November 2, 1908.

The plaintiff claims a reference to take an account of what is overdue, and that a time may be fixed for payment, together with costs, and in default that all payments heretofore made by the defendant may be forfeited and the agreement rescinded, and that the defendant may stand absolutely debarred and foreclosed from all right, title, interest and equity of redemption in the said lands.

The defendant in his statement of defence admits execution of the agreements, but says:—

10. That he made payments for which the plaintiff does not give credit.

11. That in or about the month of September, 1912, the plaintiff distrained upon the crop of the defendant and converted the proceeds to her own use, and that the proceeds thereof were more than sufficient to cover any arrears due under said agreement.

12. That on or about July 19, 1912, the plaintiff commenced an action for possession of said lands and on September 13, 1912, obtained a judgement for possession, which was duly executed by the Sheriff.

13. That the defendant bought the said lands in a wild state and since purchasing has broken in the neighbourhood of 300 acres and has erected buildings thereon and the total value of the improvements is $5,500.

The defendant then counterclaims:—

(*a*) For an account of moneys paid to the plaintiff;

(*b*) That the plaintiff be ordered to deliver up possession of the said lands, and

(*c*) To specifically perform the said agreement, or in the alternative to repay the moneys which the defendant has paid to the plaintiff and the value of the said improvements and damages.

In reply to the counterclaim the plaintiff says that she is willing and ready to specifically perform the said agreement, but the defendant has failed to do so.

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The defendant's position is, that it would be a gross injustice to him to deprive him of his land and forfeit his payments of money and improvements under the circumstances which occurred in this case, and he counterclaims for specific performance of the said agreements, together with other relief.

It will thus be seen that both parties invoke the equitable jurisdiction of the Court.

The land in question was in a wild condition when sold to the defendant in 1906. Probably for this reason the first instalment was not payable until October 1, 1908. The defendant entered into possession and commenced breaking the land. The first crop was raised in 1908, and the plaintiff appears to have secured the benefit of it. In 1909, 1910 and 1911 the defendant broke further land, in all amounting to 250 acres, as the plaintiff herself admits. During these three years the crop of the defendant was partly hailed out, but the credits admitted by the plaintiff and set forth in par. 13 of her statement of claim, amounting in all to $1,489.75, indicate that she got the benefit of a very substantial portion of the crops. The improvements sworn to by the defendant, and uncontradicted by the plaintiff, are as follows:—

250 acres of breaking at $4 per acre	$1,000
House	800
Stable	800
Well	50
Fencing	50
Amounting in all to	$2,700

which, being added to the admitted credits above mentioned, make a total of $4,189.75, realized by the plaintiff either in money or in improvements to the land, without taking into account the moneys realized by the sheriff from a sale of the defendant's crop hereinafter mentioned. If the plaintiff's contention be allowed, and the defendant fail to redeem in time, the defendant will forfeit all of the above total.

The defendant states that he did not pay the $800 on July 1, 1912, because he was in hopes of raising enough money to pay the plaintiff off; that he spoke to her about it, and she said she would take it, but did not think he could raise it. The defendant went to one Underhill, an estate agent (who was called as a witness and corroborated the defendant), and arranged to get $5,000 from one company and $1,000 from another, and that he deposited $800 in his solicitor's hands, so that he was in a position to pay the plaintiff off in full, and so informed her; but she then declined to accept the money. The plaintiff denies that the balance of her money was ever tendered, but I did not understand her to deny that the defendant had arranged and offered to pay it.

On July 19, 1912, the plaintiff commenced an action against the defendant for possession of the said lands, and obtained

judgment in September. On October 16 the plaintiff's solicitor handed the writ of possession to the sheriff, and the sheriff took possession accordingly. Meanwhile, on September 3, the plaintiff signed a distress warrant, under which the bailiff, George Bates, entered upon the lands in question and distrained all the defendant's crop, which was subsequently sold by the sheriff in January, 1913, realizing $473.70, which must be added to the credits above mentioned, after deducting the sheriff's costs.

This action was commenced on December 30, 1912.

The plaintiff not only employed her present solicitor to act in the proceedings above mentioned and in this action as her legal adviser, but also Mr. Wemyss, a solicitor in Neepawa, and two counsel in Winnipeg, so that "the incidental expenses" which the plaintiff insists upon would doubtless include a very considerable sum over and above her travelling disbursements on several occasions.

It appeared by the evidence that the lands in question have nearly doubled in value, and of course the defendant's improvements must have largely added to their value. The defendant had been hailed out (in part) on three occasions, and failed to pay up the instalments from time to time due to the plaintiff. The only course apparently open to him was to raise enough money in a lump sum to pay off the plaintiff completely; but this she refused to accept, except upon terms which I have no right to impose upon the defendant against his will.

The relationship between a vendor and purchaser is very similar to that between a mortgagee and mortgagor. The principle upon which the Court acts in decreeing cancellation of an agreement for the sale of land is practically the same as that on which foreclosure of a mortgage is decreed. This was recognized by Jessel, M.R., in *Lysaught* v. *Edwards*, 2 Ch.D. 499 at 506, and was accepted as law in this Province by Bain, J., in *West* v. *Lynch*, 5 Man. L.R. 167, at 169.

Mr. Hudson, in his written argument, urges that the plaintiff cannot be compelled to accept her money before it is due, and he refers to *Rutherford* v. *Walker*, 8 W.L.R. 52 (also a case of vendor and purchaser), which recognizes this general rule.

Where, however, a mortgagee has demanded, or taken steps to compel, payment, and for this purpose entry into possession is a demand for payment, the mortgagor may redeem without notice, and before the time fixed for payment has arrived: see *Bovill* v. *Endle*, [1896] 1 Ch. 648. I see no reason why this reasonable rule should not apply to a vendor as well as to a mortgagee.

In the present instance the plaintiff sued for and recovered possession of the lands in question from the defendant prior to the commencement of this action. She also seized, under her distress warrant, all the defendant's crop of 1912, thus depriving

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him of the means of utilizing the farm for his own support, and for the purpose of paying off the plaintiff.

I am, therefore, of opinion that the plaintiff has, by her conduct, accelerated these payments, and could not justly refuse the whole balance of her principal, interest and costs, which the defendant was able and willing to pay in the fall of 1912.

Then, again, the evidence at the trial shewed that the plaintiff has recently rented the lands in question to one Wilson, who has put in his crop and is entitled to the benefit thereof. The defendant, while conceding to Wilson the right to harvest his crop for this year, is desirous of regaining possession of his farm, and he asks for an account and re-delivery of possession and specific performance of the agreements. I think this claim for specific performance must now be read in the light of the situation created by the plaintiff herself; that is to say, that the defendant is entitled to treat the balance of his purchase money as now due; and upon payment thereof he is entitled to possession.

What, then, is the position of the plaintiff in respect to possession. She had refused to accept payment in full except on terms which she has no right to impose, and she has put it out of her own power to deliver possession. Mr .Hudson argues that the lands were leased to Wilson in order to prevent the farm from going to waste. Still, he has the rights of a tenant, and, at the instance of the plaintiff (the defendant not objecting), I have protected Wilson's right to the benefit of this year's crop.

The plaintiff was not at the commencement of this action "ready and willing" to accept payment in full of her principal interest and costs, and she is not now ready to fulfil her obligation of delivering possession on payment by the defendant: see *Hipgrave* v. *Case*, 28 Ch.D. 356; *Ellis* v. *Rogers*, 50 L.T.N.S. 660.

For these reasons I think the plaintiff's action must be dismissed.

As regards the defendant's counterclaim, I am of opinion, for the reasons above expressed, that the defendant is entitled to specific performance of the agreements on the footing that the whole amount is now due.

The defendant is also entitled to a reference to the Local Master at Minnedosa to take an account of what remains due to the plaintiff. A good deal of evidence was given by the parties as to the amount of grain seized and sold by the sheriff. The defendant complains that he had more grain than the sheriff has accounted for. I am satisfied, however, that if there was a balance of grain unaccounted for, it was all left on the farm, and so the defendant either got the benefit of it, or in some way neglected to protect it. I therefore accept the sheriff's account in reference to this grain as binding upon the parties.

A question also was discussed as to the disposition of the

moneys realized by the sheriff. The evidence before me shews that first of all a seizure of the grain was made by Bates, the bailiff, under the plaintiff's distress warrant. Then the sheriff went out with an execution for $104 at the suit of the plaintiff. And then certain other writs of execution were placed in the sheriff's hands against the defendant, amounting to about $1,000. The parties interested in these subsequent executions are not before me, so any claims they desire to raise must be raised in the Master's office. But I hold that the plaintiff's distress is entitled to priority over the plaintiff's execution, as being first in point of time. The plaintiff is also entitled to the premium of insurance against hail, which she paid last summer.

On the other hand, the defendant is entitled to a credit of $473 in April, 1912, which is omitted from the account set forth in the plaintiff's pleadings.

Upon payment of the amount due to the plaintiff at any time within three months after the Master shall have filed the amount the defendant is entitled to possession of the said lands, subject to the rights of the plaintiff's tenant to this year's crop.

The defendant is entitled to his costs both of the action and of the counterclaim. Further directions and costs are reserved.

Judgment accordingly.

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Ontario Supreme Court (Appellate Division), Garrow, Maclaren, R. M. Meredith, Magee, and Hodgins, JJ.A. February 10, 1913.

1. EVIDENCE (§ X—730)—ACCIDENT INSURANCE—STATEMENT BY INSURED AS TO INJURY IMMEDIATELY FOLLOWING ACCIDENT—COMPETENCY.

For the purpose of proving the physical condition of a deceased person in an action on a policy of accident insurance, evidence is admissible as to what was said by him immediately after the occurrence of an injury alleged to have caused his death. (*Per* Hodgins, Maclaren and Magee, JJ.A.)

[*Youlden* v. *London Guarantee Co.*, 4 D.L.R. 721, 26 O.L.R. 75, affirmed.]

2. INSURANCE (§ III D—60)—CONSTRUCTION OF CONTRACT—RENEWAL RECEIPT—NEW AGREEMENT.

A receipt for a renewal for one year of a policy of insurance not contemplating an extension, creates a new contract. (*Per* Hodgins, Maclaren and Magee, JJ.A.)

[*Youlden* v. *London Guarantee Co.*, 4 D.L.R. 721, 26 O.L.R. 75, affirmed.]

3. INSURANCE (§ III A—46)—RENEWAL RECEIPT—INCORPORATION OF TERMS OF POLICY BY REFERENCE.

The words "according to the tenor" of a designated policy of accident insurance, used in a receipt for renewal of the insurance for another year, are sufficient to incorporate all of the terms and conditions of the policy in the new contract created by the renewal receipt, so as to comply with sec. 144 (1) of the Insurance Act, R.S.O. 1897, ch. 203, requiring that all the conditions or stipulations prejudicial to the

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insured or beneficiary shall be set out in full on the face or back of the instrument forming or evidencing the contract.

[*Youlden* v. *London Guarantee Co.*, 4 D.L.R. 721, 26 O.L.R. 75, affirmed.]

4. INSURANCE (§ VI A—246)—ACCIDENT INSURANCE—NOTICE OF INJURY—CONDITION AS TO GIVING—BINDING EFFECT ON BENEFICIARY.

The beneficiary named in a contract of accident insurance, although not a party thereto, is bound by the conditions of the policy as to the method of giving notice of an injury to the assured. (*Per* Hodgins, Maclaren and Magee, JJ.)

[*Youlden* v. *London Guarantee Co.*, 4 D.L.R. 721, 26 O.L.R. 75, affirmed.]

Statement

APPEAL by the plaintiff from the judgment of Middleton, J., *Youlden* v. *London Guarantee and Accident Co.*, 4 D.L.R. 721, 26 O.L.R. 75.

The appeal was dismissed.

Argument

J. L. Whiting, K.C., for the plaintiff, argued that it was shewn by the evidence that the deceased died from an accident, as defined by sec. 152 of the Insurance Act, and that the receipt of the 2nd January, 1909, was evidence of a new and independent contract for another year. The learned trial Judge erred in holding that sec. 144 of the Insurance Act was complied with. The intention of the Legislature was to prevent incorporation of conditions in the contract by reference, to the prejudice of the beneficiary. He referred to *Hay* v. *Employers' Liability Assurance Corporation* (1905), 6 O.W.R. 459; *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.* (1906), 11 O.L.R. 330.

W. N. Tilley and *C. Swabey*, for the defendants, argued that sec. 144 of the Insurance Act had no application here, as it deals only with sealed instruments. They referred to *Long* v. *Ancient Order of United Workmen* (1898), 25 A.R. 147; *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; *In re Scarr and General Accident Assurance Corporation*, [1905] 1 K.B. 387; *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.* (1904), 8 O.L.R. 117, 121; *Liverpool and London and Globe Insurance Co.* v. *Agricultural Savings and Loan Co.* (1903), 33 S.C.R. 94.

Whiting, in reply, referred to to *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.*, 11 O.L.R. 330, *per* Garrow, J.A., at p. 333; *Fenton* v. *Thorley & Co. Limited*, [1903] A.C. 433; *Hamlyn* v. *Crown Accidental Insurance Co.*, [1893] 1 Q.B. 750.

Meredith, J.A.

R. M. MEREDITH, J.A.:—The insurance in question originated in 1902, and was evidenced by the policy No. 65996.

That insurance seems to have been renewed from year to year, and was in force when the insured person died in 1909: and his death took place under such circumstances that,

admittedly, the plaintiff has no legal claim against the defendants under the policy. How then can she recover? What sort of difficulty does the case present?

The contention is, that the policy must be disregarded, and that the contract of insurance must be taken to be the mere renewal receipt; and, as no conditions are set out in or upon it, none are applicable to the case. But how can any such contention reasonably be made? The "accident renewal receipt" is, upon its face, and was in fact, nothing but a receipt for the premium by which the policy No. 65996 was renewed for another year. Indeed, without the policy, the plaintiff suing in her own right only, as she does, would have no right of action. The "insurance contract" was the contract which was first made in 1902, and thereafter renewed from year to year, the contract evidenced by the policy No. 65996, and none other: that contract, admittedly, complies with the requirements of the law, and under it, admittedly, there is no right of action. The premiums might just as well, as a matter of law, have been paid without any receipt being taken for them; could it in such a case be contended, reasonably, that there was no contract in writing?

It is true that it may be that there was no right of renewal, such as that in question, without the consent of the defendants: but what difference can that make? Whether it was in the power of one of the parties alone, or whether it required the concurrence of each, in either case the contract ended unless and until it was renewed; the renewal in either case is indifferently called a renewal of the policy, and the effect of it is just the same—the old contract is carried on in its entirety for another year. That is, and in this case was, the intention of the parties, as well as the effect in fact and in law of every such renewal, unless in it there is some provision to the contrary; and such there was not in this case.

The only difficulty is to make anything like a real difficulty out of the appellant's contention in this respect.

Upon the question of admissibility of evidence, the trial Judge, in my opinion, erred.

How can the observation, made some time after the event, that he thought he had hurt himself, be considered admissible evidence, except, if material, against him? It did not relate to his sensations at the time; but was his opinion as to something that had happened before.

However, little or nothing turns upon the statement. If it were meant to convey the opinion that he had ruptured or strained himself, the meaning which the words would ordinarily convey, it was wrong, because nothing of the sort occurred. Whilst, if it were intended to convey the meaning that by over-exertion he had exhausted himself, there was no need to say

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anything; that was as evident to those to whom he spoke as it could be to him. They knew of his condition before his exertion, they saw what he did, and they saw the weakness which it apparently brought on. So that excluding the statement has really no effect upon the case.

Upon the question of fact, it is never questioned that a finding on circumstantial evidence is quite as good as one on direct testimony; discussions of that kind are quite out of the question. The real questions are: when the case was tried by a jury, was there any evidence upon which reasonable men could find as the jury have found? and, when tried by any judicial officer, whether the finding was right—having regard always to the advantages of a Judge who sees and hears the witnesses over any Court that does not.

Having regard to these things, I am not prepared to say that the trial Judge erred in his finding as to the cause of death; though bound to say that there is no great margin of foundation for the support of that finding in the evidence upon which it is based.

I would dismiss the appeal.

Garrow, J.A.

GARROW, J.A.:—I agree.

Hodgins, J.A.

HODGINS, J.A.:—I agree with the learned trial Judge as to the evidence admitted by him, and with his finding that the respondents are liable, unless, by reason of the provisions of the Insurance Act, they are protected by the conditions found in the original policy. The evidence at the trial brings the case within R.S.O. 1897, ch. 203, sec. 152. I also concur in his view that this contract is a new insurance, and not merely the renewal of an old one. The contract now relied upon was not one kept on foot by payments or by performance of conditions which the insured might comply with without the assent of the insurer. See *Long* v. *Ancient Order of United Workmen*, 25 A.R. 147, where the description given by Osler, J.A., at p. 156, of guarantee contracts may well express this one: "The renewal is a new contract upon a new consideration which was entirely optional between the parties, continuing the former on foot for a further period on the terms therein contained, or as modified by the renewal contract."

The question arising by reason of the conditions in the old policy raises much difficulty.

The husband of the appellant had been insured in 1902 under an accident policy, No. 65996, the terms and conditions of which, if they form part of the present contract, are said to present an effectual bar to the action.

On the 2nd January, 1909, the respondents, in consideration of $12.50 paid to them, issued what is termed therein an "accident renewal receipt" in the following terms:—

"Printed renewal receipts issued from head office for Canada are alone admitted as valid. No agent is authorised to give credit or take promissory notes in payment of premiums or waive or alter any term or condition of policies or receipts.

"Accident Renewal Receipt.

"Canada Branch. Agency: Kingston.
"Head Office: Toronto.

"Policy No. 65996.

"The London Guarantee and Accident Company Limited.
"Head Office No. 61 Moorgate St., London, Eng.

"Toronto, Jan. 2nd, 1909.

"Received the sum of twelve 50/100 dollars, being the renewal premium for an accident insurance of $2,500 on the life of Mr. Harry Youlden and $12.50 weekly indemnity for one year from January 7th, 1909, at noon, according to tenor of policy No. 65996.

"D. W. Alexander, manager for Canada."

"Not valid unless countersigned by S. Roughton, agent."

The name of the beneficiary is not found therein; and the respondents allege that, for that reason, the receipt is not the whole contract.

The insurance given is "accident insurance of $2,500 on the life of Mr. Harry Youlden and $12.50 weekly indemnity for one year from January 7th, 1909, at noon;" and that insurance is "according to tenor of policy No. 65996."

Clearly, the weekly indemnity would be payable to Harry Youlden, and on his death the $2,500 would be payable to his estate, unless he had designated it otherwise. The application for the policy No. 65996 was not produced, nor was it suggested that there was any application immediately preceding the receipt in question. In the policy it is agreed that the payment on death will be made to Nina Youlden, wife of the assured, and to him, in case of non-fatal injury, either in whole or in part; and the weekly indemnity is likewise payable to him. In the proof of loss, Nina Youlden signs as "beneficiary," and she sues as such.

The writ in the action was issued on the 11th January, 1910. By 3 Edw. VII. ch. 15, sec. 3, a sub-section was added to sec. 80 of the Ontario Insurance Act, enabling any person now being or hereafter becoming entitled as beneficiary to money payable under a contract of insurance, to sue for the same in his own name. The appellant was, therefore, if beneficiary, entitled to maintain the action. The respondents do not dispute this, but rely on the fact that to establish her right the appellant has to refer to the policy. But the right of the beneficiary arises from her designation as such, which may be made by the contract of insurance or in writing, which, therefore, includes a will.

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In the absence of information as to any will and of the original application, her only title appears to be derived from the insertion of her name in policy No. 65996, under which the principal sum is, on death, payable to her. It is necessary, therefore, to construe the words "according to tenor of policy No. 65996." There are two possible meanings to be given to them. The first is, that the "tenor" of the policy refers only to its form, shewing that it is an insurance contract and identifying the parties to it, and amplifying the words of the receipt in so far as is necessary to determine the events on which the sum insured becomes payable as a matter of contract, and to whom, and not as including the penal conditions, provisoes, and stipulations which are in the nature of conditions subsequent. The second is that contended for by the respondents, namely, that the "tenor" of the policy includes everything which that policy discloses and requires. The appellant asserts that, even if the latter construction is the correct one, the Insurance Act has, in the circumstances of this case, deleted from the insurance contract relied upon by the respondents, the conditions which are said to be a bar to her recovery.

The particular defence relied on is failure to comply with the condition endorsed on the policy, that, "in the event of injury, within the intent and meaning of this policy, being sustained by the insured . . . notice shall be given in writing within fourteen days of the accident from wheh the injury resulted . . . addressed to the manager of the company for the Dominion of Canada, at his office, stating the full name . . . with full particulars of the accident and injury; and failure to give such notice within such time shall invalidate all claims under this policy."

The policy is under seal; and, in consideration of the warranties contained in the application and $12.50, and "subject to the terms and conditions hereof," the company insure Harry Youlden for twelve months. Then follow the provisions shewing the circumstances under which payments will be made. The one applicable is part of (a): "Within ninety days after proof that the insured shall have sustained bodily injuries, effected through external violent and accidental means, and that such injuries alone and independently of all other causes shall have occasioned death within ninety days from the sustaining of such injuries, the company shall pay the principal sum of this policy to Nina Youlden, wife of assured."

In the remaining part of (a), the payment is expressly made "subject to the conditions endorsed hereon," and, where there is a subsequent qualification, it reads, "subject to the said conditions and the provisoes hereinafter contained," and then it takes the form of "subject as aforesaid."

The following paragraph ends the policy: "Provided further

that the several conditions, restrictions, stipulations, and notices endorsed hereon, as well as those herein contained, shall be read as incorporated herein, and are and shall be conditions precedent to the right of the *insured* to recover hereunder."

Endorsed on the policy are "conditions of assurance," of which the one I have quoted is that relied on by the respondents.

The first inquiry to be made is as to what effect is to be given to the words in the receipt, "according to tenor of policy 65996." I was desirous of knowing whether such a seemingly innocent reference to a former policy drew with it the consequences set up by the respondents, and have endeavoured to ascertain the meaning of the word "tenor" as used in this connection.

In criminal law its meaning is well-settled. In an indictment for forgery "according to the tenor following," where a prosecutor failed in proving the instrument *verbatim* as laid, the variance was held to be fatal: *The King* v. *Powell* (1771), 1 Leach C.C. 77. Chitty's Criminal Law (1826), p. 234, citing *The King* v. *Gilchrist* (1795), 2 Leach C.C. 657, 661, says: " 'Purport' means the substance of an instrument as it appears on the face of it to every eye that reads it; 'tenor' means an exact copy of it." Buller, J., in *The King* v. *May* (1779), Doug. 193, 194, ruled, at the trial of a prisoner on an indictment for perjury, that the word "tenor" had so strict and technical a meaning as to make it necessary to recite *verbatim*. In the report of the judgment of the Court of King's Bench in *Rex* v. *Bear* (1699), 2 Salk. 417, on an information for libel, it is said, "The tenor of a thing is the transcript;" and in *Wright* v. *Clements* (1820), 3 B. & Ald. 503, in a civil action for libel, "tenor" was as strictly construed as in *The King* v. *May, ante*.

The Supreme Court of New York took the same view in *The People* v. *Warner* (1830), 5 Wend. 271. Marcy, J., says: "The word 'tenor' has a technical meaning and requires an exact copy." See, also, in Massachusetts, *Commonwealth* v. *Wright* (1848), 55 Mass. 46, at p. 65; in North Carolina, *State* v. *Townsend* (1882), 86 N.C. 676, at p. 679, where it is said that "*tenor* imports *identity;*" in Arkansas, *McDonnell* v. *State* (1893), 24 S.W.R. 105; in Texas, *Edgerton* v. *State* (1902), 70 S.W.R. 90.

In Broom's Legal Maxims, 6th ed., p. 430, it is said that it is the tenor of the feudal grant which regulates its effect and extent.

In commercial cases, averment of presentment according to the tenor and effect of the bill meant presentment where, by the exact terms of the acceptance, it was made payable: *Bush* v. *Kinnear* (1817), 6 M. & S. 210; *Huffam* v. *Ellis* (1811), 3 Taunt. 415; and see *Good* v. *Walker* (1892), 61 L.J.N.S. Q.B. 736.

In dealing with the words "in form following," Crampton, J., in *Lord Mountcashell* v. *Lord O'Neill* (1852), 3 Ir. C.L. Rep. 436, at p. 454, remarks: "There is a distinction to be observed, and

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even noted in our books, between the legal words 'tenor' and 'form' and the setting out of an instrument according to the tenor, or according to the form. Tenor has a stricter sense than form. In the former case an instrument must be set out *in hæc verba*, but where a form is to be pursued the same strictness is not required."

In the celebrated case of *Miller* v. *Salomons* (1852), 7 Ex. 475, Chief Baron Pollock, in construing the words of 3 Jac. I. ch. 4, sec. 15, "the tenor of which oath hereafter followeth," says, at p. 561: "Apparently the effect of this statute was to exclude Jews from any benefit that might arise from taking the oath—for they certainly could not take the oath *according to the tenor* (which is the same thing as *verbatim*), nor subscribe it as so taken."

In deciding whether probate may be granted to a party as executor "according to the tenor," Lord Ashbourne, C., says: "The whole will must be considered, and every part of it must be examined to find its general tenor:" *Re McKane* (1887), 21 L.R. Ir. 1, at p. 6.

An examination of dictionaries, including law dictionaries, give much the same result. Thus, the Century Dictionary: "Tenor: general course or drift of a thought . . . which . . . runs through a whole . . . statute." Wharton, Tomlin, and Mozley & Whiteley, in their law dictionaries, agree with Kinney's definition, "An exact copy of a writing, pursuing the course of its words as they succeed one another." See also *Sturgis* v. *Dunn* (1855), 19 Beav. 135.

I find no warrant in criminal or common law, nor in that laid down by Judges, for construing "according to tenor of policy 65996," otherwise than as importing the policy and all contained therein or thereon.

It is, therefore, not really necessary for the respondents to have recourse to the cases cited on the argument as holding that conditions impairing or modifying the contract may be imported by reference merely. But, as they are mentioned and discussed by the learned trial Judge, it may not be out of place to examine them.

In *Venner* v. *Sun Life Insurance Co.* (1890), 17 S.C.R. 394, the policy was adjudged void for misrepresentations in the application. By the policy the company had agreed to pay "upon the express condition that if Langlois' " (the insured) "answers in the application were later proved to have been false the policy would then be void" (per Taschereau, J., at p. 399). The condition was thus literally "set out in full," although it needed proof of the particular false statement in the application before effect could be given to it. But the case does not deal exhaustively with the section referred to.

In *Jordan* v. *Provincial Provident Institution* (1898), 28 S.C.R. 554, the Court followed the case just cited, and held that, as the application was, by the policy, made part of the contract, and as there was a condition endorsed on the policy rendering the insurance void for misrepresentation of a material fact in the application, the company had sufficiently complied with sub-sec. 1 of sec. 33 of the then Ontario Insurance Act (1892), 55 Vict. ch. 39.

These two cases affirm only this conclusion, namely, that a condition invalidating a contract for misrepresentation at its inception is set out in full even if it leaves the identification of the particular false statement at large.

In *Hay* v. *Employers' Liability Assurance Corporation*, 6 O.W.R. 459, this Court has decided that the proposal of the plaintiff was "by reference thereto in the policy sufficiently incorporated therewith and set out in full therein," within the meaning of the Ontario statute, then R.S.O. 1897, ch. 203, sec. 144(1); and, construing it as part of the contract, held that there was a plain breach thereof, and that the plaintiff could not recover.

In *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.* (1904-6), 8 O.L.R. 117, 9 O.L.R. 569, 11 O.L.R. 330, this Court adhered to that view.

These cases mark an advance on those in the Supreme Court; for in neither of them was there any actual condition making the contract void for misrepresentation in the application, and they are decided upon the principle that a contract may be avoided by misrepresentation, which misrepresentation, if in the application, may be relied on under sec. 144, sub-secs. 1 (*a*), 2, and 3, provided that it is referred to in the policy as the basis of the contract.

While I am bound by these cases, I do not think they are inconsistent with the view expressed by the learned Chancellor in the *Elgin* case, 9 O.L.R. 569, which seems to me to indicate exactly the difference in meaning between sub-sec. 1 and the succeeding sub-sections. I cannot understand how, in law, a condition, which is itself part of a contract, can be said to impair or modify the legal effect of the contract taken as a whole, although it is easy to see how, speaking in a business sense, it may well do so. The majority in this Court have in fact affirmed that view in *Hargrove* v. *Royal Templars of Temperance* (1901), 2 O.L.R. 79, as stated by Osler, J.A., at p. 95.

The result, however, of these cases is, to my mind, inconclusive upon the present appeal. They do not really touch the question whether a condition modifying or impairing the effect of a contract can be read into the contract by reference, unless conditions which modify or impair the effect of a contract (admittedly in existence, and, therefore, treated as valid) are to be regarded in the same way under the Insurance

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Act as conditions forming an essential part of the contract itself, and by reason of the breach of which the contract may be found to have been void from its inception.

In view of the argument on behalf of the respondents, it may be well to point out that, under sec. 144, sub-sec. 1, of the Ontario Insurance Act, R.S.O. 1897, ch. 203—where any insurance contract is evidenced by a sealed or written instrument—"all the terms and conditions" of the contract must be set out in full on the face or back of the instrument forming or evidencing the contract. Hence there is no possibility of introducing an oral term or condition, as, where it is evidenced as it is here, all the terms and conditions must be set out in the instrument. Unless these terms and conditions are so set out, none of them which impairs or modifies the contract is valid, nor can it be given in evidence against the insured or the beneficiary.

But, if the words "according to tenor of policy No. 65996" make the policy part of the insurance contract, it is clear that the statute has been literally complied with. If policy 65996 does not of itself form the contract, it evidences it in conjunction with the renewal receipt. Under the Interpretation Act "instrument" may be read as "instruments." See *per* Maclennan, J.A., in *Wintemute* v. *Brotherhood of Railroad Trainmen* (1900), 27 A.R. 524, at p. 527; and these two documents form the contract, and the condition is found therein or thereon.

The only remaining question is, whether the beneficiary is bound by the condition, she not having contracted to be so bound. The right of the beneficiary to sue and receive the insurance money payable is statutory; and the condition relied on is one which, if valid, defeats this statutory right. The insured and the company have entered into a contract which the Insurance Act makes a trust in favour of the appellant as a preferred beneficiary. Is she, therefore, in the same class as the insured? The appellant argues that she is not, and urges that the condition is one in defeasance of the contract; and the last clause of the policy previously quoted purports to bar the insured, and not the beneficiary.

It is true that, under the Insurance Act, a trust is created in favour of a preferred beneficiary, such as the appellant. But I have found no case where the trust has been treated as created in such a fashion that the insurance company is a bare trustee for the beneficiary on the happening of the event insured against. It has been dealt with as if the trust, while it arose immediately on the designation of the beneficiary, was always subject to the terms of the contract out of which arose the trust fund, and, therefore, subject to be defeated by the neglect of the insured. Most of the actions upon insurance contracts are brought by beneficiaries under the statute; and default in payment of pre-

miums, absence of proper notice, and forfeiture for non-compliance with conditions, have all been treated as good defences against this class of beneficiary. The allowance of such a defence in cases like the *Venner* and *Jordan* cases, can be readily understood, because the foundation of the contract was attacked. But in the present and in similar cases it is a hardship if the defence set up here, or one depending upon a default of the insured or beneficiary after the happening of the event insured against, should be allowed to prevail against the express trust declared by the statute. It seems unjust that a condition, often not known to a beneficiary, and, as here, intended to arise after injury to the insured—who is the only one likely to know of it—should enable a company to escape the liability it was paid to assume. But, as I understand the decisions, the same rule has been applied in all cases.

Such a condition as is found here has been held effective, and the giving of the required notice a condition precedent to liability. See *Accident Insurance Co. of North America* v. *Young* (1892), 20 S.C.R. 280 (in which case the plaintiff was a beneficiary to whom the policy was payable); *Employers' Liability Assurance Corporation* v. *Taylor* (1898), 29 S.C.R. 104; *Atlas Assurance Co.* v. *Brownell* (1899), 29 S.C.R. 537.

In *Home Life Association of Canada* v. *Randall* (1899), 30 S.C.R. 97, a beneficiary was held bound by a condition in the policy requiring certain proofs of a valid claim to be submitted before action could be brought, which proofs, when furnished, shewed that the deceased had died from consumption within the year. This brought it within the 19th condition endorsed on the policy, which provided that a death from consumption within the year was a risk not covered by the contract.

In the first two cases there were dissenting judgments, which, with *Shera* v. *Ocean Accident and Guarantee Corporation* (1900), 32 O.R. 411, may be referred to for opinions treating of conditions similar to that invoked in this case, but in a different way.

There is not much direct authority to be found dealing with the status of a beneficiary when confronted with the effect on her rights of conditions subsequent. In the *Randall* case, Strong, C.J., expresses the opinion (30 S.C.R. at p. 106)—*obiter*, it is true—that a condition limiting the right of action to a year from the death would bind the beneficiary.

Meredith, J., in *Webb* v. *New York Life Insurance Co.* (unreported), tried at the Toronto non-jury sittings on the 25th March, 1892, expressed the same opinion upon the same point. See also *Wood* v. *Confederation Life Insurance Co.* (1901), 2 N.B. Eq. 217.

In the *Venner* case, it was argued that the third party could recover, the policy being payable to him. Venner, however, was

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a creditor, and not a beneficiary; and the case did not raise the exact question to which I have alluded.

I think the foregoing decisions must bind this Court in this case.

The nature of the trust created has been very fully stated, though not in such terms as to warrant an express decision that it would oust the effect of such a condition, in *In re Adam's Policy Trust* (1883), 23 Ch. D. 525; *Fisher* v. *Fisher* (1897-8), 28 O.R. 459, 25 A.R. 108; and by Osler, J.A. (dissenting), in *McKibbon* v. *Feegan* (1893), 21 A.R. 87; while Jessel, M.R., in *Matthew* v. *Northern Assurance Co.* (1878), 9 Ch. D. 80, held the view that the insurance company was not a trustee but an ordinary debtor. See also *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147.

I think the appeal should be dismissed.

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

MACLAREN and MAGEE, JJ.A., agreed with HODGINS, J.A.

Appeal dismissed with costs.

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PETERSON v. BITULITHIC & CONTRACTING CO.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. April 14, 1913.

1. ESTOPPEL (§ II A—20)—BY DEED—DESCRIPTION OF WIDTH OF HIGHWAY—ACCEPTED SURVEY—MUNICIPALITY—OWNER.

In a dispute between a municipality and the owner of land as to the width of a highway running through the land, the fact that the land was acquired by the owner through a conveyance which described the land according to a certain plan then registered and which plan shewed the width of the highway to be as claimed by the municipality, is binding on the owner, especially where a subsequent survey and plan were made at the request of the government based upon the former plan; and the owner, in an agreement for the sale of the land, dealt with it and described it by the new plan.

[*Peterson* v. *Bitulithic & Contracting Co.* (No. 1), 7 D.L.R. 586, reversed.]

2. HIGHWAYS (§ III—114)—SPECIAL SURVEY ACT (MAN.)—CONSTRUCTION OF STATUTE AUTHORIZING MUNICIPALITY TO DEFINE BOUNDARIES OF STREETS AND LANDS.

A plan made pursuant to the Special Survey Act, R.M.S. 1902, ch. 158, authorising a survey by a municipality "for the purpose of correcting any error or supposed error in respect to any existing survey or plan, or of shewing the divisions of lands" is not an act of expropriation, but is simply intended as evidence of the position or location of the boundary lines which have been obliterated, and when the plan is ratified by the Attorney-General, incorporated in and promulgated by the order of the Lieutenant-Governor-in-council, it is a substitute for the evidence which has been lost and for the landmarks which have been obliterated, and is conclusive on the owners of the lands in question.

[*Peterson* v. *Bitulithic & Contracting Co.* (No. 1), 7 D.L.R. 586, reversed.]

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3. STATUTES (§ II B—113)—LIBERAL CONSTRUCTION—MUNICIPAL POWER IN DEFINING BOUNDARIES OF PROPERTY—CURATIVE NOT CONFISCATORY.

The Special Survey Act, R.S.M. 1902, ch. 158, authorizing a survey by a municipality for the purpose of correcting errors in prior surveys and for the purpose of defining and establishing the boundaries of property is not a statute which confiscates property, but is curative, remedial and beneficial in its purpose, and as such should receive a generous interpretation so as, if possible, to carry out the intention of the Legislature in making certain and defining property rights. (*Per* Haggart, J.A.)

[*Peterson* v. *Bithulithic & Contracting Co.* (No. 1), 7 D.L.R. 586, reversed.]

Statement

APPEAL from decision of Mathers, C.J.K.B., *Peterson* v. *Bitulithic & Contracting Co.* (No. 1), 7 D.L.R. 586.

The appeal was allowed.

H. M. Hannesson, for the plaintiff.

H. P. Blackwood, and *A. Bernier*, for Bitulithic & Contracting Co.

I. Campbell, K.C., and *A. E. Dilts*, for the rural municipality of St. Vital.

Howell, C.J.M.

HOWELL, C.J.M.:—The statement of claim alleges that the plaintiff Guay was the owner of a part of lot 106 according to the Dominion Government survey of the parish of St. Boniface,

Lying to the west of the westerly limit of the highway known as St. Mary's road, which said road is of the width of 66 feet, where the same crosses said lot 106.

See. 2*a* of the statement of claim is as follows:—

2*a*. On or about the said 1st day of September, A.D. 1909, the plaintiff Guay agreed to sell the land before described to the plaintiff Peterson, who therefrom entered into possession thereof, and so continued without disturbance until the happening of the events hereinafter recited.

In par. 4 it is alleged that the defendants "entered and trespassed on the lands aforesaid."

At the trial the defendants put in a transfer executed by the trustees of the late Senator Girard to the plaintiff Guay of the portions of this lot lying immediately to the east of this highway and adjoining it on that side, and also a considerable portion of the lot lying immediately to the west of the same highway and adjoining it on the west side, a portion of this latter parcel, the plaintiffs' claim, is the land in question in this suit.

The description of the land in the transfer begins as follows:—

All that portion of said lot 106, commencing on the westerly limit of the St. Mary's road, in the parish of St. Boniface, as the said road is shewn on plan 472.

Certificates of title by this description were duly issued to Guay.

The defendants also put in at the trial an agreement between the two plaintiffs, whereby Guay agreed to sell to Peterson the

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most northerly 45 feet of the last mentioned parcel, that is, the parcel abutting upon that road, but the road is therein described as "shewn on a plan registered in the land titles office as No. 606."

On October 28, 1911, the plaintiff Peterson filed a caveat in the land titles office claiming an equitable estate in the land described as in that agreement.

At the trial the plaintiff Peterson gave evidence on his own behalf, and I quote portions:—

Q. How long have you owned the property in question? A. Since 1909.

Q. Whom did you buy it from? A. Mr. Abraham Guay.

Q. Your co-plaintiff? A. Yes. . . .

Q. You bought the property between the road and the river? A. Yes.

Q. Do you know St. Mary's road? A. Yes. . . .

Q. Did you enter into possession of the property you bought? A. Yes.

Q. When did you do so? A. On September 1, 1909.

The only conclusion I can come to from the pleadings, the documents and the evidence, is that Peterson bought the land in dispute from his co-plaintiff, and pursuant to that purchase he entered into possession on September 1, 1909, which is the date of the agreement to purchase put in by the defendants, and I must draw the natural inference that his only purchase was under that agreement.

The plan 472 shews St. Mary's road to be 99 feet wide.

Mr. R. C. McPhillips, who made plan 606, was called as a witness, and he swears in answer to a question put to him by the plaintiffs' counsel, that this plan was prepared as a result of a survey made by him under the direction of a Dominion order-in-council. He says that the survey made by him shews St. Mary's road at this point as 99 feet wide, and stakes were put down shewing this—so that the actual survey on the ground of which this plan is an indication, made that road 99 feet wide.

The plaintiff Peterson is, however, in actual possession of a strip of land 16½ feet wide, which, if the road is 99 feet wide, is a part of the highway, and was so in possession when the invasion thereof by the defendants took place. Peterson swears he purchased this land in question from Guay and took possession pursuant to that purchase; but it is argued that if this parcel in dispute was not a part of the land so purchased, he cannot be deprived of possession unless it is shewn to be a part of the highway.

All parties agree as to the centre line of the highway, and they agree that this line is correctly shewn in plans 472 and 606; but the dispute is whether the highway is 66 feet or 99 feet wide.

The case *St. Vital* v. *Mager*, 19 Man. L.R. 293, was relied on at the trial as an authority that this road is only 66 feet wide. In that case R. C. McPhillips, a land surveyor, gave evidence

which came up for discussion on page 299. In this case the same Mr. McPhillips was called and, in answer to a question put to him by plaintiffs' counsel, he swore that plan 606 is the plan referred to on that page, and that plan 606 was prepared as a result of the survey which he made at the request of the Dominion Government, and that case decides that this highway was vested in the province pursuant to that survey and plan. This survey was made in 1886, and the plan made from the survey is dated January 22, 1887, and was registered on November 3, 1900, as No. 606.

Although that case refers to the width of St. Mary's road at lots 107 and 108, it decides nothing as to the width of the road at lot 106, for the very good reason that the plaintiff in that case claimed title through the Hudson's Bay Company, and was not in any way complicated by the plans above referred to, and further, perhaps, St. Mary's road was really only 66 feet wide after its junction with St. Anne's road, so far as Mager was concerned. A simple review of the facts might simplify matters.

The earliest owners of that portion of lot 106 under consideration were the Girard trustees, and by the conveyance of the trustees to the plaintiff Guay of the land on both sides of the road and up to the road according to plan 472, the trustees declared that the road at that point was 99 feet wide. If the trustees had directed that plan to be made and registered and had made conveyances pursuant to it, that would be a dedication of the land as a highway as far as they could do so. They found this plan already registered and they acted upon it, and for all we know to the contrary, may have approved of it and procured its registration. The plaintiff Guay, by taking under that plan, recognized the road to be 99 feet wide.

The plaintiffs by dealing with the land and describing the road by plan 606, and Peterson by registering a caveat describing his land by that plan, have declared that the road is located according to that plan, and as the plan does not shew the width of the road, it seems to me that was an approval and a recognition of the survey to represent which the plan was made, and if so the plaintiffs have declared the road there to be 99 feet wide.

Before the grievances complained of in this suit, proceedings were taken for a special survey of the line in dispute under ch. 158, R.S.M., and a plan of the survey was duly approved of and registered as required by the Act. I have considered with great care the remarks of the learned Chief Justice of the King's Bench with reference to this survey and plan.

The learned Chief Justice treated the plan as an act of expropriation, but with great deference in this case I would treat it simply as evidence of the position or location of a line. The original Act authorized the survey "for the purpose of correcting any error or supposed error in respect of any existing survey

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or plan . . . or of shewing the divisions of lands," and the notice published in the *Gazette* pursuant to sec. 5 of the Act gives as a purpose of the survey the following:—

> For the purpose of correcting errors in prior surveys . . . and for the purpose of defining and establishing the location of boundaries of property.

An order-in-council was duly passed confirming this survey, and the plan was duly registered as No. 1871.

Mr. McPhillips, who made plan 606, also made the special survey and plan 1871, and swears he located St. Mary's road in the last mentioned plan upon the same ground as 606, and that he laid out the road 99 feet wide.

The sole contest in this suit is as to the location of the western boundary of St. Mary's road. All parties agree where the centre line of this road is. The first registered plan 472 places the western boundary where the defendants contend it is. The original owners of the land, so far as the evidence shews, placed the western boundary according to that plan. The plaintiff Guay, in taking title, admitted the western boundary to be as the defendants claim. The plaintiff Peterson, by his agreement to purchase and by his caveat filed two years later, admitted the western boundary to be as set forth in plan 606, and the official survey under which this highway was vested in this province placed this western boundary on the same line as plan 472, and plan 606 was made from that survey. The special survey and the plan thereof, No. 1871, simply was to settle the errors or disputes and define the boundary line, and is, to my mind, simply further evidence of the fact of the exact location of the western boundary line of the highway, the location of the centre line of which all parties admitted.

It seems to me the notice in the *Gazette* published under sec. 5 of the Act was sufficient to justify a survey of the boundary lines of the highway, and that, by virtue of secs. 14 and 17, the plan fixes, as against the plaintiffs, the western boundary of St. Mary's road, which was the eastern limit of their land.

The documents, plans and evidence in this cause establishes, as against the plaintiffs, the fact that the western boundary of St. Mary's road, at the point in dispute, is as claimed by the defendants, and I would find as a fact that the land in dispute now occupied by the plaintiff Peterson is a part of St. Mary's road.

Probably the plaintiffs were led to enter into possession of the land in dispute because of the decision in the *Mager* case, thinking it established the road as to them, and the ordinary rule for this reason as to costs might well not be followed.

The appeal will be allowed without costs, and the judgment entered for the plaintiffs must be set aside and judgment entered for the defendants without costs.

HAGGART, J.A.:—The land described in the statement of claim charged to have been trespassed upon by the defendants is a portion of a larger quantity acquired by the plaintiff Guay from the executors of the late Senator Girard in the year 1904. The transfer executed by the executors and the certificate issued to the plaintiff Guay describe the land by metes and bounds, and refer to the different parcels as lying to the east or west of St. Mary's and St. Anne's roads, and also refer to these roads as shewn upon plan No. 472.

On September 1, 1909, the plaintiff Guay, by an agreement in writing, sold to his co-plaintiff a portion of the above mentioned land described as 45 feet in width of parish lot 106, of the parish of St. Boniface, lying to the west of the westerly limit of St. Mary's road as shewn on plan 606 filed in the registry office. Both parties sign and seal the agreement of sale. The plaintiff Peterson gives notice to the public of his purchase by filing his caveat and describes the land as the same is described in the agreement of sale. St. Mary's road is shewn upon both of these plans as being 99 feet in width where it crosses parish lot 106.

Some months after the purchase the plaintiff Peterson fenced his lot up to within 33 feet of the centre line of St. Mary's road, and contended that the road was only sixty-six feet in width.

The defendant municipality proposed paving the road and let the contract for this purpose to their co-defendant. The defendants removed the fence. This action is to restrain the defendants as trespassers. The subject of the trespass is 45 feet by 16½ feet of land, and the question to be determined is whether the road opposite the plaintiff Peterson's land is 66 feet or 99 feet wide. Where is the western limit of St. Mary's road? The western limit of the road is the eastern limit of the plaintiff Peterson's land.

There is no evidence that the plans in question were made by a duly authorized official or that all the formalities required by law were complied with, but it is to be observed that both plaintiffs make use of them to describe the land in dealing with it. I do not think that they should be allowed to take advantage of any defects, if any such exist. They dealt with the land in question as fronting on a 99-foot roadway.

The defendants, however, claim that, if any uncertainties as to boundaries ever existed, they have been cured by the steps taken under the provisions of the Special Survey Act, ch. 158, of the Revised Statutes of Manitoba (1902). Sec. 3 of this statute, as amended by sec. 1, ch. 62, of the statutes of 1910, enacts as follows:—

> The Attorney-General may direct a special survey . . . for the purpose of correcting any error or supposed error in respect of any existing survey or plan, or of plotting land not before subdivided, or of shewing

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the divisions of lands of which the divisions are not shewn on any plan of subdivision (or for the purpose of fixing the location or width of any roads or highways or for the purpose of establishing any boundary lines the position of which, owing to the obliteration of the original monuments defining the same on the ground, have become doubtful or difficult of being ascertained), and upon every special survey to have a plan prepared shewing the same, which said special survey and plan may be made on the principle of block outline survey or a completed survey either in whole or in part.

And then sec. 5 provides that the Attorney-General may publish in the *Manitoba Gazette* a notice setting forth that the special plan has been filed and that it is to be submitted for the approval of the Lieutenant-Governor-in-council, "and also setting forth the object of the special survey" and the time fixed for the hearing by the Attorney-General of complaints by persons interested.

It was objected that this notice was not sufficient and did not contain sufficient information of any intention further than to correct errors in former plans, and should have intimated an intention to take the land and of establishing a new width or new boundaries of the highway. The words in the notice are:—

> For the purpose of correcting errors in prior surveys of the above described portion of the said city, and for the purpose of defining and establishing the location of boundaries of property within the same.

I think the notice, though not following the exact wording of sec. 3, as amended, is comprehensive and wide enough to intimate the objects sought by the proceedings. The expression, "the location of boundaries," is comprehensive. The sole question is: Where is the eastern limit of the plaintiffs' land? It is coterminus with the western boundary of St. Mary's road, and the fixing of that line establishes the width of the road and the location of the road.

The order-in-council seems to be in due form and the notice of this order-in-council under sec. 15 is duly proved, and the Legislature, anticipating the usual mistakes of solicitors, generously provides that such notice, when published,

> Shall be conclusive evidence of the order-in-council and of the regularity of all proceedings leading up to the passage of such order-in-council and of the approval of the survey and plan and, except in so far as the order-in-council may be set aside or varied under the provisions of this Act, such order-in-council shall not be set aside on any ground whatever, and such survey and plan shall be thenceforth held to be approved and shall be final and binding upon all parties whatsoever.

This is not a case of confiscation or of the vesting of one man's property in another without compensation. It is legislation prompted by the existing conditions, the obliteration of original surveyor's posts or landmarks.

Evidence which would define the property rights of adjoining land-owners is lost; original monuments and landmarks have

been obliterated; an expert, a surveyor, is appointed an arbiter, makes his inquiries and investigations and reports by a special plan or survey, and this report, plan or survey is the substitute for what has been lost or obliterated, and is the evidence, so to speak, upon which the Court disposes of the questions in issue. The lines, areas, measurements, then, are conclusive so far as they can be made so by statutory enactment.

It is contended that this statute confiscates the plaintiff's land or encroaches upon his rights, and that we should not construe it so as to accomplish that object unless we are obliged to so construe it.

Haggart, J.A.

It is, in my opinion, curative, remedial and beneficial in its purpose. It should receive a generous interpretation so as, if possible, to carry out the intention of the Legislature in making certain and defining property rights and eliminating the source of endless litigation brought about by vague and undefined boundaries.

The sole question is: Where is the western limit of St. Mary's road? The statute put in operation by the request of the municipality, or on the initiative of the Attorney-General, has determined that question.

The findings of this expert arbiter, ratified by the Attorney-General, incorporated in and promulgated by the order of the Lieutenant-Governor-in-council as shewn upon this special plan, is a substitute for the evidence that has been lost and the landmarks that have been obliterated, and this plan shews the limits of the domain of the plaintiffs and the defendant municipality respectively.

With all due respect for the carefully considered reasons of the learned Chief Justice of the King's Bench, I would allow the appeal.

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

PERDUE and CAMERON, JJ.A., concurred.

Appeal allowed.

WOOD v. CITY OF HAMILTON.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 14, 1913.

1. LICENSE (§ I A—1)—LIABILITY FOR FAILURE TO KEEP MARKET PLACE SANITARY—OCCUPANCY OF STALL WITH KNOWLEDGE OF CONDITION.

A huckster occupying a stall in a public market under a weekly license, assumes the risk of injury to health by reason of the unsanitary condition of the stall by continuing in occupation thereof for many weeks after becoming aware of its condition.

[*Wood* v. *City of Hamilton*, 8 D.L.R. 824, reversed; *Law* v. *Corporation of Darlington* (1879), 5 Ex. D. 28, distinguished.]

Statement

APPEAL by defendants in an action for damages for injury to the plaintiff's health, alleged to have been caused by the

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defendant's negligence, *Wood* v. *City of Hamilton*, 8 D.L.R. 824, 4 O.W.N. 427.

The appeal was allowed and the action dismissed.

H. E. Rose, K.C., for the defendants, argued that, accepting the view of the learned trial Judge that the plaintiff was a licensee, and not a lessee, of the premises in question, the license ran only from week to week, and it was open to her to terminate it at the end of any week. She was, therefore, every week voluntarily assuming the risk arising from the alleged negligence of the defendants. The case of *Flynn* v. *Toronto Industrial Exhibition Association*, 9 O.L.R. 582, does not seem to go the length claimed for it by the plaintiff—see *per* Osler, J.A., at p. 585, also *per* Garrow, J.A., at p. 587. Reference was made to *Glenwood Lumber Co. Limited* v. *Phillips*, [1904] A.C. 405, 408, where light is thrown on the general principle governing such cases, as being a matter "not of words but of substance." [RIDDELL, J., asked whether the city could come in and put the plaintiff out at any time.] No; and that is where the case at bar differs from the *Flynn* case, and from *Marshall* v. *Industrial Exhibition Association of Toronto*, 1 O.L.R. 319—see *per* Street, J., at p. 328. The plaintiff's possession was more exclusive than in these cases. The judgment of the Divisional Court in the *Marshall* case was affirmed by the Court of Appeal, 2 O.L.R. 62, but the note there does not state what was decided; for which reference must be had to the judgment of the Divisional Court, at pp. 328-330 of 1 O.L.R. I refer to Halsbury's Laws of England, vol. 21, p. 388 *et seq.*, and cases there collected. The learned trial Judge erred in his application of *Lax* v. *Corporation of Darlington*, 5 Ex.D. 28—see pp. 29, 30.

W. M. McClemont, for the plaintiff, relied upon the grounds and authorities cited by the learned trial Judge, and argued that the plaintiff was a licensee under the terms of the by-law under which she occupied her stall. He referred to various sections of the by-law in support of his proposition, contending that she was in a different position from the monthly tenants of the market stalls and sheds. The defendants cannot go behind their own position, as defined by the law, which brings this case within the *Flynn* case. *Hargroves Aronson & Co.* v. *Hartopp*, [1905] 1 K.B. 472, is a case practically on all fours with the case at bar—see *per* Lord Alverstone, C.J., at p. 477, shewing that, even if the plaintiff were a tenant, he might have a right of action in such a case as this, where the defendants had control of the gutter, of which the plaintiff had no demise, and were bound to keep it in proper repair—see *Miller* v. *Hancock*, [1893] 2 Q.B. 177. Reference was also made to *Malone* v. *Laskey*, [1907[2 K.B. 141; Bell on Landlord and Tenant, p. 400; *Gar-*

butt v. *City of Winnipeg* (1908), 18 Man. L.R. 345; Am. & Eng. Encyc. of Law, 2nd ed., vol. 18, p. 235, citing *Cole* v. *Buckle*, 18 C.P. 286. There is an analogy in tenancy from week to week to tenancy from year to year. As to the alleged estoppel by knowledge, reference was made to *Gordon* v. *City of Belleville* (1887), 15 O.R. 26, 29. The facts are similar to those in *Morrison* v. *Pere Marquette R.R. Co.* (1912), 27 O.L.R. 551, affirmed by the Appellate Division, *Morrison* v. *Pere Marquette R. Co.*, 12 D.L.R. 344, 4 O.W.N. 889, and in *McMahon* v. *Field* (1881), 7 Q.B.D. 507.

Rose, in reply, referred to *Smith* v. *Excelsior Life Insurance Co.*, 4 D.L.R. 99, 3 O.W.N. 1521; *Tredway* v. *Machin* (1904), 20 Times L.R. 726; *Lane* v. *Cox*, [1897] 1 Q.B. 415.

Mulock, C.J.

February 14. MULOCK, C.J.:—The facts, about which there is no dispute, are as follows:—

The defendant corporation, under the provisions of the Municipal Act, established a market in the city of Hamilton, dividing one of the buildings forming part of the market into open stalls, which were let to hucksters by the week; no one being entitled to the use of a stall for a longer period than one week. For many years the plaintiff had occupied a particular one of these stalls, but in the summer of 1910 was allowed to substitute the southerly one for that formerly occupied by her. When she took possession of the southerly stall, it seemed perfectly dry and in a sanitary condition, and so it remained until the autumn of 1911, when it fell into disrepair; the roof leaking in various places and water finding its way into the stall, also from crevices between the wall and roof, and eaves-trough and roof, and from the street. It came down in such quantities as to flood the floor. The plaintiff unsuccessfully endeavoured to catch it in vessels, and was obliged to place planks on the floor to enable her to avoid standing in the water. During the cold weather, on returning to the stall in the mornings, the floor would be found covered with ice to such a depth that the caretaker was obliged to remove it before the door could be opened.

The premises were in this leaky condition in September or October, 1910, and the plaintiff at that time reported the condition to the chairman of the market board of the City of Hamilton, who promised to have the necessary repairs attended to, but neglected to do so. Some slight attempt at repairing was made in the autumn of 1911, but the evidence shews that it made matters worse.

In the meantime, the plaintiff continued to occupy the stall and to complain frequently to the city authorities of this unsanitary condition. Her complaints bearing no fruit, she secured the services of her brother, and in February or March, 1912,

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he reported the condition of the stall to the new chairman of the board.

The condition of the stall caused the plaintiff's clothing to become wet, and this, added to the general dampness of the premises, caused her to become ill, in the month of March, 1912; but she continued to occupy and use the stall until April, when she was taken seriously ill with an attack of sciatic neuralgia, and was obliged to go to bed, where she remained for some months.

The plaintiff testified that when it rained or thawed during the months of January, February, and March, 1912, the stall would be filled with water to a depth of nearly half an inch, and that this condition continued up to the time of her being taken ill; and that, prior to this, she had enjoyed good health.

The learned trial Judge, in finding for the plaintiff, followed *Lax* v. *Corporation of Darlington*, 5 Ex. D. 28. That case presents some features like the present one, and Lush, J., who tried it, expressed the view that the defendant corporation, having received toll from the plaintiffs, had thereby invited them to bring their cattle to the market, and had thus assumed the duty of maintaining it in a safe condition; and, accordingly, gave a judgment in favour of the plaintiffs, which was sustained in appeal.

That case, however, differs from the present one in that no question was there raised of contributory negligence on the part of the plaintiffs; whilst here it is pleaded and relied upon by the defendants.

Before us it was contended by the plaintiff's counsel that the plaintiff was not a tenant, but a licensee; and that, therefore, *Lax* v. *Corporation of Darlington, ante*, governed. If, however, her illness was caused by her own want of ordinary care, she cannot recover, even if the defendants were bound to maintain the premises in a sanitary condition, and failed to do so. Testing her duty in the light of her own evidence, it appears to me that in remaining in the premises when she was aware of their unsanitary condition, she must be held to have been the immediate cause of her illness. She was a woman of forty-eight years of age, and had been engaged in the huckster business for years. In the autumn of 1911, and throughout all the succeeding months, until April, 1912, the premises were in a wretchedly unsanitary condition, of which she constantly complained to the authorities, but without producing any good results; and for a month after the commencement of her illness, brought about by the unsanitary condition of the premises, she continued to occupy them, in order to retain her trade, only ceasing to do so when her illness became so serious as to compel her to take to her bed. Every one is bound to use ordinary care for his protection against injury—what constitutes ordinary care depend-

ing upon the facts of each case. Every prudent person of full age (the plaintiff was forty-eight years old) knows that he runs great risk in remaining for months exposed to conditions such as the plaintiff described as existing from October, 1911, until April, 1912. Whilst knowledge of the risk is not *per se* contributory negligence (*Gordon* v. *City of Belleville*, 15 O.R. 26), yet, if the facts are such that contributory negligence should be inferred, and that no reasonable jury should find in the plaintiff's favour, then the plaintiff is not entitled to have his case go to the jury: *Wright* v. *Midland R.W. Co.* (1884), 51 L.T.R. 539.

Here the plaintiff, a woman of mature years, with full knowledge of the unsanitary condition of the premises, continued to occupy the same for months after that condition became manifest, and for about a month after the commencement of her illness, brought about by that condition. If she had at an earlier date withdrawn from the premises, the illness complained of would have been avoided. Her continuing, however, under the circumstances, to occupy the stall was not, I think, the conduct of a person exercising ordinary care; and I, therefore, with much respect, find myself unable to share the view of the learned trial Judge, being of opinion that the plaintiff's illness was caused by her own negligence, which disentitles her to maintain this action.

Therefore, I think this appeal should be allowed with costs, and the action dismissed with costs.

Sutherland, J.

SUTHERLAND, J.:—The facts are fully set out in the judgment below. I agree with the learned trial Judge in his opinion that the rights of the plaintiff were those, not of a lessee, but of a licensee. The character and scope of the possession which the person is entitled to is of prime importance in considering the question.

In Woodfall on Landlord and Tenant, 19th ed. (1912), p. 146, there is a full discussion.

By-law No. 2 of the defendants, "to regulate the central market," etc., seems to me plainly to indicate that the possession of the stand assigned to the plaintiff, and the one in question herein, was not an exclusive one. I refer particularly to secs. 24 and 27, sub-secs. 1, 2, and 4.

Under her weekly license, the plaintiff had only a right to the use of her stand during certain hours of the day, and for a specified length of time: *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; *Marshall* v. *Industrial Exhibition Association of Toronto* 1 O.L.R. 319, *per* Street, J., at p. 328 (affirmed 2 O.L.R. 62); *Glenwood Lumber Co. Limited* v. *Phillips*, [1904] A.C. 405; *Flynn* v. *Toronto Industrial Exhibition Association*, 9 O.L.R. 582, *per* Osler, J.A., at p. 585, and *per* Garrow, J.A., at p. 587.

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If she were a mere licensee, she could, of course, not recover, as the trial Judge properly pointed out. I agree also with him in the view that she was more than a mere licensee: *Holmes* v. *North Eastern R. Co.*, L.R. 4 Ex. 258.

In his judgment (*ante*), Clute, J., says: "In *Lax* v. *Corporation of Darlington*, 5 Ex. D. 28, . . . it was argued that the plaintiffs incurred their loss by their own fault, and that the danger was obvious, or that they knew it. Bramwell, L.J., said: 'If that question had been before us, I should have had very great misgivings whether the plaintiffs were entitled to recover, because if they knew the danger and chose to risk it, it is their own fault; they are volunteers, and in my opinion the defendants ought not to have been made liable to them in that case.'" He goes on further to say: "Although this was *obiter*, yet it touches the point upon which I have the chief difficulty in the present case." He also says: "The plaintiff's continuing to occupy the premises after she had given notice, and while they were unsanitary, was not unreasonable under the circumstances, from the fact that she was in constant expectancy of the repairs being made, and repairs were in fact made some weeks prior to her illness, but so negligently done that the premises still continued in an unsanitary condition. I do not think that such continuance, under the circumstances, constituted contributory negligence upon her part."

I am unable to agree with this view, upon the facts in question in the action. Before the 30th November, 1911, complaints had been made by the licensee to the defendants about the water coming into the huckster's stand which she was occupying from time to time. The defendants made certain repairs on the 30th November, which, the plaintiff says, were ineffectual for the purpose of keeping out the water.

Under the terms of the by-law under which the market was being operated, it was not possible for a stand such as the one in question to be assigned to any person "for longer periods than one week at a time."

Notwithstanding the fact that from week to week during the whole of the time from November to March, the plaintiff was the only person assigned to the particular stand in question, we must treat the matter as though each week she were applying for that particular stand, and was having it assigned to her each week, she paying the stipulated weekly market fee for it.

It seems to me that, on her own evidence, she was each week voluntarily assuming the risk of injury to her health from an alleged negligence of the defendants of which she was aware.

In *Lax* v. *Corporation of Darlington*, already referred to, Brett, L.J., at p. 33, says: "If the plaintiffs wilfully and purposely undertook a risk and danger which was fully known to

them, under those circumstances, notwithstanding the primary liability of the defendants, it would be right in point of law to say the plaintiffs had contributed to the loss, or that they were the sole cause of the damage to their cow."

Each week it was open to the plaintiff to avoid the risk and danger she was running from the alleged unsanitary condition of the stand. She saw fit on the contrary, with knowledge thereof, to continue to apply for her license and to occupy the stand. I think she must be taken to have assumed the risk and danger and that the injury to her health was, therefore, the result of her own conduct. I think this would be so whether she was a licensee or lessee.

I am of opinion that the appeal should be allowed with costs, and the action dismissed with costs.

Riddell, J.

RIDDELL, J.:—I have had the opportunity of reading the judgment of my brother Sutherland, and concur in the result that he has arrived at.

In my view of the case, it is immaterial whether the plaintiff was licensee or tenant. As at present advised, I incline to the opinion that she was tenant. But in either case, the result is the same—her injury was of her own doing: *Lax* v. *Corporation of Darlington*, 5 Ex. D. 28; *Humphrey* v. *Wait* (1873), 22 C.P. 580, at p. 586, *per* Galt, J. *Tennant* v. *Hall* (1888), 27 N.B.R. 499, and *Opdyke* v. *Prouty* (1875), 6 Hun 242, may also be looked at. In the latter case, the General Term held, on facts very like the present: "As the defendant took the premises as they were when the lease was made, and agreed to pay the rent reserved for their use in that condition, if his goods were injured by such use, no obligation rested upon the plaintiff to recompense him for such injury. The loss was his own, and the risk of it had been assumed by him from the manner in which the premises had been taken." These remarks apply equally to this case.

Leitch, J.

LEITCH, J.:—I agree.

Appeal allowed.

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McKAY v. DAVEY.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex.D., Clute, and Sutherland, JJ. March 6, 1913.

1. SALE (§ II A—26)—WARRANTY—WHAT AMOUNTS TO—BREACH.

The representation by a seller of bees that they had been inspected and were clean and all right is a warranty that they are free from foul brood sufficient to permit a recovery for its breach.

Statement

APPEAL by the defendant from the judgment of the Junior Judge of the County Court of the County of Grey, in favour of the plaintiff, in an action in that Court for damages for breach of an alleged warranty upon the sale of bees, or for contravention of the Foul Brood Act, 6 Edw. VII. ch. 51 (O.)

The appeal was dismissed.

Argument

E. D. Armour, K.C., for the defendant:—There was no warranty by the vendor that the bees were clean, and the maxim *caveat emptor* applies. The plaintiff, at the time of the purchase, could have found foul brood if he had made a proper inspection of the hives. The bees may have been infected from the honey supplied by the plaintiff feeding the bees during the winter. There was no evidence that the disease originated with the defendant's bees. Therefore, no action lies at common law. As to the Foul Brood Act, 6 Edw. VII. ch. 51, it is not one for the protection of purchasers, but for the general suppression of the disease: Maxwell's Interpretation of Statutes, 5th ed., p. 67; *Stevens* v. *Chown*, [1901] 1 Ch. 894, 903; *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C.B.N.S. 336, at p. 356. As the statute provides a penalty, no action will lie at the instance of a private individual for a contravention of the Act: *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex.D. 441; *Cowley* v. *Newmarket Local Board*, [1892] A.C. 345, at p. 352; *Stevens* v. *Jeacocke* (1848), 11 Q.B. 731; *Pasmore* v. *Oswaldtwistle Urban District Council*, [1898] A.C. 387, at pp. 394, 398. So there is no right of action under the statute.

I. B. Lucas, K.C., for the plaintiff:—Though the learned County Court Judge has not expressly found that there was foul brood among the plaintiff's bees, yet he seems to have assumed that there was. The representations made by the defendant at the time of the sale amounted to a warranty that the bees were clean, whereas they were tainted with foul brood. As to the interpretation of the statute, it must be given a reasonable interpretation; and I submit that, while it is for the protection of the public in a general sense, yet it is also for the protection of the purchaser, in the sense that it prohibits the sale of infected bees: *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194, 214; *Osborne* v. *Williams* (1811), 18 Ves. 379, 11 R.R. 218; *Williams* v. *Hedley* (1807), 8 East 378, 9 R.R. 473; *Groves* v. *Lord Wimborne*, [1898]

2 Q.B. 402. In any case, we are entitled to a return of the purchase-money.

Armour, in reply.

March 6, 1913. Clute, J.:—In February, 1911, the plaintiff bought from the defendant about twenty swarms of bees, upon the representation, as the plaintiff says, that they had been inspected, and "were clean and all right." Twelve of these hives, the rest having died during the winter, were brought to the plaintiff's premises about the 1st May, making, with the nine hives the plaintiff then had, twenty-one hives in all.

By the 1st June, some of the bees had died off, leaving only thirteen hives altogether, viz., nine of the plaintiff's and four of those bought from the defendant. These were inspected on the 10th June, 1911, when it was found that all four of those purchased from the defendant were diseased with "foul brood," the nine hives of the plaintiff still remaining clean.

The plaintiff attempted to treat them but found them so bad that all purchased from the defendant had to be destroyed.

It was argued at bar that these bees might have been infected from the honey supplied by the plaintiff feeding the bees during the winter; but, upon a perusal of the evidence, I think it is wholly improbable.

The plaintiff had sold out all he had, in the spring of 1910, except one hive at his father-in-law's, three miles away. The bees so sold by the plaintiff were alleged to be diseased, and he made a settlement with the purchaser. He started anew with three hives, which were inspected in 1910, and reported clean. These three, at the time of the purchase, had increased to nine.

It appears from the evidence of the inspector that the defendant's bees had been inspected on the 26th June, 1910. Of thirty-five hives he examined fourteen, and of these he found three diseased with foul brood, and instructed the defendant how to treat them.

I think that the evidence shews that the defendant knew or had good reason to know that there was "foul brood" among his bees when he sold them; and, at all events, he sold them without the inspector's authority required by sec. 6 of the Foul Brood Act, 6 Edw. VII. ch. 51.

But it is said, for the defendant, that there was no warranty, and the Act was not passed for the benefit of purchasers; and, as it provides a penalty, no action will lie at the instance of a private individual for a contravention of the Act.

I think that the representations made at the time of the sale did amount to a warranty that the bees were clean, when in fact they were tainted with "foul brood."

The trial Judge, in effect, found that the plaintiff had satisfied the burden of proof when he found the probabilities in favour of the plaintiff's story; and I think that he was in error in supposing

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that he was "forced to find, with considerable hesitation, that he (the plaintiff) has not satisfied the burden of proof."

Having regard to the evidence and to the finding as above indicated, I think that the only proper conclusion to be reached is, that the plaintiff had satisfied the burden of proof cast upon him. Taking the whole judgment, it is a strong finding indeed upon all essential points in favour of the plaintiff; and the assumption that the plaintiff had not satisfied the *onus probandi* cast upon him, was quite erroneous.

I, also, am of opinion that the statute was made for the *benefit of those engaged in bee-keeping*. Section 5 imposes a penalty for knowingly selling or bartering or giving away diseased colonies or infected appliances; and sec. 6 also imposes a penalty upon any person, who sells or offers for sale any bees, hives, or appurtenances, whose brood has been destroyed or treated for "foul brood," without being authorised by the inspector so to do.

While this statute is in the interests of the public, in the sense of decreasing the danger that would limit the supply, yet it has for its immediate object the benefit of those engaged in bee-keeping (to which class the plaintiff belongs) in order to prevent the danger of infecting clean colonies by the introduction of bees already tainted with foul brood. The evidence clearly shews that this disease is very contagious, the slightest taint in honey being sufficient to spread the disease. The statute aimed at preventing that by forbidding the sale, and the injury to the plaintiff arose from the act done by the defendant in contravention of the statute: *Hagle* v. *LaPlante* (1910), 20 O.L.R. 339; *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402, 414.

The distinction in the law between an Act passed prohibiting a certain thing, with a penalty in case of breach, in the interests of the public, or for a certain class, is pointed out in *Ward* v. *Hobbs* (1878), 4 App. Cas. 13. In that case, a man sent to market hogs suffering from an infectious disease. The hogs were sold "with all faults," and "no warranty will be given by the auctioneer with any lot, and . . . no compensation shall be made in respect of any fault." It was held that the vendor was relieved from liability in respect of any defect in the article itself. It was argued at bar in that case that, although there was no express representation made in words, yet there was conduct on the part of the respondent which amounted to a representation in this way: the Contagious Diseases (Animals) Act imposes a penalty upon any one who sends an animal having at the time upon it an infectious or contagious disease to any public or other place unless he shall prove that he was not aware that the animal was so tainted with disease. It was said that the respondent, by sending his pigs into the public market, must be taken to be representing that he was complying with the law, or at all events not infringing it, and that the animals were not tainted with any infectious or contagious

disease. It was there held that the Act was passed for the benefit of the general public, and could not create a liability in favour of a particular individual; and, there being no warranty, the defendant was not liable.

I do not think the damages in this case should be limited to a return of the purchase-money. Having regard to the nature of the business, the defendant must have known that these bees would be associated with others, and, if tainted, the natural consequence would be to spread the disease among other colonies.

In *Penton* v. *Murduck* (1870), 22 L.T.R. 371, it was held that a declaration stating that the defendant had delivered a glandered horse to the plaintiff to be put with his horse, without telling him it was glandered, whereby the plaintiff, not knowing it was glandered, was induced to and did put it with his horse, *per quod* his horse died, is a good declaration though no concealment or fraud or breach of warranty is averred; and in *Earp* v. *Faulkner* (1875), 34 L.T.R. 284, it was held that no action will lie to recover damages sustained by the negligence of servants having the care of cattle which they know to be suffering from an infectious disease in allowing such cattle to mingle with other cattle. See also *Mullett* v. *Mason* (1866), L.R. 1 C.P. 559, where a cattle dealer sold to the plaintiff a cow, and fraudulently represented that it was free from infectious disease, when he knew that it was not, and the plaintiff having placed the cow with five others, they caught the disease and died, it was held that the plaintiff was entitled to recover as damages the value of all the cows.

For cases bearing indirectly upon the subject and as to *onus probandi* in certain cases, to which I do not think it necessary further to refer, see *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 6 C.B.N.S. 336; *Rowning* v. *Goodchild* (1773), 2 W. Bl. 906; *Couch* v. *Steel* (1854), 3 E. & B. 402—limited but not overruled by *Atkinson* v. *Newcastle Waterworks Co.*, 2 Ex.D. 441; *Emmerton* v. *Mathews* (1862), 7 H. & N. 586; *Burnby* v. *Bollett* (1847), 16 M. & W. 644; *Watkins* v. *Naval Colliery Co.*, [1911] 2 K.B. 162, 174, distinguishing *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; *Britannic Merthyr Coal Co.* v. *David*, [1910] A.C. 74, referred to in *Butler* v. *Fife Coal Co.*, [1912] A.C. 149, 160; *City of Vancouver* v. *McPhalen*, 45 S.C.R. 194, 214.

The appeal should be dismissed with costs.

Mulock, C.J.

Mulock, C.J.:—I agree with the view, expressed by my brother Clute in his written judgment, that the representations made by the defendant at the time of the sale amounted to a warranty that the bees were clean, whereas they were then in fact tainted with foul brood. I, therefore, would dismiss this appeal with costs.

I express no opinion as to whether the Foul Brood Act gives to the plaintiff a cause of action.

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SUTHERLAND, J. (dissenting):—The plaintiff in his statement of claim alleged that on the 20th February, 1911, he purchased a number of bees and appliances from the defendant, who warranted the bees and brood to be free from disease, but subsequently found that they were affected with a disease known as "foul brood." The defendant in his statement of defence denied that he warranted the bees and brood to be free from disease or made any representations with respect to the same, and alleged, further, that the plaintiff had opportunity to inspect and did inspect the bees and appliances before purchasing.

I quote from the judgment of the trial Judge: "The plaintiff says that, at the time, the defendant represented the bees 'all clear and all right.' The defendant denies this, and says that he did not make any representation whatever. He says that the plaintiff examined the bees for himself and relied on his own inspection." And again: "The onus is on the plaintiff to prove the representation; and, although I think that the probabilities are in favour of the plaintiff's story, I am forced to find, with considerable hesitation, that he has not satisfied the burthen of proof." I quote further from the judgment: "At the opening of the case, the plaintiff's counsel asked leave to amend his pleadings by making in the alternative a claim under the statute, notice of the claim having been given to the defendant. I do not think that the amendment is necessary. Where a contract is rendered illegal, whether by statute or common law, it is for the Court to take notice of the fact, even if the illegality is not pleaded by the parties: *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q.B. 214; *Scott* v. *Brown*, [1892] 2 Q.B. 724. If necessary, the plaintiff can amend."

The statute referred to was originally R.S.O. 1897, ch. 283, intituled "An Act for the Suppression of Foul Brood among Bees." That Act was repealed by 6 Edw. VII. ch. 51, "An Act for the Suppression of Foul Brood among Bees."

From the evidence it appears that, prior to the sale to the plaintiff, there had been inspection of the defendant's bees, and "foul brood" was discovered therein, and they had been treated for that disease. It was proved that the defendant had not been authorised thereafter by the Inspector to sell his bees, as required by sec. 6 of the said Act, which provides a penalty for non-compliance therewith.

The trial Judge in his judgment says further: "Having regard to the whole purview of the statute, I think it was intended to protect the purchasers of bees, and that the sale by the defendant, without the authority of the inspector, is within the principle" of certain cases cited by him, as follows: *Bartlett* v. *Vinor* (1693), Carth. 251; *Law* v. *Hodson* (1809), 11 East 300 (10 R.R. 513); *Little* v. *Poole* (1829), 9 B. & C. 192 (32 R.R. 630); *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; *Atkinson* v. *Denby*

(1861), 6 H. & N. 778 (123 R.R. 824); *In re Cork and Youghal R.W. Co.* (1869), L.R. 4 Ch. 748. He also referred to Smith's L.C., 9th Am. ed., vol. 1, p. 92, and said: "It is also laid down that where a statute imposes a penalty upon one party to a prohibited contract and not on the other, they are not *in pari delicto*, and the party on whom the penalty is imposed can be compelled to make restitution of money or property received under the contract. But this is not accomplished by an enforcement of the contract, but on the theory of an implied contract raised for the benefit of the less guilty party."

He, accordingly, gave judgment for the plaintiff for $111.50 in all.

With respect to the learned County Court Judge, I am unable to agree that the statute confers any right of action on the plaintiff. I am unable to see that it is one framed at all in the interest of the general public for the suppression of a named disease among bees. It is not passed in the interest of a particular class of persons, of whom the plaintiff may be said to be one. The title of the Act plainly suggests this, it seems to me, and "may be referred to for the purpose of ascertaining" the general scope of the Act: Maxwell on the Interpretation of Statutes, 5th ed. (1912), p. 67. I quote also further from Maxwell, p. 662: "The right of action, where it exists, is limited to those who are directly and immediately within the gist of the enactment. The Contagious Diseases (Animals) Act, 1869, for example, in imposing a penalty on those who send animals to market with infectious diseases, may give a right of action to the owner of an animal in the market, which caught the disease from the infected animal of the offender, the object of the Act being to protect those who expose animals for sale there; but it would not give a right of action to the purchaser of the diseased animals which had been wrongfully exposed, for the Act did not aim at the protection of buyers in the market." See *Ward* v. *Hobbs*, 48 L.J.Q.B. 281, 4 App. Cas. 13; *Pasmore* v. *Oswaldtwistle Urban District Council*, [1898] A.C. 387, at pp. 394 and 398; *Tompkins* v. *Brockville Rink Co.* (1899), 31 O.R. 124; *Attorney-General* v. *President, etc. of the Shire of Preston* (1902), 28 Vict. L.R. 402, at p. 410; *Mullis* v. *Hubbard*, [1903] 2 Ch. 431.

It seems to me that the only ground on which the plaintiff could succeed was on the ground of warranty, which was the ground asserted by him originally in his statement of claim. The trial Judge has found that the plaintiff has not been able to make out his case on that score.

I think the appeal should be allowed with costs.

Appeal dismissed, Sutherland, J., *dissenting.*

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Re SOUTH DAWSON ELECTION.

GRANT v. McLENNAN.

Yukon Territorial Court, Macaulay, J. May 16, 1913.

1. ELECTIONS (§ IV—90)—CONTESTS — GROUNDS — ILLEGAL VOTES—ABSENCE OF RECOUNT.

In the absence of a recount, the fact that a large number of illegal votes were polled for a candidate is not ground for setting aside his election under the Yukon Election Ordinances.

2. ELECTIONS (§ IV—90)—CONTESTS — GROUNDS — IMPROPERLY MARKED BALLOTS—ABSENCE OF RECOUNT.

In the absence of a recount, the fact that a large number of improperly marked ballots were counted for a successful candidate is not sufficient ground for setting aside the election under the Yukon Election Ordinances.

3. ELECTIONS (§ IV—90)—CONTESTS — GROUNDS — FAILURE OF ELECTION OFFICERS TO TAKE OATH.

The failure of election officers to take the oath of office required by law is not ground for setting aside an election under the Yukon Election Ordinances.

[*O'Neil* v. *Attorney-General of Canada*, 1 Can. Cr. Cas. 303; *Ex p. Curry*, 1 Can. Cr. Cas. 532, and *Casey* v. *Smith*, 26 N.S.R. 177, referred to.]

4. ELECTIONS (§ IV—90)—CONTESTS — GROUNDS — ALIENAGE OF RETURNING OFFICER.

That the returning officer of an election was not a British subject is not ground for setting aside an election under the Yukon Election Ordinances.

5. ELECTIONS (§ IV—90)—CONTESTS — GROUNDS — ELECTORS VOTING TWICE.

The fact that a large number of electors voted twice, is not sufficient to justify setting aside an election under the Yukon Election Ordinances.

6. ELECTIONS (§ IV—90)—CONTESTS — GROUNDS — IMPROPER INTERPRETATION OF ELECTION LAWS.

Improper interpretation of election laws by local authorities so as permit a large number of unqualified electors to cast ballots, is not sufficient reason for setting aside an election under the Yukon Election Ordinances.

7. ELECTIONS (§ IV—90)—CONTESTS — GROUNDS — INTIMIDATION OF ELECTORS.

An allegation that a person illegally, wilfully and deliberately endeavoured to intimidate electors, but not charging that he acted as agent for the candidate whose election was disputed, or that he threatened to employ force, violence or restraint in order to induce or compel any person to vote or refrain from voting at the election, or that any person was influenced or intimidated by him, is not sufficient to justify setting aside the election, under the Yukon Election Ordinances.

8. ELECTIONS (§ IV—90)—CONTESTS — GROUNDS — IMPROPER USE OF MONEY—AGENCY.

An allegation that supporters of a successful candidate paid the wages as well as the expenses of many voters in coming to the polls, does not, in the absence of an allegation that such supporters were "agents" for the candidate, and acted contrary to the Yukon Election law, shew sufficient ground for setting aside the election.

9. ELECTIONS (§ IV—90)—CONTESTS — ABANDONMENT—ATTACKING WHOLE ELECTION.

Where the petitioner in a controverted election has, by his petition, claimed the seat for the opposing candidate, although no recount had been made on the latter's behalf upon which such claim could be made effective, the petitioner thereby adopts and ratifies what was done at the election so far as he was personally concerned, and, having thus elected, cannot abandon such claim of the seat for the unsuccessful candidate in order to attack the validity of the whole election proceedings.

[*East Simcoe Election Case*, 1 Ont. El. Cas. 300, and *Aldridge* v. *Hurst*, 1 C.P.D. 410, referred to.]

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APPLICATION on behalf of the respondent, under the provisions of sec. 10 of ch. 4 of the Consolidated Ordinances of the Yukon Territory, 1902, being an Ordinance respecting Controverted Elections, for an order that all the paragraphs of the petition filed herein be struck out, and that the said petition be set aside and removed from the files of this Court, upon the grounds set out in the preliminary objections filed herein on the 29th day of April, 1913.

Statement

The petition against the election of the respondent was filed in the Territorial Court on March 26, 1913, and the following allegations were made therein:—

1. An election was held on February 25, 1913, at the city of Dawson in the Yukon Territory, for the electoral district of South Dawson, at which Lionel Gordon Bennet, barrister and solicitor, and Donald Randolf McLennan were candidates, and the said Donald Randolf McLennan has been certified to be the person elected at such election.

2. The petitioner was a duly qualified elector at such election.

3. The petitioner says that large numbers of unqualified and illegal votes were polled for the respondent.

4. That a number of spoiled and improperly marked ballots which should have been rejected by the returning officer were counted for the respondent.

5. That James Babcock, the deputy returning officer, and Robert Baird, poll clerk for the Miller and Glacier Creeks polling division at said election, did not take the oath of office and were not sworn as required by law, and that the said James Babcock is not a British subject.

6. That William K. Currie, the returning officer for the said electoral district, is not a British subject.

7. That John Black, clerk of the Territorial Court and legal adviser, and George Brimstone, sheriff of the Yukon Territory, were both present at the official count of the ballots by the returning officer for said election and they did by their actions and presence improperly influence the returning officer in the unbiassed discharge of his official duties.

8. That the local officials and employees of the Government acted in a very aggressive, offensive and partisan manner, improperly influencing and endeavouring to influence the electors at the said election.

9. That A. W. H. Smith, secretary of the Yukon Conservative Association, did illegally, wilfully and deliberately endeavour to intimidate the electors at said election by handing around blank warrants for the arrest of voters and at the same time giving oral instructions to the election

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officers in the presence of voters to use the warrants when they deemed it advisable or necessary.

10. That the expenses and wages of many voters at said election were paid to and from their places of residence to the polls by supporters of the respondent, thereby improperly and illegally influencing their vote.

11. That a large number of voters voted twice at said election.

12. That the Yukon Council Election Act and the amendments thereto were improperly interpreted by the local authorities, thereby causing and permitting a large number of unqualified voters to illegally cast their ballots at said election.

13. That the amendment to the Yukon Council Election Act passed by the said Yukon Council in June, 1912, is illegal and *ultra vires*.

Wherefore the petitioner prays that it may be declared that the election of the said Donald Randolf McLennan is void and that it be set aside and that it may be declared that the said Lionel Gordon Bennet was duly elected or that the election be declared null and void.

C. W. C. Tabor and *J. P. Smith*, for respondent.

The petitioner in person, *contra*.

Macaulay, J.

MACAULAY, J.:—As regards par. 3 of the said petition, there is no allegation contained therein of any grounds upon which the said election should be set aside, as provided in the Ordinances respecting elections, being ch. 3 of the Consolidated Ordinances of the Yukon Territory, 1902, as amended by ch. 18 of the Ordinances of the Yukon Territory, 1904, and subsequent amendments, or ch. 4 of the Consolidated Ordinances of the Yukon Territory, 1902, being an Ordinance respecting Controverted Elections, there being no provision in the said Ordinances, as amended, to permit of such votes as are mentioned in said par. 3 of the said petition being taken into consideration unless such votes could have been taken into consideration by a Judge upon a recount, as provided in secs. 100 to 108 of said ch. 3 of said Consolidated Ordinances, as amended as aforesaid; and no recount having been demanded or held as provided in said elections, the allegations contained in par. 3 of the said petition could not now be taken into consideration on the trial of this petition.

The same objection applies to par. 4 of the said petition. There was no demand made for a recount, as provided by said secs. 100 to 108; nor was any such recount held. Consequently, the allegations contained in par. 4 of the said petition could not be taken into consideration on the trial of this action.

As regards the allegations contained in par. 5 of the said petition, the omission by the officers mentioned therein to take the oath of office, as required by law, is not a sufficient ground for avoiding the said election, as such officers were in any event *de facto* officers, and there is no allegation or complaint that the said election was not fairly conducted, and there is no complaint that any of the alleged irregularities affected the result in the slightest degree, nor that any person entitled to vote was misled

in any particular. The said officers occupied their said offices under some form or colour or claim of title, and had the reputation of being the officers they assumed to be: *O'Neil* v. *Attorney-General of Canada*, 1 Can. Cr. Cas. 303; see judgment of Strong, C.J., at pp. 310 and 311, and cases therein cited, shewing that the rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons—that is to say, with reference to all persons but the holder of the legal title to the office—legal and binding; see also *Ex parte Curry*, 1 Can. Cr. Cas. 532, where it was held that the failure of a judicial officer to take the oath of office and oath of allegiance does not invalidate his judgments in criminal cases where his qualification has not been contested at the time of the trial, and such judgments are held valid and binding as having been rendered by a Judge *de facto;* see also Constantino on the De Facto Doctrine, p. 189 *et seq.;* see also *Casey* v. *Smith*, 26 N.S.R. 177, where it was held that the fact that the presiding officer who conducts an election is not properly appointed or qualified is not sufficient grounds for avoiding the election. As regards the further allegation in par. 5 of the said petition that "the said James Babcock" (the deputy returning officer mentioned in said par. 5) "is not a British subject," there is no provision contained in said ch. 3 of the said Consolidated Ordinances of 1902 and amendments thereto requiring a deputy returning officer, at an election held under the provisions of the said Ordinances, to be a British subject; and, consequently, the said allegation is not a sufficient ground for avoiding the said election.

As regards par. 6 of the said petition, the allegation contained therein is not a sufficient ground for avoiding an election, as sec. 1 of ch. 3 of the said Consolidated Ordinances of 1902 provides that

> No election shall be declared void if the person to whom the writ is addressed acts thereunder as returning officer, on the ground that such person is not a resident elector of the district or is otherwise disqualified to act as returning officer.

Furthermore, the *de facto* doctrine would also apply to this officer.

As regards pars. 7, 8, 11 and 12 of said petition, they do not nor do any of them allege or disclose any grounds or facts upon which the said election should be set aside as provided in chs. 3 and 4 of the Consolidated Ordinances of the Yukon Territory or amendments thereto, or in any statute, ordinance or law governing elections in the Yukon Territory. And it was also admitted on the argument before me that the said John Black was present at the said official count, as alleged in said par. 7, in his capacity of legal adviser, upon request by the Commissioner of the Yukon Territory, and the petitioner who argued this application on his own behalf stated that he wished to make no

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argument in regard to the allegations contained in said par. 7 of said petition; and it was further admitted that George Brimstone, the sheriff of the Yukon Territory, was present at such official count merely as a spectator, and took no part in the proceedings, the said official count having been held in the court-room at the city of Dawson.

As regards par. 9 of the said petition, it does not allege that A. W. H. Smith did make use of, or threatened to make use of, any force, violence or restraint, or inflicted, or threatened to inflict, by himself or by or through any other person, any injury, damage, harm or loss, or in any manner practise intimidation upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at the said election, or by abduction, duress, or by any fraudulent device or contrivance, impede, prevent or otherwise interfere with the free exercise of the franchise of any voter, or thereby compel, induce or prevail upon any voter to give or refrain from giving his vote at such election, contrary to the provisions of sub-sec. 5 of sec. 114 of ch. 3 of said Consolidated Ordinances; and, consequently, does not on its face disclose sufficient grounds or facts to have the said election set aside or declared void. The allegation contained in said par. 9 of an endeavour to intimidate the electors at the said election is not a sufficient charge to bring the said paragraph within the provisions of said sec. 114; nor is it alleged that the said A. W. H. Smith was an agent of the respondent, as required by sec. 117 of the said Act.

As regards par. 10 of the said petition, it does not allege that the supporters of the respondent, who, it is alleged, paid the expenses and wages of many voters at the said election to and from their places of residence to the polls, were agents of the respondent; consequently, any acts that were committed by such alleged supporters of the respondent in contravention of secs. 114, 115 and 116 of said ch. 3 of said Consolidated Ordinances would not be such acts as would constitute the said election an undue election and to have it declared void and set aside under the provisions of sec. 117 of said Consolidated Ordinances, and does not on its face disclose sufficient grounds or facts to have the election set aside or declared void.

As to par. 13 of the said petition, it does not allege any grounds upon which the said election should be set aside as provided in chs. 3 and 4 of the Consolidated Ordinances aforesaid or in any statute, ordinance or law governing elections in the Yukon Territory, and does not on its face disclose sufficient grounds or facts to have the said election set aside or declared void. Furthermore, the said amendment referred to was not an amendment to the Yukon Council Election Act, which is ch. 3 of the Consolidated Ordinances of the Yukon Territory, 1902, but an amendment to

ch. 2 of the said Consolidated Ordinances, being an Ordinance respecting the Council of the Yukon Territory, and such legislation was not *ultra vires* of the Yukon Council. No application for a recount having been made on behalf of the candidate Lionel Gordon Bennet, as provided by secs. 100 to 108 of ch. 3 of the said Consolidated Ordinances of the Yukon Territory and amendments thereto, the said election could not now be claimed by or on behalf of the said Lionel Gordon Bennet; but the petitioner having claimed the seat for the opposing candidate in and by his petition, he thus adopted and ratified what was done at the election so far as he was personally concerned, and having thus elected, it would be against principle to allow him to abandon that part of his petition in order to qualify him to attack the whole election proceedings: see *East Simcoe Election Case*, vol. 1 of the Ontario Election Cases, p. 300; and *Aldridge* v. *Hurst*, 1 C.P.D. 410. Furthermore, a petitioner cannot claim the seat unless he alleges that the person for whom the seat is claimed had a majority of the lawful votes: see McPherson's Election Law of Canada, p. 603.

For the reasons above stated, I do order that all paragraphs in the petition filed herein by the petitioner be struck out, and that the said petition be set aside and removed from the files of this Court, with costs to be paid by the petitioner to the respondent.

Petition set aside.

BRUCE v. JAMES.

Manitoba King's Bench, Patterson, K.C., Referee, May 17, 1913.

1. ARCHITECTS (§ I—5)—NEGLIGENCE IN GIVING FINAL CERTIFICATE—LIABILITY FOR.

An architect employed to superintend the erection of a building, who with knowledge that it had not been completed according to the plans and specifications, improperly gave the contractor a certificate of completion is answerable for his negligence to his employer.

[*Rogers* v. *James*, (1891) 8 Times L.R. 67; *Bo[illegible]* v. *Dizon*, 13 A.R. (Ont.) 494, followed; *Chambers* v. *Goldthorp*, (1[illegible]) 1 K.B. 624, distinguished.]

2. ARCHITECTS (§ I—5)—RIGHT TO COMPENSATION—COUNTERCLAIM FOR NEGLIGENCE.

An architect is entitled to compensation *quantum meruit* for superintending the erection of a building and making extra drawings therefor, notwithstanding the fact that he is answerable to his employer for negligently giving a final certificate to the contractor before he had finished his work according to the plans and specifications.

[*Rogers* v. *James*, (1891) 8 Times L.R. 67, followed.]

Statement

ACTION by an architect for compensation for superintending the erection of a building and making extra plans therefore. The defendant counterclaimed for damage occasioned by the plaintiff's negligence in giving the contractor a final certificate

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when the latter had not completed the building according to the plans and specifications.

There was judgment for plaintiff for the value of his services, and for the defendant on the counterclaim.

W. L. McLaws, for plaintiff.

E. L. Taylor, for defendant.

Patterson, K.C., Referee.

PATTERSON, K.C., Referee:—Action to enforce a mechanics' lien. The plaintiff claims $100 for his services as an architect in superintending the construction of a dwelling-house for the defendant, and for making extra drawings required in consequence of changes in the original plans and specifications, which changes had been assented to by the defendant. The plaintiff had prepared these original plans and specifications and had been paid for them. He was not at first employed to superintend the work, but was called in after the foundation was in and the beams, joists, posts and rafters placed in position. That was on or about August 15, 1911. He made about nine personal visits of inspection of the work between that date and November 5, 1912, when his final inspection was made. In addition to the visits he wrote a number of letters to the contractor drawing his attention to the numerous complaints about the work which the defendant made from time to time. He gave the contractor in all five certificates for payment, the final one, dated November 18, 1912, being for $784.60 and shewing that it was for the full balance of the contract price and extras, $3,700 having been previously paid.

Defendant disputes the plaintiff's right to payment, claiming that the plaintiff, while acting in the capacity of architect for the defendant, did so in a negligent, careless and indifferent manner and that, by reason of such negligence, carelessness and indifference, the work upon the building was improperly performed and defective materials supplied, and that he has suffered serious damage. He further says that the plaintiff, while purporting to act for him in reference to the said building, acted against the interests of the defendant and in the interests of the contractor, and issued certificates shewing that the said work was complete in every respect, although it had been performed in an improper manner and not in accordance with the plans and specifications relating thereto, and that, owing to the issue of the plaintiff's final certificate, he was obliged to pay a larger sum to the contractor than should have been paid in order to avoid litigation.

Defendant also counterclaims for damages suffered by him in consequence of the plaintiff's alleged negligence and says that, by virtue of the plaintiff's said carelessness, negligence and indifferent work and the improper issue of the certificates for payment, he suffered damages in connection with the building and was obliged to pay more to the contractor than the building was

worth in order to avoid litigation, and that he has suffered damages by reason of the premises to the extent of $300, for which amount he claims judgment.

I am satisfied, on the evidence, and after a personal view of the premises in the presence of the solicitors for the parties, that the defendant has good cause to complain that the house was not completed according to the plans and specifications in a number of important respects. For example, one of the stone posts underneath the front of the verandah is only three feet in the ground although the plan shews that it should be six feet deep. Several of the windows fit very badly and the upper sashes cannot be lowered. The frames for several of the doors are so badly constructed that the doors cannot be properly opened and shut, some of the frames being wider at the top than at the bottom and some wider at the bottom than the top. The floors are not free from knots as required and have not been properly dressed or put down. The woodwork finish in many parts of the house has not been sand-papered and filled and stained and varnished in the manner required by the specifications. This is obvious both to the eye and to the touch of even an unskilled observer. The door frames have been stained a different colour from the doors and the floors have not been dressed and varnished as required by the specifications. Rain-water gets in over the front windows owing, apparently, to the improper construction of the eave-trough leading from the roof of the verandah across the top of the windows. There is no panelling in the parlour as plainly shewn on the plans and drawings. These are the main defects, although there are a number of others of less importance, which, in my opinion, the plaintiff should not have passed over.

I therefore find, without hesitation, that the plaintiff should not have given the contractor the final certificate, ex. 15. Although it does not say that the work has been completed and the word "final" is not used, yet it is a final certificate within the meaning of the contract, ex. 9, as it shews that the amount certified for is the balance remaining after deducting previous payments from the full contract price and the amounts allowed for extras: *Brown* v. *Bannatyne School District*, 2 D.L.R. 264, 22 Man. L.R. 260.

The contract between the defendant and the builder, ex. 9, referring to the final certificate of the architect, provides that "Such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractor." And I am of opinion that the defendant was bound by the certificate and had no defence to the contractor's claim for the amount mentioned in that certificate: *Brown* v. *Bannatyne*, supra, unless he could have set up fraud or collusion as against the plaintiff.

The question then arises, is the architect liable for negligence in giving such final certificate? In *Badgley* v. *Dickson*, 13 A.R.

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494, a decision of the Court of Appeal in Ontario, it was held that, although an architect employed by the owner for reward to superintend the construction of a house may, as between the latter and the contractor, by the terms of the agreement be in the position of an arbitrator and his decision as between them unimpeachable except for fraud or dishonesty, yet, as between himself and his employer, he is answerable for either negligence or unskilfulness in the performance of his duty as architect. And a prior decision of *Irving* v. *Morrison*, 27 U.C.C.P. 242, was approved, in which it was held that the owner was entitled to deduct from the amount which would have been due to the architect the loss sustained by the latter's negligence in certifying for too much.

In *Rogers* v. *James*, (1891) 8 T.L.R. 67, it was held by the English Court of Appeal that there was a liability on the part of the architect to the building owner if he has been guilty of negligence in certifying for too much.

See also *Saunders* v. *Broadstairs* Local Board, 2 Hudson on Building Contracts 159, a case almost on all fours with the present case.

In *Chambers* v. *Goldthorpe*, [1901] 1 K.B. 624, it was held by two of the Judges of the Court of Appeal, Romer, L.J., dissenting, that the architect, in ascertaining the amount due to the contractor and certifying to the same under the contract, occupied the position of an arbitrator and therefore was not liable to an action by the building owner for negligence in the exercise of those functions.

The alleged negligence in that case was as follows: The negligent measuring up of work done by the contractor for the erection of the house and permitting him to include in his accounts sums to which he was not entitled and certifying such accounts.

In the present case, however, the negligence alleged was,

(1) acting in his capacity of architect in a negligent, careless and indifferent manner, whereby the work was improperly performed and defective materials were supplied;

(2) acting against the interests of the owner and in the interests of the contractor, and

(3) improperly issuing certificates shewing that the work was complete in every respect, although it was not, in consequence of which the defendant had to pay too much to the contractor.

The case of *Rogers* v. *James*, [1891] 8 T.L.R. 67, is distinguished at 633 of the report of *Chambers* v. *Goldthorpe*, [1901] 1 K.B. 624, and also at 637, where it is pointed out that the judgment appeared to have proceeded upon the ground that the action against the defendant was for negligence in the performance of that part of his duties in which he was merely acting as the owner's agent,—or, in other words, in the performance of a duty which he owed to his employer, and to him alone, in respect of a matter in which he was acting solely as agent for the building owner.

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I think this case comes within the principle of *Rogers* v. *James*, (1891) 8 T.L.R. 67; *Saunders* v. *Broadstairs Local Board*, 2 Hudson on Building Contracts 159, and *Badgley* v. *Dickson*, 13 A.R. (Ont.) 494; and I hold that the architect is liable for negligence in the performance of his duties of inspection and supervision, which he undertook for reward. He was undoubtedly negligent in not ascertaining positively that the stone post at the verandah was only three feet in the ground. His attention had been called to the matter in the preceding June, and he had then written to the contractor requesting him to have the defect remedied, but it has not been remedied. His attention had been repeatedly called to many of the other defects, such as the finishing of the woodwork, the staining, sand-papering, plastering, ill-fitting doors and windows and other matters. He had himself repeatedly called on the contractor to remedy these, and had written letters shewing that he was well aware of the defects complained of.

On November 24, 1911, he wrote to the contractor:—

During my visit this morning I found the work in a deplorable condition and it is my disagreeable duty to give you the six days' notice provided for in the contract to take down the finish and send competent tradesmen to overhaul the whole of the plaster. The woodwork is very rough and large portions of the work and finishing will be overhauled before the work is accepted.

On January 1, 1912, he wrote to the contractor's agent a letter from which I take the following extracts:—

I have made an inspection of the work, and words fail me to express my regret at the manner in which Mr. Wire's workmen have left the work. Will you please give immediate instructions to make the doors to open and close properly, fit the windows in a reasonably tight manner. The painter has left the work in a shameful manner and will you please make your painter understand that this work must be finished as specified.

On February 5, 1912, he wrote the contractor:—

It appears needless to ask you further to put right the carpenter work and the painting in accordance with your contract, and you must understand that this is the last notice you will receive in terms of your contract, and if you fail to fix the taps in a safe and sound manner, make the doors between the parlour and the dining room to work properly, fix the fan light openers, make good the floor in the staircase hall and the kitchen, finish and straighten all the plaster work, overhaul the whole of the painting, all as specified, within six days from this date, the whole of the work will be overhauled at your expense and the cost thereof will be deducted from the balance due to you.

On March 9, 1912, the plaintiff wrote the contractor's agent as follows:—

When the foreman called here some time ago I shewed him the specifications and the sample of work contracted to be done, and asked him to send a good man there and begin at the top of the house and do the work within a reasonable meaning of the sample and the specifications, and he

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promised to do so, at the same time admitting that the work was rough. What more can I do? If the painter estimated on the specifications you can get the work overhauled and collect the cost from him, as it is simply a very bad job indeed.

On June 3, 1912, the plaintiff wrote the contractor a letter from which I take the following extracts:—

> Mr. James has rung me up to say that a large amount of water is coming through the front wall and running down on the plaster and floor. I am also informed that you have not overhauled the windows as you promised to do; that you have put additional stain on certain woodwork where your man promised to rub it smooth; that you have only given one coat of varnish to the floors where it is specified two coats, and that you have not varnished the staircase as specified.

I find on the evidence, and from my personal inspection, that the work was left very much in the same condition as is described by the plaintiff in his letters, and I hold that he must have been negligent in his inspection when on his final visit he failed to notice any of these defects and gave a certificate equivalent to one saying that the work had all been completed according to the plans and specifications. He was either guilty of the negligence above attributed to him or he must have been acting partially towards the contractor in giving that certificate.

Partiality under such circumstances would, in my opinion, be equivalent to such fraud as to make the architect liable. The defendant has not pleaded fraud or partiality, although he has alleged that the plaintiff acted in the interest of the contractor. This allegation is too indefinite to amount to a charge of fraud or collusion such as would have given him a defence as against the contractor or destroyed the binding effect of the final certificate.

I find therefore that the plaintiff is liable to the defendant for damages caused by the plaintiff's negligence above set forth. I do not think the fact that the defendant succeeded in compromising with the contractor and getting a settlement with him for $700, instead of $784.50 makes any difference, except that the amount thereby saved, $84.50, should be taken into account in arriving at the damages assessed against the plaintiff. It is difficult to ascertain exactly what such damages were; but evidence was given to shew that the selling value of the property in its present condition would be from $400 to $500 less than it would be if the house had been completed according to the plans and specifications. That may not be a proper measure of damages. If the damages should be the cost of now putting the house into the proper condition as called for by the plans and specifications, I think the evidence shews that it would require at least $165.50 over and above the $84.50 above referred to, to do so, and that the defendant should be allowed that sum on his counterclaim.

It remains to deal with the plaintiff's claim. He certainly gave a good deal of attention to the work and his services were

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probably of some value to the defendant in getting better work than he might have got otherwise, and he made a number of extra drawings that he has not been paid for. Notwithstanding his negligence, he is entitled to be paid for his services *quantum meruit*. That was the course taken in *Rogers* v. *James*, (1891) 8 T.L.R. 67, where the jury's verdict for the plaintiff for £58 instead of £123 as claimed, was not interfered with. If I allow the plaintiff $50 on his claim, I think I will not be doing the defendant any injustice.

Verdict for plaintiff for $50 and cost of a mechanics' lien action for that amount. Verdict for the defendant on his counterclaim for $165.50 with costs. I allow a set-off and order plaintiff to pay the difference.

Judgment accordingly.

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(File No. 1750.34.)

Board of Railway Commissioners, Canada. May 10 and May 14, 1913.

1. RAILWAYS (§ II B—16)—CROSSING BY OTHER RAILWAY — OVERHEAD BRIDGE—CONTRACT TO MAINTAIN—CHANGE IN TRAFFIC CONDITIONS.

On it becoming necessary to repair or replace an overhead bridge carrying the tracks of a railway company over the road of another railway company, the latter is bound to provide a structure sufficient for the conditions of modern traffic, although the bridge displaced was ample for the needs at the time it was built, where, by contract, it was required at its own expense to maintain such bridge in a good and safe state, so as not to endanger the property fixed or moveable, of the other company, and to save it from damage due to the construction or non-maintenance of the bridge.

Chief Commissioner Drayton.

CHIEF COMMISSIONER DRAYTON:—This is an application made by the Grand Trunk R. Co. for an order requiring the Canadian Pacific R. Co. to reconstruct bridge No. 145, mile 12.23, tenth district, Grand Trunk Railway, which carries the applicant company's railway over that of the Canadian Pacific R. Co.

It appears that the bridge was constructed by the Ontario & Quebec R. Co.—now owned and operated by the Canadian Pacific R. Co.—under an agreement made by the Midland Railway (which railway has been absorbed by the Grand Trunk), of date February 21, 1883.

No issue is based on any question of substitution of parties; and the matter may be considered as if the agreement read "Grand Trunk" instead of "Midland," and "Canadian Pacific," instead of "Ontario and Quebec."

Prior to the agreement in question, the Ontario & Quebec filed its plans and commenced the construction of its lines of railway, which necessitated four crossings of the Midland line. Three were made—in so far as the Ontario and Quebec Co. is

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concerned—by the construction of bridges, and the fourth—which is the crossing in question—situated near Myrtle, by an undercrossing; the result being that, in three instances, the Grand Trunk trains run underneath, and, in the case in question, over the line of the Canadian Pacific.

The bridge in question was damaged by work of the Canadian Pacific, and is now supported by temporary structures. It is some thirty years of age. The bridge must be put into a good and sufficient state of repair by the Canadian Pacific, and perhaps reconstructed in any event.

The Grand Trunk, however, desires that the Canadian Pacific should strengthen and add to the bridge so as to permit of the operation of rolling stock of the present standard, the bridge, although sufficient and proper for the railway requirements of 1883, being too light to-day. The Grand Trunk application involves an entirely new structure.

The whole issue is as to whether or not the Grand Trunk is entitled to a bridge sufficient for modern requirements, or whether the responsibility of the Canadian Pacific is discharged by merely placing the present bridge in repair, or replacing it with a similar bridge of like character.

The agreement provides:—

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

Mr. MacMurchy, for the Canadian Pacific, urges that "maintenance" merely means the preservation of the bridge in its former condition, or the substitution of a similar bridge; and Mr. Biggar's submission is that "maintenance" must be construed as applying to the changing and increasing necessities of traffic.

In addition to the above position taken by Mr. MacMurchy, he points out that no such intention can be drawn from the agreement, because where changes are to be made to meet altered conditions, the agreement specifically provides for them. The paragraph that he relies on reads:—

> That each of the said bridges shall be well and substantially built, and shall have a space in each case in the clear for the purpose of the Midland Co. (Grand Trunk), of the number of feet above expressed, and in each case shall be erected, kept, and at all times hereafter maintained in a good and sufficient state of repair, and at such a height above the Midland Co.'s line of rails, as shall secure at least seven feet clear above the highest of any freight cars now or hereafter passing over the Midland Co.'s said lines respectively, as provided in the statutes in that behalf now in force, or which may hereafter be passed by competent authority in that behalf; and this shall be done at the costs and charges of the Ontario Co. (Canadian Pacific).

For the purposes of the Midland line it was necessary to provide for clearances—as are set out particularly in each case—where the surface of the right-of-way of that company was being interfered with by the Ontario Co.'s line; otherwise the abutments of the different bridges might have been placed in such a manner as seriously to inconvenience the Midland's operations; and I have no doubt that the clearances insisted on by the Midland were ample and sufficient for its purposes.

In like manner, it was also necessary for the Midland to provide that bridges must be put at such a clearance overhead as would free the Midland from the restrictions of the Railway Act, and allow a space of seven feet between the top of its highest car and the obstruction over its line.

The case of the undercrossing is different. Here the abutments are built on the lower level to be traversed by the constructing company. The Midland is not concerned in clearances either above or below.

Having so far protected themselves, however, does the agreement under the usual rule absolve the company from any changes in connection with the undercrossing? In my view, it does not.

The Midland Co. received no consideration; and, in my view, no restriction of its right to use its property for railway purposes was contemplated. The constructing company doubtless could have got crossings under the order of the Railway Committee, proper regard having been had to the rights of the senior line. Doubtless, for this reason the agreement was entered into; not with any thought that the operations of the Midland were to be in any way curtailed or hampered by the methods of crossing decided on.

In my view, the word "maintenance" has to be read in its wider sense, and entailed upon the constructing company the duty of maintaining the bridge in question as a part of the permanent way of the Grand Trunk line, and sufficient for the purposes of that company.

I think the agreement does not defeat what I find to be the intention of the parties. The right of the Midland, and its successor the Grand Trunk, to run any and all trains over the bridges is unlimited. It certainly was within the knowledge of both contracting parties that the weights of engines, and other rolling stock, from time to time increased. The constructing company is protected from any unreasonable addition in the weight of rolling stock by the fact that the Grand Trunk has to strengthen all its bridges before the heavier rolling stock can be used on the line. The additional weight of the Grand Trunk rolling stock is reasonable, and no heavier than, if as heavy as, that used by the Canadian Pacific. The Grand Trunk desires to make its whole line, from Lindsay to Whitby, available for what is known as "E 50 loading," to enable that company to detour trains either

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from the main line between Whitby and Port Hope, or from the Port Hope-Midland line, making the carrying capacity of the branch equal to that of the line between North Bay and Port Arthur.

Assuming that the work of the Canadian Pacific had never injured the bridge in question, its maintenance as an inefficient bridge would

> endanger property, fixed or movable, of the Midland Company;

and the covenant

> against all damage because of the construction or non-maintenance of the said crossings, and each of them, the Ontario Co. shall and will save the Midland Co. harmless

would apply.

The terms of the agreement and the circumstances under which the interpretation of the word "maintenance" arises are different in this case from that between the Intercolonial Railway and the Grand Trunk Railway; but the general reasoning is entirely in support of the opinion now expressed. I entirely concur in the judgment of the late Chief Commissioner, Mr. Justice Killam, in that case.

At the hearing I asked the parties to supply the Board with information as to the difference in cost between a bridge sufficient to carry the former traffic and the bridge required by railway conditions of to-day; but the parties have not supplied this information. The Board's chief engineer will determine just what this difference is, and whether reconstruction of the present bridge would, in any event, be necessary, or whether mere repairs would be sufficient.

An order will go for the construction of a bridge sufficient for to-day's requirements; detail plans and stress sheets to be submitted to an engineer of the Board for his approval, unless the engineer finds that the plans already submitted by the Grand Trunk Co. are proper and reasonable. The Canadian Pacific R. Co. will build the bridges according to these plans, at its own cost; but I think that the Canadian Pacific is entitled to have the opinion of the Supreme Court—should they desire it—as to whether or not the excess of cost, to be determined by the Board's chief engineer, should, under the agreement, be borne by that company. In the event of the Supreme Court advising the Board that the Canadian Pacific is not liable under the agreement, then the Grand Trunk must pay the difference to the Canadian Pacific. Plans must be submitted and approved within thirty days, and the work completed in four months.

The Canadian Pacific is, of course, entitled to the salvage of the present structure.

Commissioner Mills.

COMMISSIONER MILLS concurred.

MR. COMMISSIONER MCLEAN:—I am unable to agree with the direction of the Chief Commissioner that the cost of reconstruction of a bridge sufficient for to-day's requirements should be borne by the Canadian Pacific Railway. With full appreciation of the reasoning of the late Mr. Justice Killam, as referred to by the Chief Commissioner in his judgment, I am unable to see that this reasoning indicates the pathway to be followed here. In so far as the new bridge is an improvement over the existing one, the improvement should be considered in the nature of an addition or betterment.

In the agreement between the Midland R. Co. of Canada and the Ontario & Quebec Railway, it is recited that the agreement in respect of terms therein set out is an agreement in perpetuity. It is also recited:—

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

The matter, therefore, turns on the question of what is meant by the word "maintenance." Maintenance, in my opinion, is clearly distinguishable from the re-construction which creates an addition or betterment. An addition or betterment reflects the change in the investment of the carrier as a result of the work in question being done. Maintenance has been defined as including

> such depreciation as may ordinarily be removed or offset by proper expenditures at such times as the worn-out parts may be economically replaced: Floy, Valuation of Public Utilities, p. 24.

The Department of Railways and Canals has of recent years followed in its statistical practice the forms of returns from railways used by the Interstate Commerce Commission. The Interstate Commerce Commission in dealing with the question of additions and betterments in connection with bridges, gives in substance the following direction:—

> To this account shall be charged the excess cost of new bridges . . . over the cost of replacing in kind bridges . . . removed or abandoned, including the cost of abutments, piers, supports, draw and pier protection: Eaton's Handbook of Railroad Expenses, p. 345.

If the Grand Trunk were re-constructing a bridge, it would, in following strict accounting practice, charge in its accounts this excess cost to capital. It would seem reasonable to follow the same practice where there is an agreement as to the maintenance of a bridge by another company. I do not read the agreement as an undertaking in perpetuity on the part of the Ontario & Quebec Railway to re-construct the bridge from time to time as

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the conditions of traffic vary. The agreement was made in the light of the knowledge at that time existing in respect of railroad condition. The Ontario & Quebec, or its successor in title, meets the requirements of the agreement by maintaining the bridge as it was constructed.

It may be on account of the changed conditions on the Grand Trunk Railway, the present type of bridge prevents the Grand Trunk from making a full and efficient use of its facilities; but to my mind the primary obligation of the Ontario & Quebec Railway, or its successor in title, is discharged by maintaining the bridge as constructed. The further question as to whether the full and efficient use of the Grand Trunk's facilities should be impeded by the bridge as at present existing is one in which the parties are at large, and independent of the terms of the agreement; and the question as to what distribution of costs should be made between the parties in respect of excess cost of a new bridge is something which should be determined independently of the terms of the agreement.

Order accordingly.

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THE KING v. MATHESON; Ex parte GUIMOND.

New Brunswick Supreme Court, Landry, McLeod, White, and Barry, JJ. April 18, 1913.

1. OBSTRUCTING JUSTICE (§ I—1)—RESISTING OFFICER—REFUSING PERMISSION TO SEARCH PREMISES.

The refusal of permission to a liquor license inspector to search a house for liquor supposed to be kept in violation of law, although unaccompanied with threats or physical violence, is, under ch. 22, sec. 114 (2) of the Liquor License Act, C.S.N.B. 1903, an unlawful obstruction of an officer in the discharge of his duty.

[*Rex* v. *Leclaire* (1906), 12 Can. Cr. Cas. 332, and *Bastable* v. *Little*, [1907] 1 K.B. 59, specially referred to.]

2. INTOXICATING LIQUORS (§ III H—90)—SEARCH AND SEIZURE—LICENSE INSPECTOR—RIGHT TO ENTER PREMISES WITHOUT SEARCH WARRANT.

A liquor license inspector may enter a house without a search warrant in order to search for liquor which he, with good reason, believes is being stored for sale in violation of law, when he can do so peaceably and without force. (*Per* Barry, J.)

3. INTOXICATING LIQUORS (§ III G—86)—PLACE OF SALE — DWELLING-HOUSE.

A dwelling-house may be a place wherein liquors are sold or reputed to be sold, within the meaning of the N.S. Liquor License Act, C.S.N.B. 1903, ch. 22, so as permit an inspector to enter and search for liquors which he has good reason to believe are being therein stored for sale in violation of law, where, to his personal knowledge, the owner of the house has been previously convicted both for illegally keeping and illegally selling liquor on the premises. (*Per* Barry, J.)

Statement

MOTION on the return of an order *nisi* to quash a conviction against Amedee Guimond for unlawfully obstructing a liquor license inspector in making a search in premises where liquor was reputed to be sold.

A. T. LeBlanc, for the defendant, supported the order *nisi*.
P. A. Guthrie, shewed cause.

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LANDRY, J. (oral):—With the facts detailed by my brother Barry, I believe the tribunal finding the accused guilty of obstruction had jurisdiction to pronounce upon them, and declare if, under the Act, they amounted to obstruction or not. Landry, J.

The same words used under different circumstances might not amount to an obstruction. In themselves they look innocent, and they seem to lack threats of violence of any kind, and afford, perhaps, but little ground to conclude that, had the constable gone on to search any further, resistance would have been resorted to. But here, the magistrate had evidence of the reputation of the house as to the sale of liquor, and he had a right to decide on the intention of the party accused in the words he used and the attitude he assumed. I would not say that a man in his own house has not the right without violating the law in question to make such a verbal declaration to a party presenting himself to search, as would indicate a wise withholding of his consent to such a search; but I think it must always be left to the tribunal hearing the case, looking at all the evidence, to say if obstruction was meant or not. In a case like this the accused had one of two objects in view in what he did. He desired to express a withholding of consent, or he wanted to prevent a search knowing a search would disclose something prejudicial to his interests. In the first case his acts could hardly, in my opinion, amount to obstruction; in the latter case, it was obstruction pure and simple. The justice had the right, the jurisdiction and the duty to decide that. I cannot say he decided wrongly.

McLEOD, J. (oral):—I have had some little doubt about this, but, on consideration, I have to agree with the conclusion reached in the judgments that have just been delivered. The question is, Was the inspector obstructed in the discharge of his duty? It is not necessary that there should be any physical acts of obstruction. All that is necessary is for the party to do such an act that the officer may think, and rightly think, that he should not, or could not, proceed in the search. We have the evidence of the inspector and the other officer as to what was done. Guimond told him that he must not search his house; that he would not permit it. The inspector says he feared there would be violence if he proceeded. It seems to me, after giving it due consideration, that that is an obstruction within the meaning of the law. That is, it is preventing the officer from proceeding to search the house, unless he chose to do so by force. I think, therefore, the order nisi to quash the conviction should be discharged. McLeod, J.

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WHITE, J. (dissenting):—I am unable to agree that the language used by Guimond constituted obstruction of the constables within the meaning of the statute. Had Guimond either by word or gesture threatened that he would forcibly resist the constables if they persisted in their search, that would have justified a finding of obstruction. It is true one constable says he believed he would have to use force to prosecute the search. This evidence was objected to, and I think properly so, for unless Guimond's language, or attitude, was of a threatening character—and nothing of that kind was proved—the fact that one of the constables choose to think force might be used does not afford any proof that force would in fact have been used; nor, can what passed through the constable's mind render Guimond guilty, unless it appear that Guimond said, or did, something to indicate that he would resist the search by force.

This is a criminal case, and if the words relied upon as constituting obstruction are fairly capable of a construction compatible with the innocence of the accused, then we are bound to put that construction upon them. To hold Guimond guilty of obstructing the constables, because of the words he appears to have used, is, in effect, to hold that no man can forbid a constable to search his house, though he may believe such constable, in making the search, is a trespasser, and may intend to sue for damages in respect of such trespass.

Suppose a man whose house was searched brought such an action, and established his right to recover either because the house was not one where liquor was reputed to be sold, or upon other grounds, would not the fact that he had stood by and permitted the constables to search without any protest on his part have been urged, and properly so, in reduction of damages, if not implying assent to the search complained of, and therefore as justifying it.

I can see nothing in the language used by Guimond which would in any way have impeded or obstructed the search which the constables desired to make had they chosen to go on and make it. I think the conviction should be quashed.

Barry, J.

BARRY, J.:—Amedee Guimond was convicted on the 10th day of December last, before Francis F. Matheson, esquire, police magistrate of the town of Campbellton, for having, on the 21st of November last, unlawfully obstructed Charles W. Hughes, license inspector and chief of police of the town, in making searches in premises reputed, as it is alleged, to be the defendant's own, and a place where liquor is reputed to be sold.

The information was laid under the Liquor License Act (ch. 22, Con. Stat. 1903), the 114th sec. of which provides as follows:—

114 (1) Any officer, policeman, constable, or inspector may, for the purpose of preventing or detecting the violation of any of the provisions of this chapter, which it is his duty to enforce, at any time enter into any and every part of any inn, tavern or other house or place of public entertainment, shop, warehouse, or other place wherein refreshments or liquors are sold, or reputed to be sold, whether under license or not, and may make searches in every part thereof, and of the premises connected therewith, as he may think necessary for the purpose aforesaid.

(2) Every person being therein, or having charge thereof, who refuses or fails to admit such officer, or policeman, or constable, or inspector demanding to enter in pursuance of this section in the execution of his duty, or who obstructs, or attempts to obstruct, the entry of such officer, policeman, constable or inspector, or any such searchers as aforesaid, shall be liable to the penalties and punishments prescribed by section 62 of this chapter.

The only evidence of the reputation of the defendant's dwelling-house is that furnished by the complainant himself, who says that it had been reported to him that Guimond was storing liquor for sale; he also knew of his own knowledge that the accused had been convicted of selling liquor illegally, and also convicted of keeping liquor for sale in the house to which informant went to search on the 21st of November. He was present in Court when judgment was given in the prosecutions referred to, and received the fines for the Court in his capacity of liquor license inspector.

It seems that on the 21st of November, officer Hughes, accompanied by officer Adams, went to the accused's residence, no objection being raised to their entering the house or to officer Hughes going upstairs. He saw Mrs. Guimond, told her that it had been reported to him that they had liquor stored there, and that he had come to search. Mrs. Guimond shewed him a bottle of whiskey and a bottle of wine, and told him that was all there was in that room. Hughes then went upstairs where he met the accused, and told him he was there to make a search for liquor. Hughes says:—

He (the accused) told me that he did not want me in the house at all, that he did not want me there searching. I told him that if I was there illegally, that he could take me to Court. He said, "I don't want you here at all. I refuse you to search.' I called officer Adams upstairs and told him (the accused) he might repeat that before officer Adams. He told me that he did not want me there to search. I said, "Do you refuse to allow me to search?" He says, "I refuse." He told me he had advice on it.

Officer Hughes says he did not make a search, because accused refused to allow him to do so, and he believes that in order to search he would have had to use force. This evidence corroborated by officer Adams is the only evidence of the obstruction complained of. The defendant used no physical force or threats,

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did not shut a door in the officers' faces or interpose his body to prevent their entrance to any room. The officers had no search warrant with them at the time.

The rule to quash the conviction was granted on the following grounds:—

1. No evidence to support the conviction.

2. The depositions do not disclose any offence in law nor any infraction of the Liquor License Act for which the accused may be convicted.

3. The informant not having a search warrant, had no authority to search defendant's house, it not coming, under the evidence, within the meaning of the places mentioned in sec. 114 of the Liquor License Act, and therefore there could be no infraction of sub-sec. 2 of sec. 114, the informant being a trespasser.

The circumstances of the case being exceptional, and the conviction being, not for what may be designated as one of the more common violations of the law, such as selling or keeping liquor for sale, but for obstructing an officer in the execution of his duty, it is, I think proper that the evidence should be examined into, with a view to ascertaining whether, admitting it all to be true, the acts complained of constituted an offence in law.

The ordinary meaning of the term "obstruct" is to hinder or prevent from progress, block, or stop up by the interposition of obstacles. I do not think that to constitute the offence of obstruction, it is necessary that any physical opposition should be employed; thus, to borrow an illustration from the affairs of every day, the vexatiously hindering progress in a legislative assembly by factious opposition, is obstruction, though physical force be never resorted to by the obstructionists. It is said in Halsbury's Laws of England, vol. 9, p. 506, that

it is doubtful whether obstruction to be punishable need be either a physical act or a threat.

Under sec. 291, sub-section (3), of the Railway Act, 1903, which provides that every person who wilfully obstructs or impedes any officer of a railway company in the execution of his duty upon the premises of the company, shall be liable to the penalties imposed by that Act, it was held by the Court of King's Bench of Quebec, that it was an obstruction of the railway officer for a cabman having no right upon the railway cab-stand, to refuse to move away from same with his cab on the demand of the officer whose duty it was to enforce the company's regulations respecting the station property, although the cabman offered no physical resistance, but simply refused to leave when ordered: *Rex* v. *Leclaire* (1906), 12 Can. Cr. Cas. 332.

So, also, it has been held that a workman "obstructs" his medical examination under the Workmen's Compensation Act,

if by his own acts he prevented examination or made it impossible, *e.g.*, by going away to some unknown place without giving any intimation to his employer: *Finnie* v. *Duncan*, [1904] 42 Sc.L.R. 192.

By the Prevention of Crimes Act, 1871 (Imp.) 34 & 35 Vict. ch. 112, sec. 12, provides that "where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act." By the Prevention of Crimes Amendment Act, 1885 (Imp.) 48 & 49 Vict. ch. 75, sec. 2,

> the provisions of the twelfth section of the said recited Act (the Prevention of Crimes Act, 1871), shall apply to all cases of resisting or wilfully obstructing any constable or peace officer when in the execution of his duty.

Two constables, having measured certain distances on a road much frequented by motor cars, were watching in order to ascertain the pace at which each car passed over the measured distance, with a view to discovering whether it was proceeding at an illegal rate of speed. One Little gave warning of this fact to approaching cars, which then slackened speed. There was no evidence that Little was acting in concert with any of the drivers of the cars, or that any car when the warning was given, was going at an illegal pace. In a prosecution against Little for wilfully obstructing police constables in the execution of their duty the magistrates were of the opinion that the acts of Little did not in law constitute an obstruction of the police constables in the execution of their duty within the meaning of the sections of the Acts mentioned, and dismissed the information, but stated a case for the opinion of the King's Bench Division. It was there held that the magistrate had come to a right conclusion, but Darling, J., in the course of his judgment in the case says (p. 63):—

> I do not wish to be understood to say that, in order that there should be an offence under this section there must be some physical obstruction of the constable. In my opinion a policeman who, in seeking information which might lead to the conviction of the perpetrators of a crime, was wilfully misled by false information, would be obstructed in the execution of his duty, and I should not like to say that the person who so wilfully misled him was not committing an offence within the meaning of this section;

and Lord Alverston, C.J., said (p. 63):—

> I also would wish to guard myself from saying that the only obstruction contemplated by this section is a physical obstruction: *Bastable* v. *Little*, [1907] 1 K.B. 59.

I have come to the conclusion, though not without some doubt, that the acts of the accused did, in law, constitute an obstruction of the inspector in the execution of his duty within the meaning of sec. 114, sub-sec. 2, of the Liquor License Act, Con. Stat. N.B. 1903, for it seems to me that so far as mere words

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are concerned, Guimond went about as far as he could go in preventing the officer from searching the premises.

Then it is contended that without a search warrant, the inspector had no authority to enter the accused's premises, and that he was a trespasser there. The Act provides for the issuance of a search warrant upon proper information, and such warrant authorizes the officer to enter, if need be, by force, the place named in the warrant, break open any door, lock or fastenings of the premises and any closet or cupboard therein (sec. 115). The Act provides also for the appointment by the Lieutenant-Governor-in-council of a special officer to enforce the provisions of the Act (sec. 112); and the duty is cast upon any such officer so appointed, as well as upon every policeman and constable, when any information is given to any of them that there is cause to suspect that some person is violating any of the provisions of the Act to make diligent enquiry into the truth of such information. It was the duty, therefore, of Inspector Hughes, imposed upon him by express legislation, when it was reported to him, as he says it was, that Guimond was storing liquor for sale, to make diligent inquiry into the truth of the information he had received and for that purpose to enter, if he could, without a warrant, the place suspected. In order to authorize him to force an entrance, break locks, etc., a warrant might, perhaps, have been necessary. Upon that question I say nothing, because it does not arise here, but to say that he had no authority to go upon the premises under any circumstances without a warrant would be attributing to sec. 114 a meaning which it does not possess, and have the effect of rendering the section nugatory.

Then, was the accused's house "a place wherein liquors were sold or reputed to be sold" within the meaning of the section, so as to entitle the officer to enter? It seems to me that the case is much stronger than if it had been merely a matter of repute. Not only had it been reported to the officer that Guimond was storing liquor for sale upon the premises in question, but the officer himself, of his own knowledge, from having been in Court when the convictions against Guimond were made, and from having personally collected the fines, knew that Guimond had been convicted both for keeping for sale and selling intoxicating liquor upon those very same premises. It seems to me that, in the circumstances, the officer was justified in regarding the accused's premises as a place where liquor was sold, and that he was within his duties in entering for the purpose of inquiring into the truth of the information he had received.

I think the application must fail on all grounds, the rule be discharged and the conviction affirmed.

Conviction affirmed, WHITE, J., *dissenting.*

SWANSON v. McARTHUR.

(Decision No. 2.)

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. April 14, 1913.

1. WRIT AND PROCESS (§ II A—16)—SERVICE OUT OF JURISDICTION—ORDER FOR LEAVE—CO-DEFENDANT WITHIN JURISDICTION.

The test for applying that part of the rule for service out of the jurisdiction (Man. K.B. rule 201 (*g*)) which permits service *ex juris* upon any person who is a "necessary and proper party to an action properly brought against some person duly served within the jurisdiction" is whether both would have been proper parties to the action had they both been within the jurisdiction, and this without taking into account what may be the result of the trial.

[*Swanson* v. *McArthur*, 7 D.L.R. 680, varied; *Massey* v. *Heynes*, 21 Q.B.D. 330, applied.]

2. WRIT AND PROCESS (§ II A—16)—JOINING DEFENDANT OUT OF JURISDICTION—FAILURE TO ESTABLISH CLAIM AGAINST RESIDENT DEFENDANT.

Where leave is given to serve a person out of the jurisdiction as a necessary or proper party defendant to an action brought against a co-defendant within the jurisdiction, it is not necessary that the order for service *ex juris* should contain a condition that in case the action be dismissed against the party within the jurisdiction, the plaintiff shall thereupon consent to its dismissal as to the defendant so served out of the jurisdiction; the latter's rights in that respect, where the service is justified only if the action is properly sustainable against the co-defendant within the jurisdiction, can be dealt with at the trial if a plea of want of jurisdiction is raised.

[*Re Jones* v. *Bissonette*, 3 O.L.R. 54, considered.]

Statement

APPEAL from decision of Mathers, C.J.K.B., *Swanson* v. *McArthur* (No. 1), 7 D.L.R. 680.

The judgment below was varied.

W. H. Trueman, for the plaintiff.

W. C. Hamilton, for the defendant.

D. H. Laird, for the Eastern Construction Company.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—This action is brought by the plaintiff against the defendant McArthur, a resident of this province, and the Eastern Construction Company, a corporation having its head office at the city of Ottawa in the Province of Ontario. No other ground is asserted for making the company a party defendant than that it comes within sub-sec. (*g*) of rule 201, more particularly referred to hereafter.

As against the individual defendant, the plaintiff, according to his statement of claim, seeks to recover moneys alleged to be due under an agreement that the plaintiff should execute certain work in the construction of the National Transcontinental Railway to be paid for by the defendant McArthur at the rates

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and prices set out therein, with such variations of said work as the chief engineer might direct.

It is further alleged that the plaintiff performed the work agreed to be done under said agreement, including variations ordered thereunder, and (here we have the corporation defendant first referred to in the allegations) "in addition thereto at the request of defendants work from station 1186 to station 1200, at the rates and prices provided for in said agreement, and the whole of said work was completed on December 7, 1908." This is plainly an assertion or declaration that, independently of the work done under said agreement and of the variations thereof under the supervision of the chief engineer, there was separate and distinct work done on the line of construction from station 1186 to station 1200 by the plaintiff at the request (the joint request, I take it) of the two defendants, the individual and the corporation, and that it was agreed that this separate and distinct work should be paid for by the two defendants on the basis of the prices and rates fixed by the agreement, previously mentioned, to which the plaintiff and the defendant McArthur were parties. Without question there is here, as against the corporation defendant, alleged a cause of action, and, taking the statement in this paragraph as it stands by itself, it certainly alleges a direct and not an alternative cause of action.

Particulars of the plaintiff's claim are set forth in paragraph 6 of the statement of claim, the same being prefaced by these words:—

> The following are particulars of the work done by the plaintiff under said agreement, including said variations and said additional work.

One item of these is:—

Work.	Estimate.	Rate.	Amount.
Trainfill.	264010	.46 4/5	$123,556.68

There is nothing stated in the pleading to shew that this item of trainfill comes within the work claimed to be done under the agreement or is part of the variations ordered by the engineer under that agreement, or is work in addition to and independent of the agreement.

This statement in paragraph 6 is ambiguous: "Work done . . . under said agreement, including said variations and said additional work." Does the word "including" govern the words "said additional work" so that these latter words mean "additional work" under said agreement, and is, therefore, "additional work" merely a repetition of "variations"? Or is the word "and" disjunctive, the intention being that "additional work" should refer not to the variations but to the work from station 1186 to 1200? It would seem to me that we must adopt the former construction.

Finally in par. 10 it is asked that if the Eastern Construction Company alone is found to be liable for the work from station 1186 to station 1200, relief be given against the company.

So far as the claim is for relief as against McArthur under the agreement in respect of work done thereunder or variations authorized thereby, the plaintiff has nothing whatever to do with the Eastern Construction Company, and is, therefore, not entitled to make it a party to this action.

This is not a proceeding under rule 246 of the King's Bench Act, under which the defendant McArthur seeks to serve, or has served, a notice on a person not a party to the action. To make a third party, who is outside the jurisdiction, a party defendant, it is necessary that there should be at least two contributors, one of whom is subject to the jurisdiction. The principle to be applied is the same as if the subject-matter of the claim of the defendant were the subject of an independent action: *McCheane* v. *Gyles*, [1902] 1 Ch. 287, *per* Vaughan Williams, L.J., at 298.

There is power given by sub-sec. (*a*) of rule 242 to add any party, as plaintiff or defendant, at any stage, where it may be deemed necessary. But there is no provision that gives this power to add in case of parties out of the jurisdiction.

Rule 201 provides that service out of the jurisdiction of a statement of claim may be made whenever

(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

The whole question here is whether the construction company comes within this sub-section, and, if it does, to what extent.

Is the construction company here a proper party? I would say it is in so far as the plaintiff alleges a claim against it in respect of the work done from station 1186 to 1200, but not otherwise. If the construction company had been within the jurisdiction there could, in view of the provisions of rule 219, be no doubt whatever. And this is the test to be applied:—

Supposing both defendants had been within the jurisdiction, would they both have been proper parties to the action? *per* Lord Esher, M.R., in *Massey* v. *Heynes*, 21 Q.B.D. 330, 338.

The Court cannot take into account what may be the result of the trial. See also *Witted* v. *Galbraith*, [1893] 1 Q.B. 431.

In the result it seems to me the proper order to be made in this case is to allow the service of the statement of claim on the corporation defendant to stand, on condition, however, that proceedings at the trial and otherwise, so far as it (the defendant corporation) is concerned, shall be restricted to the work alleged to have been done by the plaintiff from station 1186 to

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station 1200, in respect of which relief is claimed against both defendants. It was urged that there should also be a further condition that in the event of the plaintiff failing to establish his claim against McArthur in respect of the foregoing, his action as against the Eastern Construction Company shall be dismissed, on the ground that, if the plaintiff fail as against McArthur in respect of the work from station 1186 to 1200, then his only justification for joining the construction company will be shewn to have had no existence. This was the reasoning adopted by the Divisional Court in *Re Jones* v. *Bissonnette*, 3 O.L.R. 54, as set out in the judgment of Mr. Justice Street, at 57, and it does appear to me that that argument is one to which it is, to say the least, difficult to find an answer. But it remains open to the defendant company effectually to raise the defence of want of jurisdiction and, that being so, the Judge presiding at the trial can be left to deal with this branch of the case, should the necessity arise, on the principles indicated.

The second paragraph of the order of the referee of June 10, 1912, must be set aside. The first paragraph will stand subject to the modifications which have been set forth above.

As to the question of costs. On this motion each of the parties has succeeded to a certain, though not, of course, to the same, extent. Moreover, it is difficult, at this stage, to provide for the various possible results of the action. The reasonable course to adopt seems to me to be to refer the costs of the appeal from the order of the referee to the Chief Justice and of the appeal from the order of the Chief Justice to this Court, to the Judge at the trial to be disposed of in such manner as he shall deem equitable, and I would so direct.

Judgment varied.

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TOWN v. KELLY.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 9, 1913.

1. PARTNERSHIP (§ VI—29)—ACTION FOR DISSOLUTION—SUBSTITUTED AGREEMENT ON TERMINATION OF PARTNERSHIP.

An action brought in form for the dissolution of a partnership should not be dismissed merely because it appears that at the end of the term the parties substituted a new agreement for the adjustment of their partnership rights, whereby one of the partners was to enter the employment of the other; the court should, in the same action, give the plaintiff relief by declaring and enforcing the terms of the substituted agreement if set up in the defendant's pleading.

[*Town* v. *Kelly*, 5 D.L.R. 14, reversed.]

Statement

APPEAL from the decision of Prendergast, J., *Town* v. *Kelly*, 5 D.L.R. 14.

The appeal was allowed.

J. C. Collinson, for plaintiff.
C. S. Tupper, for defendant.

The judgment of the Court was delivered by HOWELL, C.J.M.: —I agree with the learned trial Judge that the partnership was dissolved by the agreement entered into between the parties, but I think he should have gone further and given the plaintiff relief by declaring what that agreement was and by enforcing it.

It is evident that the parties intended to give the plaintiff an opportunity to get back the $5,000 which he had put in the partnership. With this object in view, I find that they agreed that the plaintiff should superintend the manufacturing of brick for the defendant at his yard for the then ensuing season, and that he should so continue until December 1, 1910.

The defendant agreed that the wood then on hand formerly belonging to the partnership should be used in burning this brick, and that the balance of this wood left over should be divided equally between the parties.

I find further that the defendant was to furnish the horses, harness and drivers necessary to perform this work, and that the defendant should also permit the plaintiff to use the clay then in the defendant's possession for the manufacture of this brick, and also all the machinery and plant, buildings and kilns necessary for this work.

For all this work it was agreed that the plaintiff should be allowed a salary of $150 per month from the 1st day of May, 1910, to the 1st day of December following.

It was further agreed that the plaintiff should be charged $2.50 per 1,000 on all the brick burned for the wood used in burning the same, that he should be charged $1 a day for each horse while being used in that work, together with the actual cost of its feed during that time, and that he should also be charged with the actual cost or wages of the drivers of these horses while they were used by him in manufacturing the brick, and he was not to be charged for anything else in the using or occupation of that plant, material or machinery, buildings or kilns.

In order to permit the plaintiff still further to recoup himself for the money put into the partnership, it was agreed that the plaintiff should receive $5,000 for the burning of 5,000,000 brick, subject to increase or reduction as it fell below or exceeded the "base price" of $6 per 1,000, the particulars of which are set forth in the seventh and eighth paragraphs of the defendant's statement of defence.

In making up the actual cost to the defendant there must be charged $2.50 per 1,000 for the fuel used in the burning of the brick and also for the horses, feed and drivers above set forth; and of course the plaintiff is to pay all the labour required or employed in the manufacture of this brick, and in the moving

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and handling of the wood, but the $150 per month paid to the plaintiff is not to be included in the cost above mentioned.

The plaintiff has apparently received the regular payment of $150 a month, but the parties cannot agree as to the amount coming to the plaintiff, if any, under the other terms of the agreement.

The matter will be referred to the Master to find:—

1. The quantity of brick manufactured under the plaintiff's superintendence during the year 1910.

2. The cost to the defendant on the basis set forth in the seventh and eighth paragraphs of the defendant's statement of defence, charging in the cost the sums payable to the defendant therein set forth for fuel, drivers, horses and feed for horses.

3. Having arrived at this cost, the Master is to find the gross sum, if any, payable to the plaintiff, after charging him with any sums paid by the defendant on account.

4. The quantity of wood formerly belonging to the partnership which was on hand in May, 1910, and which had not been used in the burning of the brick during that season, and fix the amount payable by the defendant therefor.

The appeal is allowed, and the judgment entered is set aside. The matter is referred to the Master to find the facts above set out. The plaintiff must have the costs of this appeal, to be costs in the cause to the plaintiff. Further directions and the costs of the hearing and of the reference must be reserved.

Appeal allowed.

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Ontario Supreme Court, Middleton, J., in Chambers. March 31, 1913.

1. COURTS (§ IV B—263)—JURISDICTION OF SUPERIOR COURT—CUSTODY OF INFANTS—EFFECT OF PRIOR AWARD BY JUVENILE COURT.

A prior disposition of the custody of children made by the Commissioner of a Juvenile Court under the statute 8 Edw. VII. (Ont.) ch. 59, does not deprive the Supreme Court of Ontario of jurisdiction, subject to the limitations contained in the Act, to order on *habeas corpus* the return of the child to the parent.

2. INFANTS (§ I C—11) — CUSTODY — RELIGIOUS INSTRUCTION — WELFARE OF CHILD.

Where the children concerned are too young to have a real religious preference, they may be given into the custody of their mother, who is a Protestant, without condition as to the faith in which they shall be brought up, notwithstanding their deceased father was a Roman Catholic, and the Juvenile Court had placed the children with a Roman Catholic Children's Aid Society.

3. INFANTS (§ I C—10)—CUSTODY—POWER OF FATHER TO DISPOSE OF TO PREJUDICE OF MOTHER.

Sec. 14 of 8 Edw. VII. (Ont.) ch. 59, applies only to validate an agreement surrendering the custody of a child to a Children's Aid Society as against the parent signing the agreement, and, where signed by the father only, the mother is not debarred from claiming the custody.

4. INFANTS (§ I C—13)—CUSTODY — DISPOSAL OF—RIGHT OF BASTARD'S FATHER.

The custody of an illegitimate child cannot be controlled by its putative father.

[*Re C. (an infant)*, 25 O.L.R. 218, followed.]

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Statement

MOTION by Mary Helen Metcalf, mother of the infants Ilene (*sic*) May Maher and Frances Maud Maher, on the return of a writ of *habeas corpus* directed to the St. Vincent de Paul Children's Aid Society, for an order for delivery of the infants to the applicant.

A. R. Hassard, for the applicant.

T. L. Monahan, for the St. Vincent de Paul Children's Aid Society.

March 31. MIDDLETON, J.:—A writ of *habeas corpus* was granted at the instance of the mother, and on the return of the writ it was agreed that the truth and sufficiency of the return should be determined upon *viva voce* evidence. The evidence was taken before me on the 12th March instant.

Middleton, J.

The elder infant was born on the 25th August, 1902; the younger infant on the 13th November, 1903. The father and mother were not married until the 8th April, 1903; so that the elder child was not born in wedlock. Edward Maher, the father, was a Roman Catholic; the mother was an Anglican. This diversity of faith proved disastrous, although the evidence discloses little to indicate that religion occupied any prominent place in the life of either party. The father died on the 26th August, 1907. The mother married her present husband, Walter J. Metcalf, on the 3rd December, 1907.

The mother states that it was understood that any boys should be baptised and brought up as Roman Catholics, and that girls were to be brought up as Protestants.

In addition to the two infants named, a boy, now dead, was born, and he was baptised in the Roman Catholic Church. The two girls were also baptised in the Roman Catholic Church: Ilene, under the name of Mary Teresa, on the 17th May, 1906, at St. Peter's Church, by Father Minnehan; and Frances, under the name of Catherine Frances, on the 14th February, 1906, at St. Helen's, by Father McGrand. The mother states that these baptisms were without her knowledge. Miss Josephine Maher, who took the children to be baptised, states that it was with the mother's knowledge and approval.

I do not regard this as of importance; but I am inclined to think that Miss Maher has confused the occasion with the baptism of the boy; as she seems to have thought that the mother prepared the children to be taken to the church, speaking as of one

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occasion instead of the two that are indicated by the baptismal certificates.

Maher died of consumption, after having been ill for some time. During his illness he and his wife and children lived with his sisters, who are devout and zealous Roman Catholics. At this time the mother was not behaving well; and there was no doubt, then, ample reason for doubting her fitness to be the custodian of the children. Maher, on the 31st July, 1907, executed a document, prepared on a form in common use by children's aid societies, by which he recited that he was the father of these two girls, and the infant son, then alive, and that he was unable to maintain and care for the children, as he was without means, and unable, through illness, to earn a living for himself, or the infant children, and that he was desirous of intrusting the infants to the St. Vincent de Paul Children's Aid Society; and he, therefore, committed the said children to the care of the society, and appointed it to be the lawful guardian of the infants, until they attained the age of twenty-one years; releasing to the said society all claims of any kind, nature, or description upon the said children.

It was said that, contemporaneously, Maher executed a will appointing the society testamentary guardian of the children; but this will was not proved before me.

The mother kept the children, notwithstanding these documents and notwithstanding the knowledge of the society of what had been done. They were for a short time placed in the custody of a home in Gerrard street; but, after the second marriage, they lived with the mother and stepfather, together with a child, issue of an earlier marriage of the stepfather.

In 1908, the mother was convicted of forgery, and was imprisoned for thirty days. The family was then reduced to great poverty. The second husband was drinking, and the situation went from bad to worse, till proceedings were taken in the Police Court with reference to the custody of the children. These proceedings dragged on for a considerable time, the children being meanwhile left with the mother and stepfather. Upon the establishment of the Juvenile Court in Toronto, the proceedings were transferred to that Court, and were finally dealt with there, on the 29th January, 1912.

In the meantime—on the 13th October, 1911—the mother had been arrested for larceny, convicted, and sentenced to sixty days' imprisonment; being released on the 3rd December, 1912. Another child had been born, the issue of the second marriage. This child is now some two years of age. It was taken care of by the Protestant Children's Aid Society, and has now been restored to its mother's custody.

Upon the proceedings before Commissioner Starr, the record

shews that, with the consent of the parties—*i.e.*, the mother and the representative of the society—it was agreed that the children should remain in the custody of the society as wards, on condition that the mother pay $2 per week, "and if she makes good, children as wards of said society to be returned to her care."

The $2 has not been paid, but the society does not now make any point of this. The reason for payment being asked was, that the society makes arrangements for the adoption of children intrusted to them. Mrs. Metcalf desired the children to be retained by the society, and that they should not be put out.

On the same date, the 29th January, the Commissioner, in pursuance of the statute, made an order, in the case of each of the infants, finding it to be a dependent and neglected child and in danger of loss of health and morality on account of the immoral conduct and neglect of the mother, and directing the delivery of the child to the care of the society, to be kept at its home in Toronto until placed in an approved foster home. The children have not yet been placed in any foster home, and are still with the society.

The mother and stepfather have both "turned over a new leaf;" and the evidence before me entirely satisfies me that, under the circumstances as they now exist, the children can safely and properly be delivered to their custody and control. The child already mentioned as born of the second marriage has been restored by the Protestant Children's Aid Society to the custody of its parents, and another child, now five months old, has been born. The parents are not well off, but the stepfather has steady employment, and is well able to maintain a modest home. The officers of the Children's Aid Society have repeatedly visited this home, and they confirm the statements of other observers that it is a comfortable, clean, and well-kept place; so that, apart from legal difficulties, there is no reason why the order sought by the mother should not be made.

First, it is said that the decision of the Commissioner is final; and that, he having made an order for delivery to the Children's Aid Society, it is not open to the High Court to review it.

The statute 8 Edw. VII. ch. 59 deals with "neglected children." A "neglected child" is defined in sub-sec. (*i*) of sec. 2, and includes 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." In that statute (see sec. 2(*f*)) a distinction is drawn between a "Judge" defined in the statute as including, *inter alia*, a "Commissioner for the trial of juvenile offenders," and a Judge of the High Court. After the interpretation sections, provision is made for the appointment

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of a superintendent of "neglected and dependent children," the establishment of children's shelters and homes which may be supervised by a children's aid society—defined (sec 2(*b*)) as a society established for the protection of children from cruelty and for the care and control of neglected children, approved by the Lieutenant-Governor in Council—and provision is then made for the maintenance of such homes.

By sec. 10, a neglected child may be brought before the Judge, who is to investigate the case, after notice to the parents; and, if the Judge finds the child to be a neglected child, he may order the child to be delivered to the children's aid society, and the society may send the child to the society's temporary home, to be kept until placed in a foster home; or, if the Judge finds the child to be immoral and depraved, he may commit it to an industrial school.

By sec. 11, the children's aid society is, subject to the provisions of secs. 12 and 13, the guardian of the child, and may place the child in a foster home during minority or for any shorter period.

By sec. 12, a child thus made a ward of a children's aid society, or a child deserted by its parents and maintained by a children's aid society, is to be under the control of the society until it reaches the age of twenty-one or such earlier age as the society thinks proper; and during that time all the powers and rights of the parents shall, subject to the Act, vest in the society. A child whose parent has been convicted on a criminal charge or in respect of an offence committed against the child shall be deemed to be deserted by that parent (sub-sec. 5).

By sub-sec. 3, a Judge of the High Court or a County Court Judge, if satisfied, on complaint by a parent, that the child has not been maintained by the society, or was not deserted by the parent, and that it is for the benefit of the child, may restore it to its parent.

By sec. 13: "Where a parent applies to the High Court for an order for the production of a child committed under this Act, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may, in its discretion, decline to make the order." This is followed by provisions authorising the making of an order for the reimbursement of moneys properly incurred in bringing up the child, and by a provision (sub-sec. 3) that where the child has been abandoned or deserted, or allowed to be brought up at the expense of another person or of a children's aid society, 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 child to the

parent unless satisfied that, having regard to the welfare of the child, he is a fit person to have custody of the child. This is supplemented by a provision (sub-sec. 4) empowering the Court to direct that a child shall be brought up in the religion which the parent has a legal right to require, even if the parent is not given custody; and by a provision (sub-sec. 5) protecting any right which the child now has to exercise its own choice.

Section 14 provides that a parent who, by instrument in writing, has surrendered custody of a child to a children's aid society or home subject to inspection, shall not, contrary to the terms of the instrument, be entitled to the custody of or any control or authority over the child.

These are the provisions of the statute which relate to the matter before me.

Section 14 applies only to the parent who executes the instrument, and does not give to the father the right to hand over a child to a children's aid society, to the prejudice of the mother; and I, therefore, think that the instrument of the 31st July, 1907, may be ignored.

Then sec. 13 recognises the right of the High Court to deal with the custody of an infant whose case has been dealt with by the Commissioner. Power is given to the High Court, under certain circumstances, to decline to make the order sought. This implies the right of the Court to make the order notwithstanding the prior adjudication of the subordinate tribunal. The power of the Court of Chancery, now vested in the Supreme Court, to deal with the custody of children, can be taken from that Court only by an enactment couched in the clearest and most positive terms. The statute in question falls far short of this, and, as already pointed out, it tacitly recognises that jurisdiction.

With reference to the elder of the two infants, it is further to be observed that, as it was not born in wedlock, Maher had no right whatever. The rights of the mother of an illegitimate child were investigated carefully in a case reported as *Re C., an Infant* (1911), 25 O.L.R. 218; and I find nothing to add to what I there said.

In this case I interviewed the infants, and am satisfied that there is so much affection between them that they ought not to be separated; and, therefore, finding no unfitness in the mother to have their control at the present time, I think that I should award her the custody of both.

The only matter which occasions me trouble is the question of the religion of the younger child. The mother has said, and this has not been contradicted, that upon marriage it was understood between her husband and herself that any boys born of the marriage should be brought up as Roman Catholics; any girls

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should be brought up as Protestants. There is nothing definite before me to indicate that the father ever receded from this position. No doubt, at his instance, shortly before his death, the children were baptised in the Roman Catholic Church; and I might well infer from this that he would desire them to be brought up as Roman Catholics; but it must not be forgotten that at that time the mother was not behaving well, and the father may well have thought that she had really abandoned the children. I think that where, as here, the interests of the child demand that there should be a united home, and where as yet the children are too young to have any real religious preference, the Court has power to hand the children over to the custody of the mother, without imposing any condition as to the faith in which they shall be brought up.

I have yet to deal with the question of costs. I appreciate the motives of the Children's Aid Society. Their officers have acted with great care and prudence; and they did no more than their duty in carefully investigating the circumstances; and I would gladly relieve them from payment of costs if I did not realise that in so doing I should necessarily cast a burden upon the parents which, at the present time, they are not financially able to bear. I, therefore, fix the costs, which I order to be paid, at $50. This will not cover the costs of the application unless the applicant's solicitor is generous to his client.

Order accordingly.

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June 24.

Re VINING.

Ontario Supreme Court, Falconbridge, C.J.K.B. June 24, 1913.

1. WILLS (§ III B—88)—DECEASED LEGATEE—WHO TAKES BEQUEST TO.

The children of a legatee dying before a life tenant, but after the testator, take a bequest of a sum of money which the will makes payable, together with a share of the residue of the estate, on the death of the life tenant, by virtue of a testamentary provision that the share of a deceased legatee should be divided between his or her children.

2. WILLS (§ III L—191)—LAPSED LEGACY—DEATH OF LEGATEE WITHOUT ISSUE.

A bequest to a legatee who died without issue before a life-tenant, will lapse under a testamentary provision that the legacy, together with a share of the residue of an estate, should be payable to such legatee at the death of the life-tenant, or if not surviving, that it should be divided among the former's children.

3. WILLS (§ III G 5—140)—REMAINDERS — BEQUEST TO SURVIVING CHILDREN—CHILD DYING BEFORE EXECUTION OF WILL.

Issue of a daughter who died before the execution of her father's will, take nothing under a bequest of the residue of his estate to his children, with a provision that, should any of them be dead the share should be divided between his or her children.

[*Re Musther*, 43 Ch.D. 569; *Re Webster's Estate*, 23 Ch.D. 737; *Butler* v. *Ommaney* (1827), 4 Russ. 73; and *Christopherson* v. *Naylor* (1816), 1 Mer. 320, followed.]

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RE VINING.

MOTION by the executors of the will of Ilonzo Vining, deceased, under Con. Rule 938, for an order determining certain questions arising upon the construction of the will.

J. Vining, for the executors.

C. G. Jarvis, for the surviving children of the testator.

W. R. Meredith, for the Official Guardian, representing the infant grandchildren, and for Mrs. Mallory.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—The testator died on the 23rd May, 1895, leaving a will dated the 21st September, 1894.

By paragraph 3, the testator devised the income of all his property, both real and personal, to his wife for life.

By paragraph 4, he directed that, after the decease of his wife, all his property was to be converted, and out of the proceeds he bequeathed the following legacies, amongst others: to his daughter Amelia Brown $400; to his daughter Hannah Vining $800.

By paragraph 5, he directed "that all the rest and residue of my estate both real and personal that I shall own after the payment of the legacies" should be divided between all his sons and daughters equally; and, should any of his sons and daughters be dead, he directed that the share of one so dying be divided between his or her children.

The widow died on the 26th January, 1913. Amelia Brown died intestate on the 21st January, 1913, leaving her surviving her husband and several children, who have assigned their interest to their father. Hannah Vining died, unmarried and intestate, on the 18th January, 1899. Elizabeth Knapp died, a widow and intestate, in 1892, leaving her surviving several children and children (infants) of a deceased child.

The questions for determination, in the events which have happened, are:—

(1) Is Lorenzo Brown, husband of the late Amelia Brown, entitled to the legacy of $400 and also to a share of the residue?

(2) Are the next of kin of Hannah Vining entitled to the legacy of $800 and also to a share of the residue?

(3) Are the next of kin of Elizabeth Knapp entitled to a share of the residue?

With regard to the legacies, I think that each of the legatees had a vested interest on the death of the testator, and not an interest conditional on surviving the tenant for life.

With regard to the residue, the children of Amelia Brown are clearly entitled to the share which would have gone to their mother, had she survived the tenant for life; and it seems also clear that the share of Hannah Vining, who died unmarried, lapses, and is divisible among the others entitled.

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There is more difficulty in regard to Elizabeth Knapp; but, I think, the authorities compel me to hold that, as she died before the date of the will, she could not be capable of taking under it; and, although she left children living at the time of the death of the life-tenant, these could not take in substitution for her: *Christopherson* v. *Naylor* (1816), 1 Mer. 320; *Butter* v. *Ommaney* (1827), 4 Russ. 73; *Re Webster's Estate* (1883), 23 Ch. D. 737; *Re Musther* (1890), 43 Ch. D. 569.

I think the questions should be answered as follows:—

(1) Alonzo Brown, as husband and as assignee of his children's share, is entitled to the legacy of $400 and to the share of the residue to which Amelia Brown would have been entitled had she survived the tenant for life.

(2) Hannah Vining's estate is entitled to the legacy of $800, but not to any share in the residue.

(3) Elizabeth Knapp's estate has no interest under the will.

Costs to all parties out of the estate.

Order accordingly.

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June 2.

STURGEON v. CANADA IRON CORPORATION.

Ontario Supreme Court. Trial before Lennox, J. June 2, 1913.

1. MASTER AND SERVANT (§ II A 3—50)—LIABILITY OF MASTER—INJURY AT WORK—DUTY TO WARN OR INSTRUCT.

The fact that the employee is set at dangerous work at night for the first time, places upon the employer the duty of taking special care that the employee should receive all requisite instruction and warning for his protection while working where there is no light.

2. MASTER AND SERVANT (§ II A 2—46)—METHODS OF WORK—DEFECTIVE SYSTEM—COMMON LAW LIABILITY.

Where the employee sustains injury which he could not have avoided by the exercise of reasonable care by reason of the defective system of work operated by the employer, the latter is liable both at common law and under the Workmen's Compensation Act (Ont.).

Statement

ACTION by Joseph F. Sturgeon, an employee of the defendants, to recover damages for injuries sustained by him while acting as brakesman on a train of cars at the defendants' works. The plaintiff claimed at common law and also under the Workmen's Compensation for Injuries Act.

A. E. H. Creswicke, K.C., for the plaintiff.

W. A. Finlayson, for the defendants.

Lennox, J.

LENNOX, J.:—I cannot accept the evidence of Frederick Brennan. I cannot believe that the plaintiff was paid for riding up and down the trestle for three days, in order that Brennan should tell him when to throw the switch and where to put the cars; and this at a time when no change in the plaintiff's employment was contemplated; and, even if I believed Brennan,

his evidence would fall far short of shewing that the plaintiff was instructed or warned, as he should have been; in fact, there is no suggestion that he had any notice or warning whatever of the dangers to be encountered.

It was not, and it cannot be, denied that the trestle presents exceptional dangers. The plaintiff was a green hand as regards this work. In the absence of specific instructions, his experience in the yard, on solid ground, would count against his chances of safety, rather than otherwise. The fact that he was set to work at night, to grope for experience in the dark, multiplied the risks for the plaintiff, and accentuated the duty of the defendants to take special care.

In the absence of notice or warning, the plaintiff, in attempting to alight as he did near the switch as the car stopped, had the right to expect and believe that he would find some platform, walk, or structure upon which he could land and proceed with safety to the switch. In face of abundant uncontradicted evidence of the practice of landing upon and running along the walls, and evidence too that the method the plaintiff was attempting was sometimes pursued, it is idle to argue that the defendants expected or intended that the plaintiff should remain upon the car until the switch-platform was reached. Brennan was with the plaintiff the first night he worked upon the trestle until midnight, but they were not working near the switch or track in question; and, in fact, the accident occurred upon the very first occasion upon which the plaintiff was called upon to turn the left switch. The plaintiff could not, by the exercise of reasonable care, have avoided the injuries he sustained.

The defendants are liable as well at common law as under the statute, but I need not separately assess the damages, as the statute is broad enough to cover the amount which, I think, the plaintiff is fairly entitled to recover. There will be judgment for $1,800 with costs.

Judgment for plaintiff.

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June 18.

McCARTHY v. CITY OF HULL.

Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll, and Gervais, JJ. June 18, 1913.

1. ESTOPPEL (§ III E—73)—SUBMISSION BY CONDUCT—EXCESSIVE TAXES PAID WITHOUT PROTEST.

An assignee cannot recover taxes paid on the ground that the assessments were excessive, under an assignment of the claim from the heirs of a taxpayer who had paid such taxes for many years without protest or claim that the assessments were excessive.

Statement

APPEAL by plaintiff from the dismissal of the action.

This was an action to recover some $8,000 of alleged improper and excessive assessments on property in the city of Hull, paid since 1888. The defence was that the claim was one of litigious rights, the heir of the original holder of the property having transferred this claim to the appellant. The trial Judge maintained the defence of litigious rights and dismissed the action.

It appeared that the property had once belonged to a Mrs. Russell, who left as sole heir one J. W. Russell. He died in turn in 1908, and the Crown was seised of his vacant estate. But in 1910, a Mrs. Jackman, of Newport, U.S.A., was declared the lawful heir by petition of right. Part of the property had been sold, and in September, 1910, she sold all her rights and claims against the city of Hull to appellant for one dollar and other valuable consideration. What the other consideration was, however, was never revealed. The city pleaded this was a transfer of litigious rights, and tendered $80.70, representing the costs of transfer and costs of an action of that class up to plea.

A. McConnell, for appellant.

J. W. Ste. Marie, for respondent.

The judgment of the Court was rendered by

Trenholme, J.

TRENHOLME, J.:—We think the trial Judge was right. We think the action should fail on another ground also. The proprietors in their lifetime never questioned the validity of these assessments, and always paid without protest these taxes during 10 or 12 years. The appellant alleges excessive valuation. Originally this property was farm land, but it was subsequently subdivided into lots for real estate purposes, and the valuation was naturally increased.

Appeal dismissed.

HUNTER v. RICHARDS

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Ontario Supreme Court (Appellate Division), Garrow, Maclaren, R. M. Meredith, Magee, and Hodgins, JJ.A. February 26, 1913.

1. WATERS (§ II E—100)—POLLUTION BY SAWMILL REFUSE—LIABILITY FOR.

In the absence of a grant or prescriptive right the owner of a saw-mill is answerable for injuries resulting from the fouling of the waters of a stream by saw-dust and mill refuse cast into it.

[*Hunter* v. *Richards*, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, affirmed.]

2. WATERS (§ II E—100)—RIGHT TO POLLUTE BY GRANT.

As against one claiming title from a common grantor, the defendant did not acquire a right to pollute the waters of a stream with saw-mill refuse, by virtue of a condition of his purchase of a mill site that he should erect a saw-mill thereon, where he subsequently received a grant of the land free from such condition.

[*Hunter* v. *Richards*, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, affirmed.]

3. EASEMENTS (§ IV—46*a*)—PRESCRIPTIVE RIGHTS — LOSS OF — PAYMENT OF DAMAGES—INTERRUPTION OF USER.

A claim of prescriptive right to foul the waters of a stream is defeated by proof that, for a number of years within the period necessary to acquire a prescriptive right, annual payments were made a lower riparian owner for damages occasioned by the pollution of the stream.

[*Hunter* v. *Richards*, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, affirmed.]

4. EASEMENTS (§ II A—7)—POLLUTION OF STREAM—LOST GRANT.

In an action for the pollution of the waters of a stream a defence of a right to do so under a lost grant cannot prevail in the face of testimony from the defendant that he had made annual payments for a number of years in respect to the damages occasioned by the fouling of the stream.

[*Hunter* v. *Richards*, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, affirmed.]

Statement

APPEAL by the defendants from the order of a Divisional Court, *Hunter* v. *Richards*, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, affirming the judgment of Latchford, J., in favour of the plaintiff, in an action to recover damages for injury done to the plaintiff by the defendants in fouling Constant creek, in the township of Grattan, and obstructing the flow of water to the plaintiff's mill by throwing refuse in the creek, and otherwise injuring the plaintiff.

W. N. Tilley, for the appellants.

Peter White, K.C., and *M. L. Gordon*, for the plaintiff.

The authorities cited are referred to in the opinions delivered in the Court below, and the questions argued upon this appeal are stated in the judgment which follows.

The judgment of the Court was delivered by

Meredith, J.A.

MEREDITH, J.A.:—The judgment pronounced at the trial of this action has been anything but successfully assailed

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in this Court or in the Divisional Court; it was, as it seems to me, quite right.

It is not open to question that the defendants, through their saw-milling operations, create a nuisance upon the plaintiff's land, as well as many other lands, and also in the waters in question, causing very appreciable injury; a nuisance which becomes more and more objectionable and injurious as the surrounding country becomes more settled, and the lands affected more highly cultivated and more valuable.

The defendants attempt to justify this nuisance and these injuries, in so far as they affect the plaintiff's land, on the ground that they were within their legal rights in all that they have done in the past, as well as in their intention to continue them in the future.

This alleged right is put in three ways: (1) under an implied grant from the plaintiff's predecessors in title; (2) by prescription; and (3) under "a lost grant." But, in my opinion, they have quite failed to establish in evidence—the onus of proof being of course upon them—anything like any one of such rights.

The first of the grounds is based upon the fact that the land of the defendants was purchased from the then owner of it, who was then also owner of the plaintiff's land, on the condition that the purchaser should build a saw-mill and a grist-mill upon it, within a specified time. Some years afterward, the saw-mill having been erected and some steps taken towards the erection of the grist-mill, the vendor was satisfied in respect of these conditions, and granted the land free from them; as well might be, the grantor having no interest, except the public welfare, in the erection of the mill; and so, so much having been done, the rest was quite reasonably left to the law of demand and supply. At all events, the Crown Lands Department was quite satisfied; and the grant was deliberately and intentionally made free from the conditions imposed under the contract of sale, conditions which, at the time of making the contract, were intended to be fulfilled before the grant was made.

In these circumstances, what possible right could the grantees have beyond those expressed in the grant and those which would go with the sale of any land having a mill-site upon it? And assuredly it neither carried the right to commit nor to continue, through all time, a great and far-reaching nuisance, and one which might perhaps be a crime at common law—for mill-waste travels far and is an enemy of navigation. It appears to me that it would be entirely wrong to imply any grant in this case; and that the doctrine of estoppel would be basely used if applied in the defendants' aid. But, assuming that in either

way the grantor could not object to any injury affecting the lands now owned by the plaintiff, arising from a reasonable use of the mill-stream for the purpose of saw-milling, that would give no everlasting right to continue early-day loose methods, even if early-day necessities made them then excusable; and it is made quite plain, upon the evidence, that present-day reasonable precautions would prevent all that the plaintiff complains of; and, indeed, are all that he asks for. If the defendants' contention be right, they and a thousand and one other grantees of the Crown, and all persons claiming under them, would have the right still to pollute the waters of this Province, in even more objectionable ways, because in early days that was commonly done.

In view of the defendants' testimony alone, it is quite impossible to give weight to the second ground relied on by them. In the year 1896, the defendants paid the plaintiff $100 for the injury caused to his land by the nuisance complained of; for a number of years afterwards they paid him so much a year for removing the mill-waste—also called drift-wood by parties and witnesses—which was the main cause of his complaint; and since that time they have sent their own men to do that work. The defendant Harry Richards, in his examination in chief in the plaintiff's behalf, at the trial, puts it thus:—

"Q. What do you say as to whether he is suffering any damage from any driftwood or sawdust put in the creek by you during the last six years? A. I do not consider he has suffered any that I have not compensated him for.

"Q. What do you mean by that? A. That I have not paid him for.

"Q. I am speaking of the last six years though. A. Well, any flood-wood that went on to his meadow after that, I picked it off, except last year he sent up word and I sent men down to pick it off every year except one year he refused; I have in my notes there where he refused."

The third ground is the extraordinary one that, notwithstanding these things, and though the defendants may have no defence to this action under any statute of limitations, they have under the fiction of a lost grant: and, in order to make a defence in that way, they ask the Court to disregard the present, to disregard all this evidence to the contrary, and to treat this trial as if it were being held before the year 1896, when the $100 were paid; that is to say, that the Court is first to exclude evidence of the greatest weight, and then to determine in the plaintiff's favour that the case is one of lost grant; and this although it may be that, had the trial taken place over sixteen years ago, evidence not adduced at this trial might possibly have been given which would have as effectually defeated this defence as Harry

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Richards's testimony did that on the second ground. It would be extraordinary if in this case, obviously failing on their second ground, the defendants could succeed upon the third.

Upon the whole evidence, no one could reasonably find that there was any grant from any one, at any time, giving the defendants the right now to injure the plaintiff's land as they are doing; nor indeed that, on the whole, there is any reasonable evidence of possession from which such a grant might be presumed.

In dealing with questions of this nature, the character of this country in the earlier days of its settlement, and the needs of the earlier civilised inhabitants, must never be overlooked if justice is to be done. Things which were then the order of the day would mightily surprise land-owners of older settled countries, and even many of us of this country of later birth or adoption. The needs of the earlier settlers in their gigantic and heroic task of entering into the primeval forests and converting them into fertile lands brought about a fellowship and liberality which gave, by leave to one another, rights of entry, rights of passage, and other rights such as if all were members of one great family. Indeed, until later years any one, even the greatest stranger, was permitted to shoot, trap, hunt, and fish, and gather natural fruits, where he would; but gradually these privileges are being withdrawn: "accommodation roads" are closed, and "trespassing is forbidden" is coming to be the rule rather than the exception; but all these things when done, including the fouling of streams, was seldom as of right, but only as of neighbourliness—tacit license.

Equally with the other grounds of defence, this ground is, in my opinion, quite untenable.

I would, therefore, unhesitatingly, dismiss the appeal.

Appeal dismissed with costs.

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RICE v. SOCKETT.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. July 2, 1913.

1. CONTRACTS (§ I V C—357)—BUILDING CONTRACT — DEFECTS—WAIVER.

The failure of a contractor to join the ends of some of the reinforcing rods in a cement structure as required by contract, will be deemed waived by the owner's failure to require it to be done when the omission occurred, of which he was then aware, as the defect was one that could not be afterwards rectified.

2. DAMAGES (§ III A 1—42*a*)—BUILDING CONTRACT—FAULTY CONSTRUCTION OF SILO—LOSS OF CROP GROWN FOR STORAGE—LIABILITY OF CONTRACTOR.

A contractor who builds a silo in so faulty a manner as to render it useless, is answerable for the loss sustained by the owner in not being able to use it for storing a crop of corn which it was in the

contemplation of both parties that the silo should protect when harvested, regard being had to the means whereby the loss was or could have been minimized by the owner.

Statement

APPEAL by the plaintiff from the judgment of the County Court of the county of Wellington dismissing an action in that Court, and allowing the defendant $96 on his counterclaim.

The judgment appealed from was upon the second trial of the action; the judgment on the first trial having been set aside and a new trial directed by a Divisional Court: *Rice* v. *Sockett* (1912), 8 D.L.R. 84, 27 O.L.R. 410.

The judgment below was varied.

R. L. McKinnon, for the plaintiff.

J. J. Drew, K.C., for the defendant.

Magee, J.A.

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

The amount involved in the plaintiff's claim for construction of a concrete circular silo is $180. The plaintiff was to furnish the cement and doors and do the work. The defendant was to provide the gravel and stone and water. The plaintiff admits that he was to do a first-class job, so far as his own material and the workmanship were concerned.

The defendant alleges that the work is very rough and defective, the concrete improperly mixed so that it does not form a hard, solid wall, and has in many places so little binding that it readily disintegrates, and it would be unsafe to use. He also alleges that two of the series of horizontal reinforcing rods, which were to go entirely round the silo at different heights and to have the ends hooked together and to be imbedded in the cement, do not go around, but stop at the sides of two doors or openings, and, consequently, the ends are not hooked together and do not meet, but are merely bent and anchored in the cement.

It is unnecessary to enter into the question whether, as to these two rods, the failure to fasten them together was owing to a change made, at the defendant's request, in the height of the doors or openings, or whether, when that change was made, the rods should have been put in a different position. Although the defendant objected to them, and, by changing the interval between the rods, the subsequent ones were hooked together, it does not appear that he in any way required the plaintiff to change the two rods which he objected to, but allowed him to go on and finish the silo.

But on the question of the workmanship in the concrete wall itself, which the learned trial Judge has found to be defective, whatever opinion one might be inclined to form from merely reading the evidence, which is contradictory, the weight to be attached to the statements of individual witnesses is a

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matter which the trial Judge has so much better an opportunity of forming an opinion upon that an appellate Court would not be justified, in the circumstances, in interfering with his conclusions. He has dealt very fully with the various differences between the parties, and has held that the plaintiff did not in fact perform his contract, and, consequently, cannot claim payment for it.

The evidence was fully dealt with by counsel; but there does not seem warrant for considering that the learned trial Judge did not reach a correct conclusion when he finds lack of sand, which the defendant offered, lack of cement and lack of proper mixing, resulting in a honeycombed or crumbling wall, and when he prefers to believe the defendant, instead of the plaintiff's foreman, who contradicts him.

The defendant has not only resisted payment for the silo, but has counterclaimed for damages sustained through not being provided with a silo for the preservation of a crop of eight acres of corn which, in expectation of its construction, he planted and cultivated; and for this the learned trial Judge has awarded $96 to the defendant. The learned trial Judge appears to have been fully justified in finding that it was in the contemplation of the parties that the silo was to be used for a crop of corn that year. The defendant says that, having no place to put the crop, he left it in the field, feeding it to his cattle as he could, but in that way one-half of his crop was lost. He himself could not give any idea of the amount of his crop, except that it was a good one, nor of its value, nor of his loss. The learned trial Judge appears to have arrived at the sum of $96 by computing the crop as twelve tons to the acre and worth $2 per ton in the field, and the loss at one-half the crop. But the same expert witness, whose valuation the learned Judge accepts in this regard, puts the difference between the use or non-use of a silo as only from four to twenty or thirty per cent. in favour of the former, which perhaps he means to be exclusive of the loss from vermin and birds; but he apparently considers the main loss of leaving the corn in the field to be the exposure to the weather, which he puts at twenty per cent., or more if till late in the season. The defendant made no effort to dispose of any of the corn, nor, so far as appears, to increase his stock of cattle for the purpose of using it. It appears that it is unusual to sell corn; but it does not appear that farmers or others might not be ready to buy. The defendant did nothing to minimise his loss, and, singularly enough, grew as much corn the following year, having no silo. Taking his statement that he lost half the corn, there is no evidence that such loss was the result of not having the silo. Upon the

evidence $40 would, I think, cover all that the plaintiff should pay.

The judgment should, I think, be varied by reducing the damages on the counterclaim to that amount. With that exception the appeal should be dismissed, but without costs.

Judgment accordingly.

BOOKER v. O'BRIEN.

(Decision No. 2.)

Saskatchewan Supreme Court, Haultain, C.J., Johnstone, Lamont and Brown, JJ. July 9, 1913.

1. BROKERS (§ II B—10)—REAL ESTATE BROKER—COMMISSIONS UNDER OPTION CONTRACT—DEFAULT OF PRINCIPAL.

Where as part of an agency agreement with an real estate agent, an option contract was given to him stipulating for the payment out of the purchase money of a sum as "commission" in the event of the sale of the property before the expiry of the option, the optionee is entitled to such commission where the owner refused to sell to a person produced by the optionee within the stipulated time, who was able and willing to buy on the terms of the option.

[*Booker* v. *O'Brien*, 9 D.L.R. 801, affirmed; *Kelly* v. *Enderton*, 9 D.L.R. 472, referred to. As to real estate agents' commissions generally, see Annotation, 4 D.L.R. 531.]

Statement

APPEAL by the defendant from the judgment of Newlands, J., *Booker* v. *O'Brien*, 9 D.L.R. 801, against him for commission on a sale of real estate.

The appeal was dismissed.

G. F. Blair, for appellant.

W. B. Willoughby, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—The plaintiff and defendant entered into the following agreement on the 10th January, 1912:—

Moose Jaw, Sask.,
January 10th, 1912.

For and in consideration of the sum of one dollar cash in hand, the receipt of which is hereby acknowledged:—

I, T. R. O'Brien, owner of lots eleven (11) and twelve (12), in block seventy-two (72), being in the town of Swift Current, province of Saskatchewan, do by these presents sell, grant and convey unto John T. Booker, of Swift Current, Sask., an option to buy the lots above-mentioned at a price of sixteen thousand dollars on following terms, viz.: six thousand dollars cash on execution of contract, five thousand to be paid six months from date of contract, five thousand to be paid twelve months from date of contract, with eight per cent. interest.

I also agree to pay John T. Booker one thousand dollars to be taken out of second payment as commission provided sale of lots herein men-

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tioned is made not later than Jan. 25, 1912, on which date this option expires at 18 o'clock.

(Sgd.) T. R. O'BRIEN.
(Sgd.) J. T. BOOKER.

The plaintiff lived at Swift Current, Sask., and conducted a "real estate" business there. On January 25, one T. H. McVicar agreed to purchase the said property on the terms set out in the agreement, through the plaintiff, and paid a deposit of $300 to the plaintiff's clerk, one Delaney, who was in charge of the plaintiff's office and business during his absence. On the same day, Delaney notified the defendant of the transaction by the following telegram:—

Swift Current, Sask.,
Jan. 25, 1912.

T. R. O'Brien,
Empress Hotel, Moose Jaw, Sask.

Lots eleven and twelve, block seventy-two sold, wire confirmation to Swift Current, am writing.

JOHN T. BOOKER.

and confirmed the telegram by the following letter written on the same day:—

Swift Current, Sask.
Jan. 25, 1912.

Mr. T. R. O'Brien,
Moose Jaw, Sask.

Dear Sir,—In confirmation of my wire of this morning, which reads as follows: "Lots eleven and twelve, block seventy-two sold. Wire confirmation. Am writing." I have sold according to the option you gave.

You may forward contracts to us and we will then complete them and forward same to our buyer.

Kindly give this your early attention.

Yours very truly,
J. T. BOOKER,
per E. E. Delaney.

Delaney also gave McVicar a receipt for the $300 paid by him, in the following form:—

$300. January 25, 1912.

Received from T. H. McVicar three hundred 00/100 dollars. Deposit on purchase of lots 11 and 12, block 72, price ($16,000) 6,000 cash, balance six and twelve months. Balance of first payment when papers are executed.

J. T. BOOKER,
per E. E. Delaney.

The above telegram was received by the defendant O'Brien early in the afternoon of the 25th January, and in reply to it he sent the following telegram:—

Moose Jaw, Sask.,
Jan. 25, 1912.

John T. Booker,
Swift Current.

Wire received at one, option expired, not for sale at present.

According to the evidence this telegram was received by Delaney between three and four on the afternoon of January 25, and its contents were communicated by him to McVicar, who was present when it arrived.

Apparently no other negotiations took place between any of the parties, and the present action was brought, in which the plaintiff claims $1,000 commission for procuring a purchaser able and willing to buy the property on the terms set out in the agreement. The action was tried before Mr. Justice Newlands, without a jury, and the plaintiff recovered judgment for the amount of his claim.

The defendant appeals from that judgment on the ground that the agreement above set out is only an agreement for sale to the plaintiff on option and is not an agency agreement entitling the plaintiff to a commission on a sale to a third party.

With some hesitation I come to the conclusion that the agreement in question is not only an agreement for sale on option, but is an agency agreement as well. If the agreement is nothing more than an agreement for sale to the plaintiff on option, any reference to a "commission" to be taken out of the second payment was quite unnecessary, and the stipulated second payment would have been $4,000 instead of $5,000. The use of both the words "sale" and "option" in the last clause of the agreement points clearly, in my opinion, to alternative action, otherwise the words "on which date this option expires" are superfluous.

The case of *Kelly* v. *Enderton*, 9 D.L.R. 472, [1913] A.C. 191, 82 L.J.P.C. 57; which was cited in the argument, had to do with an agreement very similar in form to the present one, and decided that it was not only an agency agreement, but was also an agreement for sale on option.

Finding, as I do, that there was an agency agreement, the question now arises, did the plaintiff earn his commission? It is argued on behalf of the appellant that in any case no commission was earned because no sale was completed within the time limited by the agreement. I cannot agree that that was the intention or meaning of the document in question. The plaintiff procured a purchaser able and willing to buy the lands on the terms agreed to by the defendant, and that fact was notified to the defendant within the time specified. Nothing more remained to be done by the purchaser except to make the cash payment on "execution of the contract," which was not re-

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quired or contemplated to be done within the time mentioned. In any event the defendant refused to carry out the sale before the stipulated time had expired, and thereby relieved the plaintiff and the purchaser from any further action.

The plaintiff is, therefore, in my opinion, entitled to his commission, and the appeal should be dismissed with costs.

Appeal dismissed.

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COCKBURN v. KETTLE.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Sutherland, J. March 27, 1913.

1. MALICIOUS PROSECUTION (§ III—20)—ACTION FOR—TERMINATION OF PROCEEDINGS—REBUTTING PRIMA FACIE CASE—COMPROMISE.

It may be shewn in defence of an action for malicious prosecution that the termination of a criminal proceeding in the plaintiff's favour was in fact the result of compromise or agreement, notwithstanding the records shew that the dismissal was based on the prosecutor's statement that he did not have any evidence to offer.

[*Baxter* v. *Gordon Ironsides & Fares Co.*, 13 O.L.R. 598, applied.]

2. MALICIOUS PROSECUTION (§ III—20)—ACTION FOR—TERMINATION OF PROCEEDINGS IN PLAINTIFF'S FAVOUR—COMPROMISE.

A favourable termination of a criminal prosecution for obtaining chattels with intent to defraud, so as to permit the recovery of damages for malicious prosecution, is not shewn where the prosecution was dismissed only upon terms of the prisoner giving security to pay for the property.

3. ABUSE OF PROCESS (§ I—1)—ACTION FOR—EVIDENCE—TERMINATION OF PROCEEDINGS—NECESSITY OF SHEWING.

In an action for abuse of criminal process by causing an arrest in order to coerce payment of a debt, it is necessary to shew that the proceeding terminated in the plaintiff's favour.

Statement

AN action for damages for malicious prosecution and false arrest.

The statement of claim was as follows:—

1. The plaintiff is a tenant farmer, residing in the township of West Flamborough, in the county of Wentworth; and the defendant is a retired farmer, in the village of Wilsonville, in the county of Norfolk.

2. On or about the 27th day of March, 1912, the plaintiff attended, on invitation, a public auction sale held and conducted on the defendant's farm, purchased some $560 worth of cattle thereat, and gave his promissory note at seven months' time in favour of the defendant; and the said note was not due or payable at the time the matters hereinafter referred to occurred.

3. On or about the 1st day of May, 1912, the defendant swore out an information and had issued by one W. H. Moss, Esquire, a Justice of the Peace in and for the County of Wentworth, a warrant, and under and by virtue of it arrested the plaintiff,

falsely charging therein that the said plaintiff had committed the crime of having unlawfully, with intent to defraud by false pretence, obtained from the defendant five head of cattle, and caused him to be taken by a constable of the said county to the police station at the town of Dundas, in the county of Wentworth, and there to be imprisoned and kept in durance until the following day, when he was brought before one E. S. Woodhouse, a Police Magistrate at the said town of Dundas.

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4. On the said last-mentioned day, the defendant was brought before the said magistrate, at the hour of two o'clock in the afternoon, and the defendant procured an adjournment and a remand of the plaintiff to further imprisonment until the hour of five o'clock in the same afternoon, when the said defendant asked leave to withdraw the case, as he had no evidence to offer. Whereupon the said magistrate dismissed the same and discharged the plaintiff out of custody, whereby the said prosecution was determined.

5. In the meantime the defendant had procured the plaintiff's landlord, one Nicholson, to become an endorser of the plaintiff's note for $560 aforesaid, the said Nicholson, by arrangement, having secured a chattel mortgage on all the plaintiff's goods and chattels as indemnity against payment of the said note.

6. The plaintiff alleges, as the fact is, that the defendant wrongfully and maliciously used the criminal process of the Court to procure the said endorsement to the said note.

7. By reason of the premises, the plaintiff was falsely and maliciously arrested and prosecuted, has wrongfully suffered imprisonment, been injured in his character and reputation, and has incurred expense in arranging the said chattel mortgage security, and in defending himself from the said charge and obtaining his release from the said imprisonment.

8. The plaintiff, therefore, claims damages for said malicious prosecution and false arrest, his costs of this action, and such further and other relief as to this honourable Court may seem fit and proper.

The statement of defence was as follows:—

1. The defendant admits the allegations contained in the first paragraph of the statement of claim.

2. The defendant admits the allegations contained in the second paragraph of the plaintiff's statement of claim, but says that the invitation on which the plaintiff attended the auction sale was the invitation issued to the general public by advertisement or otherwise.

3. The defendant admits the allegations contained in the third paragraph of the statement of claim, excepting that the defendant denies that the information and warrant under which the plaintiff was arrested, falsely charged that the plaintiff

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had committed the crime of having unlawfully, with intent to defraud by false pretence, obtained from the defendant five head of cattle. The defendant says that, when he laid the said information and caused the said warrant to be executed, he was in possession of information and facts which led him to believe that the plaintiff was guilty of the charge laid, and on the said information and the facts which the defendant was then in possession of, and on information and facts which have since come into his possession, he now believes and pleads that the plaintiff was guilty of the charge laid, and pleads reasonable and probable cause for the prosecution and arrest of the plaintiff.

4. The defendant caused the arrest of the plaintiff on the advice of his solicitor and of Magistrate Woodhouse and of James Clark, High Constable for the County of Wentworth, and with the full intention of pressing the charge laid, and was present with counsel at the court-room at the hour fixed by the magistrate for the purpose of pressing the charge, when he was approached by the plaintiff's counsel with the suggestion that a settlement be made and that the case be dropped. The plaintiff's landlord also requested and suggested that a settlement be arrived at; and, on these requests, and out of consideration for the plaintiff's wife, who was present and was much grieved on account of the plaintiff's arrest, the defendant, on the advice of his solicitor, agreed to a settlement and asked leave to withdraw the charge.

5. The defendant admits the allegations contained in the fifth paragraph of the statement of claim, excepting the amount of the plaintiff's note endorsed by the said Nicholson, and says that two notes were taken, which, with interest, amounted to $596.42.

6. The defendant denies the allegations contained in the remainder of the statement of claim, and puts the plaintiff to the proof thereof.

7. The defendant further says that, on the 2nd day of May, 1912, the said plaintiff, on the advice of and in the presence of his counsel, executed a release of all claims for damage which said release reads as follows:—

"Memo. of agreement made between (made May 2nd, 1912), W. B. Cockburn, of the first part, and Clarence C. Kettle, of the second part.

"Whereas the said Cockburn purchased from the said Kettle certain cattle for $562.30, which the said Kettle claims were obtained by false pretences, but which the said Cockburn denies.

"And whereas the said Kettle instituted proceedings against the said Cockburn whereby the said Cockburn was placed under arrest.

"And whereas security has been given by the said Cockburn

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for his indebtedness to the said Kettle, and the said Kettle has agreed to drop his prosecution of the said action instituted by him.

"Now, therefore, in consideration of the premises and of the sum of one dollar now paid by the said Kettle to the said Cockburn (the receipt whereof is hereby acknowledged), the said Cockburn, for himself, his heirs and assigns, hereby agrees to release and waive all his claims for damages which he may or may not have against the said Kettle by reason of the institution by the said Kettle of the said proceedings and the arrest of the said Cockburn or anything in connection therewith or in any wise howsoever."

The defendant claims that the said release is a complete answer to the plaintiff's claim herein, and that the plaintiff is estopped thereby from recovering from the defendant any damages herein.

The plaintiff's reply was as follows:—

1. The plaintiff says that the release referred to by the defendant in his statement of defence as a complete answer to the plaintiffs' claim herein, is illegal and void in law, was procured under pressure and duress while he was in prison under a warrant issued by the defendant, and was not explained or fully understood by him when executed.

2. The plaintiff further pleads that the defendant had no reasonable or probable cause whatever to charge him with the commission of a crime and to imprison him, and did not act on the solicitor's advice given him, but made that a pretext for his action and conduct, and did not lay all the facts fully before his legal advisers, if any such were consulted.

3. In all other respects the plaintiff joins issue on the plaintiff's statement of defence.

January 14. The action came on for trial before FALCONBRIDGE, C.J.K.B., and a jury, at Hamilton.

W. M. McClemont, for the plaintiff.

S. F. Washington, K.C., for the defendant.

Leave was given to the plaintiff to amend the statement of claim, paragraph 8, by adding after the words "false arrest" the words "and for abuse of the process of the Court and proceedings therein;" and to the defendant to amend the statement of defence, by adding a paragraph, at the end, setting up that the proceedings before the magistrate were not terminated in the plaintiff's favour by dismissal on the merits; and the pleadings were amended accordingly.

The learned Chief Justice then proceeded, without the assistance of the jury, to try the issue as to the validity of the release.

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At the conclusion of the evidence upon this issue, judgment was given as follows:—

FALCONBRIDGE, C.J.:—As to the facts, I find, upon the evidence, that the plaintiff fails in proving his reply; the release was not procured under pressure; it was fully explained to him and executed by him voluntarily, without any duress or pressure, with the natural persuasion which his landlord and his wife may have brought to bear upon him, but which has nothing whatever to do with coercion or duress or pressure.

The learned Chief Justice then asked for argument upon the question whether the release was void as being against public policy; but, upon the suggestion of counsel for the defendant, that the issue as to whether there had been a termination of the criminal proceedings favourable to the plaintiff, should also be tried without a jury, the learned Judge heard evidence on that issue.

Edwin A. Woodhouse, the magistrate before whom the plaintiff was brought, identified the information and his endorsement upon it, which says: "The prosecutor says he has no evidence to offer, and the charge is dismissed." The magistrate said that when the case was called, the accused (the plaintiff) pleaded "not guilty," and asked for an adjournment; that an adjournment was made till a later hour on the same day; that after the adjournment the counsel for the prosecutor (the defendant) said that he had no evidence to offer; and that the witness (the magistrate) then dismissed the charge, making the endorsement stated.

The learned Chief Justice then heard argument, and gave judgment as follows:—

FALCONBRIDGE, C.J.:—The case seems to be, in this new aspect, completely covered by the authority of *Baxter* v. *Gordon Ironsides & Fares Co.* (1907), 13 O.L.R. 598, which is the most recent case on the subject, and which reviews the other cases on malicious prosecution cited by Mr. McClemont. I do not think it would be possible for a plaintiff to fulfil all the requisites for success in an action for malicious prosecution by merely tacking on an ancillary or subsidiary or alternative claim alleging abuse of the process of the Court. I think that the defendant has clearly brought himself within the case cited; and, as regards any abuse of the process of the Court, I have already found that there is no duress, no coercion, and that the plaintiff thoroughly understood the nature of the document that he was signing, and that solemn agreements of that sort are not to be got rid of so easily. At the same time, if it had not been for the authority of the *Baxter* case, I might have felt bound to let the whole case go to the jury.

I think the action must be dismissed with costs.

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Statement

The plaintiff appealed to the Appellate Division of the Supreme Court of Ontario.

The notice of appeal was as follows:—

1. The judgment is against the evidence, the weight of it, and the law.

2. The defendant sold the plaintiff cattle at a public auction sale, and took in settlement therefor a seven months' note. Before maturity of the note, he issued a warrant charging the plaintiff with the criminal offence of having procured the said cattle by false and fraudulent representations, and arrested and imprisoned him until he procured new notes from the plaintiff endorsed by the plaintiff's landlord. He then caused his release from imprisonment, had no evidence to offer; and the case, when called in open court, was dismissed with costs by the trial magistrate, and a record to that effect made, which was put in at trial. A written release from an action for malicious prosecution was procured by the defendant from the plaintiff before he was liberated from prison.

3. The plaintiff contended at the trial and alleged in his pleadings that the real motive of the defendant's criminal charge and imprisonment was to procure the said endorsement to the said notes, and was, therefore, an illegal abuse of the process of the Court.

4. The defendant's examination for discovery, which the plaintiff craves leave to refer to in this appeal, it is submitted, supports that contention.

5. The learned trial Judge tried as matters of law, without the jury, the questions (1) of the release and (2) as to whether the compromise entered into by the plaintiff, while under imprisonment, was a termination favourable to the plaintiff, permitting him to bring an action for malicious prosecution, and held, as a finding of fact, that the release was not procured by duress, but in law was not binding on the plaintiff; but that the compromise did not shew a termination favourable to the plaintiff, giving him a cause of action for malicious prosecution, and withdrew the case from the jury and dismissed the whole action.

6. The plaintiff submits that on the second question of law, and the finding of fact on the former, the learned trial Judge was wrong, and the judgment should be reversed.

7. The plaintiff further submits that the second question was not one entirely of law, but formed part of the whole case for malicious prosecution, and should have been tried by the jury.

8. The learned trial Judge held that the portion of the plaintiff's pleadings relating to the wrongful abuse of the process of the Court was a mere subterfuge to avoid the legal consequences of the compromise, which, in his judgment, destroyed the plaintiff's cause of action under the malicious prosecution part of the action.

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9. The plaintiff submits that, in this respect, the judgment is wrong, and that the plaintiff had a separate cause of action for a wrongful abuse of the process of the Court, maintainable in law and in fact; and the admission made by the defendant in his examination for discovery, and evidence which the plaintiff was prepared to offer, would sufficiently establish such an action if submitted to a jury.

10. The plaintiff submits that, having originally pleaded a wrongful abuse of the process of the Court, been granted at the commencement of the trial leave to amend his pleading by making a claim for damages for such, and being in possession of evidence of admissions of the defendant himself and other evidence sucient for a jury to pass upon and draw such an inference, it formed a separate and distinct cause of action in law from that of malicious prosecution, and should have been submitted for trial to the jury, as the plaintiff's counsel urged at the trial. The plaintiff submits that he is entitled to have that cause of action tried, irrespective of the malicious prosecution; and, for this purpose, a new trial should be ordered.

11. The plaintiff submits that an action for wrongful abuse of the process of the Court is not confined in law to an abuse of the civil process of the Court, but extends as well to an abuse of the criminal process of the Court, and as such is maintainable as a civil action in the Court, and need not necessarily be one for malicious prosecution.

12. The plaintiff further submits that, even if a compromise is entered into, in the circumstances shewn, which destroys his action for malicious prosecution, it does not prevent him from pursuing a separate cause of action for an abuse of the criminal process of the Court, if the evidence justifies a finding of fact by the jury that the real motive of the prosecution was to secure the payment of a civil debt owing, before its maturity, which the plaintiff alleges in this case.

13. The elements in law necessary to establish a civil cause for malicious prosecution are not the same as those required to establish a civil cause for wrongful abuse of the process of the Court. In the former a termination of the criminal proceedings favourable to the plaintiff and malice must be proven in evidence, and in the latter neither is necessary. The two causes are separate and distinct, and are not dependent upon one another.

14. The plaintiff further submits that if, on the whole of the evidence submitted to the jury, their inference is, that the real motive of the defendant's prosecution and imprisonment was to secure the payment of the note in question before its maturity, and not merely to prosecute for an alleged criminal offence committed by him, it matters not whether he accomplished his

purpose by civil or criminal procedure, and that under either it is an abuse for which an action is maintainable.

15. The plaintiff submits that, if the motive is the same, and the purpose is accomplished under a writ of capias in the civil Court, an action for either is or ought to be equally maintainable in law.

16. While, in a malicious prosecution action, a wrongful motive to secure payment of a civil debt may be an element shewing "no reasonable and probable cause and malice," yet in an action for wrongful abuse of the process of the Court it is the whole gist or foundation of the action; and, because the wrongful motive may be an element of and present in both actions, it does not preclude the latter action. Or, in other words, there may be two actionable wrongs committed by the one illegal act.

17. The plaintiff submits that the written release, relied upon at the trial, is illegal and void in law, and that the compromise relied upon by the learned trial Judge was not such as to deprive him even of his action for malicious prosecution, and that the records of the Court shew a termination of the civil action favourable to the plaintiff, which should have been accepted rather than the compromise.

Statement

March 27. The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and SUTHERLAND, J.

Argument

W. M. McClemont, for the plaintiff, argued that the records of the Court shewed a termination of the prosecution in favour of his client, and on the principle laid down by Boyd, C., in *Beemer* v. *Beemer* (1904), 9 O.L.R. 69, he had a right to go to the jury, which had been refused him. The *Beemer* case is said to be in conflict with *Baxter* v. *Gordon Ironsides & Fares Co.*, 13 O.L.R. 598, but it is submitted that the learned Chancellor's view is the better one and should be followed here. The plaintiff's action is also founded on abuse by the defendant of the process of the Court, on which point reference is made to *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q.B.D. 674; *Grainger* v. *Hill* (1838), 4 Bing. N.C. 212.

S. F. Washington, K.C., was called upon to argue only as to the effect of the *Baxter* case (*supra*). He referred to *Abrath* v. *North Eastern R.W. Co.* (1883), 11 Q.B.D. 440. The plaintiff had committed a breach of faith in repudiating the release executed by him. The onus is on the plaintiff to shew a favourable termination of the prosecution, and you can go behind the *primâ facie* acquittal which appears upon the record. He relied upon the *Baxter* case.

McClemont, in reply, argued that the equity of the case was with the plaintiff—as to the law, it was a case of one technicality against another. He referred to *Fancourt* v. *Heaven* (1909), 18 O.L.R. 492.

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At the close of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O.:—The authority of *Baxter* v. *Gordon Ironsides & Fares Co.*, 13 O.L.R. 598, has not been successfully attacked, and the principle upon which it proceeded is, in our opinion, sound.

The principle of the decision is, that in an action for malicious prosecution, although the prosecution may have in fact been terminated *primâ facie* in favour of the plaintiff, it is competent to shew that it did not in fact terminate in his favour, and that the termination of it was the result of a compromise or agreement to withdraw the prosecution.

The facts in that case were somewhat different from the facts in the present case, because all that was noted in that case by the magistrate was, that the matter was dropped—"settled out of Court." In this case the magistrate made a note that "the prosecutor says he has no evidence to offer, and the charge is dismissed."

It cannot be, I think, that the mere production of the record of the dismissal of the complaint is all that the plaintiff is bound to shew. No doubt, that would be sufficient *primâ facie*, but it cannot be that it is not open to shew that the proceedings did not in fact terminate in favour of the plaintiff, but that their termination was the result of a compromise. If it were not so, if the record were conclusive, it would practically mean that where a man was properly prosecuted for an offence which he had committed, and, in mercy to him, the prosecutor had made up his mind not to prosecute, and had not, therefore, appeared to prosecute, with the result that the information or complaint was dismissed, the man whom he had befriended in that way could turn around and say that the prosecution had terminated favourably to him, and that he was entitled to maintain an action for malicious prosecution.

It seems to me that this decision is right, and that you may go behind the record of the magistrate for the purpose of shewing that, while it may appear that the prosecution terminated in favour of the plaintiff, it was really not so.

It is hard enough, from the moral standpoint, that the agreement which was entered into between the parties in this case, the benefit of which the appellant got, has been held by the Court to be one not binding on him. The agreement recites that Cockburn, the appellant, purchased from the respondent certain cattle for $562.30, which the latter claimed were obtained under false pretences, which the appellant denied; that he was placed under arrest; and that "whereas security has been given by the said Cockburn for his indebtedness to the said Kettle, and the said Kettle has agreed to drop his prosecution of the said action instituted by him; now, therefore, in consideration of the pre-

mises and of the sum of one dollar now paid by the said Kettle to the said Cockburn (the receipt whereof is hereby acknowledged), the said Cockburn, for himself, his heirs and assigns, hereby agrees to release and waive all his claims for damages which he may or may not have against the said Kettle by reason of the institution by the said Kettle of the said proceedings and the arrest of the said Cockburn or anything in connection therewith or in any wise howsoever."

Now it is manifest from this document that the reason for the respondent going to the magistrate and abandoning the prosecution was to implement the promise which he had made, and it could not in any way be treated as an acknowledgment that he had no case against the appellant; and it would appear to me as a great hardship if, where a prosecution was abandoned under circumstances such as these, the man in whose favour it was abandoned, and who had taken the benefit of what was done, were entitled to maintain an action for malicious prosecution.

I do not think that the prosecution terminated favourably to the appellant, and upon that ground his action fails.

Upon the other ground, on which Mr. Washington was not called upon, no case has been cited by Mr. McClemont in which, an action having been brought for, as he put it, abusing the process of the Court by obtaining a warrant where a summons would have been the proper proceeding, or where perhaps no proceeding ought to have been taken, it was held that that was a sufficient ground to support an action. That is one of the elements in an action for malicious prosecution, and the same principle which requires that there shall be—and it is required in the interests of the public—a termination of the prosecution, is applicable. Otherwise, in every case the wholesome principle that a man must prove his innocence would be entirely got rid of, if he could split up the various proceedings which had taken place in the course of a prosecution, and bring his action without being required to shew, *primâ facie* at all events, that the prosecution had terminated in his favour.

This Court ought not, in my opinion, to lay down any such rule.

Appeal dismissed with costs.

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KINSELLA v. PASK.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. March 20, 1913.

1. GIFT (§ I—1)—VOLUNTARY ACT—ATTENDANT CIRCUMSTANCES.

In order to establish a gift from a very old person when on a sick bed, of a large sum of money, which would leave the donor in improvident circumstances, it must be clearly shewn not only that it was the latter's intention to make a gift, but also that it was a deliberate, well understood and voluntary act, the nature, effect and consequences of which were fully appreciated.

Statement

APPEAL by the defendant from the judgment of Clute, J., at the trial, in favour of the plaintiff, in an action for the recovery of $6,800 which the defendant received from her mother, the plaintiff, in the circumstances mentioned below. The plaintiff alleged that the moneys were intrusted by her to Mr. McKee, a solicitor, for safekeeping for herself. The defendant set up that the moneys were a gift from the plaintiff to her, through Mr. McKee.

Argument

I. F. Hellmuth, K.C., and *J. H. McCurry*, for the defendant. There is no fiduciary relationship between parent and child, and no such relationship existed in this case as required that the plaintiff should have independent advice. The learned trial Judge has found that the plaintiff was in her right mind when she made the gift to the defendant. On the evidence, it is a clear case of a gift made by the plaintiff when she had a thorough understanding of all the circumstances, and the fact of her repenting afterwards, does not cast back upon the defendant the onus which she has satisfied. This Court has the right to review the decision of the learned trial Judge on the question of fact: *Bateman* v. *County of Middlesex*, 6 D.L.R. 533, 27 O.L.R. 122; *Jones* v. *Hough* (1879), 5 Ex. D. 115, 122; *Youlden* v. *London Guarantee and Accident Co.*, 12 D.L.R. 433, 28 O.L.R. 161. They also referred to the following cases: *Trusts and Guarantee Co.* v. *Hart* (1902), 32 S.C.R. 553; *Clark* v. *Loftus*, 4 D.L.R. 39, 26 O. L.R. 204; *Empey* v. *Fick* (1907), 15 O.L.R. 19, 29; *May* v. *May* (1863), 33 Beav. 81, 87; *Taylor* v. *Yeandle*, 8 D.L.R. 733, 27 O.L.R. 531; *Walker* v. *Smith* (1861), 29 Beav. 394.

R. McKay, K.C., for the plaintiff, relied upon the findings of fact and reasoning of the trial Judge; and argued that the allegations in the statement of claim were amply borne out by the evidence in the case. As to the alleged expenditures by the defendant on behalf of the plaintiff, although the point was not raised by the pleadings or at the trial, they should be allowed to the defendant if a proper account was given.

Hellmuth, in reply.

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March 20. MULOCK, C.J.:—This is an appeal from the judgment of Clute, J., the trial Judge, who directed judgment in favour of the plaintiff for $6,800.

The plaintiff, a widow eighty years old, resided alone in her own house in North Bay, and became seriously ill with bronchitis—a neighbour, an elderly woman, taking care of her.

About the 28th March, 1912, her daughter, the defendant, very properly caused her to be removed to the daughter's own house in North Bay; and a day or two afterwards also transferred to her house the plaintiff's trunks and some other of her effects.

The plaintiff had living five children, two sons and three daughters; one daughter residing at Montreal, the sons living in North Bay.

Whilst at the defendant's house, the plaintiff continued seriously ill, was confined to bed and required the attendance of a nurse.

On the 2nd April, 1912, the plaintiff signed three cheques, amounting in all to $6,600, in favour of Mr. T. E. McKee, a solicitor of North Bay. Two of these cheques were for $3,000 each, drawn on the Traders Bank at North Bay; the other was for $600, drawn on the Imperial Bank. Mr. McKee deposited these cheques in his bank to his own credit, and gave to the defendant his cheque for the amount thereof, viz., $6,600, and advised her to deposit the amount to her credit in the Bank of Ottawa, which she did, depositing it in the savings bank branch.

On the 9th April, 1912, McKee was again at Mrs. Pask's, and obtained a written retainer, signed by the plaintiff, to collect a claim for dower; and obtained from the plaintiff, on that occasion, a cheque for $100 as a retainer fee. He says that, shortly thereafter, he collected $200 in respect of this claim; that he gave the plaintiff a cheque therefor; and that this cheque was returned "paid," through his bank, endorsed in favour of Mrs. Pask. This cheque was not produced at the trial, and Mrs. Pask has offered no explanation as to how she came by it. On the 29th April, she made a deposit of $200 in the Bank of Ottawa—presumably this sum of $200—and this action is brought to recover the $6,600 and $200 in question.

The plaintiff alleges that the moneys were deposited with McKee for safekeeping for herself. The defendant says that they were a gift, through him, to her. The onus is on the defendant to establish the gift. The evidence on this issue was conflicting. The plaintiff at the trial swore that she intrusted the money to McKee for safekeeping for herself, and gave reasons for having done so. The defendant and certain other witnesses gave evidence to shew that the moneys were handed to McKee for her.

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The learned trial Judge has, in effect, discredited the evidence of the defendant and her witnesses, and has accepted that of the plaintiff; finding, as a fact, that the plaintiff deposited the moneys with McKee for safekeeping, not intending to part with the control thereof. That finding of fact, as between the parties, is conclusive, and cannot be disturbed by an appellate Court.

I have carefully read and considered the evidence at the trial; and, if it were open to me to review the learned trial Judge's finding of fact, I should feel bound to arrive at the same conclusion that he has reached.

With such a finding in an action against McKee, he would be obliged to account to the plaintiff for the moneys intrusted to him. Nevertheless, the plaintiff may follow the trust fund in the defendant's hands, if capable of identification there; and, the evidence shewing that the moneys intrusted to McKee were, to the defendant's knowledge, wrongfully transferred to her, she is also accountable therefor to the plaintiff.

The evidence shews how the plaintiff came to intrust her money to McKee. Her sons were suspicious of the defendant endeavouring to influence the mother in the matter of her will, and were arranging to have two medical men examine her as to her mental capacity. This circumstance came to the knowledge of Mrs. Pask, and was communicated to the plaintiff, then lying in bed in Mrs. Pask's house, and she was made to believe that she might be placed in a lunatic asylum and have her money taken from her. At this stage, Mrs. Pask, by her attention to her mother, appears to have won her confidence, and to have caused her to decide to make a new will, and so to place her money that the sons would not be able to trace it.

The persons surrounding Mrs. Kinsella as she lay in bed were Mrs. Johnston, a neighbour of Mrs. Pask, but a stranger to the plaintiff, Mrs. Pask herself, and her husband. These persons manifested much concern in Mrs. Kinsella's affairs, and say that finally she desired the presence of a lawyer, and that, after rejecting several whose names were mentioned, she accepted McKee, whom she did not know and had never seen. Thereupon Pask telephoned for McKee, and the latter, understanding that he was required, came to the house to prepare a will. Thereupon, on the 2nd April, 1912, he arrived at Mrs. Pask's and obtained instructions as to the plaintiff's will. Mrs. Pask and Mrs. Johnston were in the plaintiff's bed-room, and Mr. Pask was in and out, and McKee, during the whole time that he was obtaining instructions and preparing the papers, permitted interested parties more or less to interfere with the plaintiff in the business in hand. At no moment was the bed-ridden woman allowed to be alone with McKee, either when the

will or the cheques were being prepared or signed. McKee says that he first prepared her will, Mrs. Pask being the chief beneficiary, and that it was first executed; then the matter of the cheques was attended to, and they were signed. The plaintiff's saving bank books were produced, and he drew the three cheques; the total amount of her deposits was $7,927.61; and, taking therefrom $6,600, there remained the sum of $1,327.61. If the transaction was a gift, then her only remaining means were the $1,327.61, her house, and her claim for dower, which, so far as then appeared, might realise nothing. To denude herself of nearly the whole of her means of support, at a time and under conditions when she stood most in need of it, was so improvident an act as strongly to suggest the improbability of the plaintiff having intended to part with the ownership of the fund.

Mrs. Pask's explanation that her mother conceived the plan of McKee being a mere conduit through whom the money should reach the defendant, for the purpose of preventing it being traced to her by the brothers, thereby saving her from litigation respecting it, fails to convince me of the truth of the explanation. It is improbable that a very sick old woman would have thought out such a scheme. Further, it is to be observed that, according to McKee, the will was executed before the cheque transactions were carried out. By the will, Mrs. Pask, as residuary legatee, would take the moneys in question; and, if the plaintiff understood, as she may properly be assumed to have, the tenor of her will, then she would not be likely, the next moment after executing the will, to change her mind and make an immediate gift, *inter vivos*, of the bulk of her estate.

Further, it seems to me that, if she had intended to give the money to Mrs. Pask, she would, in all probability, have given it directly to her, and not through McKee, a complete stranger.

Then there is the circumstance that there is nothing in writing from the plaintiff shewing that McKee was to hand the money to Mrs. Pask. No reasonable explanation is given of the course adopted, which is inconsistent, in my opinion, with the defendant's contention that the money was given to McKee for the defendant. According to McKee, he was to pay it to her at once. This he did, and she at once deposited it in her own name. The pretence that this course was adopted in order to make it more difficult for the brothers to trace the money is unsatisfactory. It was as easily traceable by payment to her through McKee as if paid directly. Moreover, she had nothing to fear from the brothers, who had no claim to the money.

The evidence, I think, justifies the conclusion that the defendant devised the scheme of having her mother make the cheques in favour of McKee, expecting to get the money from him, and,

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if called upon by the mother to return it, to endeavour to avail herself of McKee's intervention as an answer to the claim. Then, if the mother recovered, the defendant would be in a position to shew what she conceived to be an effective answer to any claim from her; whilst, if she died, the will would protect her against the claim of her brothers and sisters.

For some reason, not clear, McKee, on the following day, prepared and the plaintiff executed a new will, the former being destroyed; but McKee says that in the former, as in the latter, will, Mrs. Pask was the residuary legatee.

But, apart from the defendant's conduct, in the face of the plaintiff's evidence that she gave the money to McKee for safekeeping, for herself and for no one else, and in the absence of any satisfactory authority to McKee to pay it to the defendant, the defendant has failed to discharge the onus which rested upon her of shewing any authority in McKee to hand over the money to her, as an absolute, irrevocable gift.

In this view of the case alone, therefore, I agree with the learned trial Judge that the plaintiff is entitled to succeed.

But even admitting that the money was intended as a gift to the defendant, it cannot, I think, under the circumstances, be upheld. The plaintiff was old and sick, and much in need of care. She had no legal claim for support upon her daughter; and, if obliged, or if she desired, to leave her house, she would, if deprived of the $6,800, find herself almost without the means of support, having but the sum of $1,327.61 in cash, and her house in North Bay. That sum, however carefully applied, would be inadequate to enable her to keep house and supply herself with necessaries of life, including nursing and medical attendance.

Under such circumstances, the giving away of such a large proportion of the plaintiff's estate, thereby leaving her, a feeble old woman, without sufficient means for her support, was an improvident act, and can only be upheld on strict proof by the donee that the transaction was carried out under such conditions as will justify the Court, having regard to the well-established principles applicable to such cases, in permitting it to stand.

In every case where a person, to his own advantage, but to the prejudice of the giver, obtains by donation some substantial benefit, he is bound to prove clearly, not only that the gift was made, but that it was the voluntary, deliberate, well-understood act of the donor, and that the donor was capable of fully appreciating and did fully appreciate its effect, nature, and consequence.

This principle is recognised generally throughout a series of cases dealing with proofs of the nature in question here.

In *Huguenin* v. *Baseley* (1807), 14 Ves. 273, Lord Eldon said:

"The question is, whether the deed is the 'pure, voluntary, well-understood act' of the settlor's mind, and whether the settlor executed it with full knowledge of all its effects, nature, and consequences."*

In *Anderson* v. *Elsworth* (1861), 3 Giff. 154, a woman of about seventy years of age, who was shewn to be sound in mind, conveyed all her property to her niece; but she did not fully understand that in making the deed she was parting with the immediate beneficial interest in the property. In setting aside the conveyance, Vice-Chancellor Stuart said (pp. 168, 169): "She had a complete right to deal with her property as she pleased. But the deed being voluntary, it must, in order to be valid, be shewn to have been executed upon proper explanation and understanding that she was immediately conveying away all her property, and not 'leaving' it to Mary Elsworth. Nothing could be more improvident than for a woman at her time of life to dispose of the whole of her property, so as to leave to herself nothing. . . . Where an instrument is executed by a person in the station of this poor woman—assuming that she was of sufficient capacity to dispose of her property—to make her voluntary and improvident deed of gift valid, it must be proved by those who claim under it that the donor perfectly understood the whole nature and effect of the deed." And further on (p. 170) he says: "This Court never can recognise any mere voluntary deed of gift, when it appears that the nature of the gift was not fully understood by the donor."

In *Cooke* v. *Lamotte* (1851), 15 Beav. 234, the judgment of the Court is summarised in the head-note, as follows: "Whenever a person obtains, by voluntary donation, a benefit from another, he is bound, if the transaction be questioned, to prove that the transaction was righteous, and that the donor voluntarily and deliberately did the act, knowing its nature and effect. The above rule is not confined to the cases of attorney and client, parent and child, etc., but is general. A nephew, who was provided for by his aunt's will, obtained a *post obit* bond from her. It was set aside, he not having proved that she knew that the effect of the bond was to make her will irrevocable." Romilly, M.R., in delivering judgment, said (pp. 239, 240): "The rule in cases of this description is this: where those relations exist, by means of which a person is able to exercise a dominion over another, the Court will annul a transaction, under which a person possessing that power takes a benefit, unless he can shew that the transaction was a righteous one. It is very difficult to lay down with precision, what is meant by the

*This is not the exact language of Lord Eldon in the report in Vesey. The passage is taken from the "American Notes" to *Huguenin* v. *Baseley*, approved by Spragge, C., in *Lavin* v. *Lavin* (1880), 27 Gr. 567, at p. 573.

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expression 'relation in which dominion may be exercised by one person over another.' That relation exists in the cases of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated, that one may obtain considerable influence over the other. The rule of the Court, however, is not confined to such cases. Lord Cottenham considered that it extended to every case in which a person obtains, by donation, a benefit from another to the prejudice of that other person, and to his own advantage; and that it is essential, in every such case, if the transaction should be afterwards questioned, that he should prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect. It is not possible to draw the rule tighter, or to make it more stringent, and I believe it extends to every such case. . . . In every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary that he should be able to establish, that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing: and if this be not done, the transaction cannot stand." Further on he says (p. 241): "It is not necessary for the plaintiffs to establish a direct case of fraud, but it is obligatory on the defendants, who claim benefits under the instrument, to prove that the transaction is one which the Court will allow to stand." In that case, the testatrix, a woman of seventy-three years, shrewd and possessed of all her faculties, made a will in favour of her three nephews, and subsequently a *post obit* bond which made the will irrevocable, and the bond was set aside.

In *Phillipson* v. *Kerry* (1863), 32 Beav. 628 (a suit to set aside a voluntary conveyance), Romilly, M.R., thus summarised the law (p. 631): "The only question therefore is, whether the deed fully expresses the nature of the arrangement she (the settlor) wished to make, and whether its full purport and effect were clearly and distinctly made known to her."

In *Donaldson* v. *Donaldson* (1866), 12 Gr. 431, the plaintiff, an infirm man, seventy-two years old, was induced by his son, with whom he resided, and who had influence over him, to leave to the decision of two referees the terms of his will. The referees made their award, and the plaintiff shortly afterwards made his will in terms of the award, and at the same time executed to the defendant a lease of certain lands of the plaintiff, worth about $1,000, being all of his means except two annuities for his own life, amounting to $135. The defendant was, at the time, lessee of the lands, and the lease was about to expire, and the new lease was on the same terms as the old one, except that it was for the lessor's life. The will and lease were prepared by a solicitor acting for both parties, and he gave no advice to

either party, but took pains to see that they each understood the papers before signing them. The defendant contended that the will was irrevocable, and the plaintiff brought this suit to set aside the will and lease. Mowat, V.-C., in giving judgment, said (p. 435): "Considering the relations of the parties, and the condition of the plaintiff . . . it was necessary for the defendant to shew (amongst other things) that the defendant had an independent adviser, one competent to advise him in the matter, and who did give the plaintiff all the advice he needed. . . . I have no doubt that he (the plaintiff) understood the general nature of the papers he executed, and that he was not in a state of mind that rendered him incompetent for the transaction of ordinary business. But between parties situated as these parties were, this is not enough. The defendant was bound to establish that the transaction was entered into willingly and deliberately on the part of the plaintiff, and without pressure from, or influence by, the defendant, as the recipient of the benefit; and these things the defendant has not established."

In *Lavin* v. *Lavin* (1880), 27 Gr. 567, the bill was filed to set aside a conveyance from a father, aged ninety years, to his son. It appeared that, at the time of the deed, the father resided with a daughter, the son also living with her, and paying her for the father's board. The father's only means consisted of the land conveyed to the son. Spragge, C., who tried the case, found that no fraud or undue influence was practised on the father, and that he was quite capable of understanding any plain explanation, if given him, of the nature and effect of the instrument; that it had been discussed prior to its preparation; and that, if proper explanations had been given the father, and if everything had been done which under such circumstances the law requires, the father would probably have executed the deed; that, though the deed may have been read to him, and though he probably knew that it was a deed to his son, still no proper explanation or advice was made to him as to its nature and effect; that, if he had been properly advised, he would not have made the conveyance without securing a reasonable provision for himself; and that, under the circumstances, it was an improvident transaction and entered into without proper advice, and should be cancelled.

This view of the law was affirmed in appeal (*Lavin* v. *Lavin* (1882), 7 A.R. 197), and followed in *Irwin* v. *Young* (1881), 28 Gr. 511.

In *Widdifield* v. *Simons* (1882), 1 O.R. 483, where a voluntary conveyance by an aged woman to a grandnephew was set aside, Hagarty, C.J., says (p. 486): "It was the whole of her property—her whole support—no power of revocation being inserted. She was at best a feeble-minded, forgetful woman, of

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very advanced age. No person was referred to to look after her interests, or to advise with her, or to point out the utter unwisdom of the transaction on her part. A witness is specially selected, from a comparative distance, unacquainted with the plaintiff, when persons with whom she was familiar could have been obtained. Her other relatives were not informed or consulted, though living in the nighbourhood, and this lad and a stranger to plaintiff are alone present to obtain for the defendant this great advantage."

In *Shanagan* v. *Shanagan* (1884), 7 O.R. 209, an action to set aside a voluntary conveyance, the plaintiff, an illiterate man, over seventy-five years of age, voluntarily conveyed his farm to two sons, the sons the same day leasing the land to the father for life, free from payment of rent. Shortly thereafter the father made a lease of the land to one of the sons, for the benefit of both, reserving a rent of $100 per year, and "the proper board, clothing, and lodging" of the father "so long as he remains on the premises;" and by the same instrument transferred the farm chattels to the son. It was held, *per* Ferguson, J., that the transaction must be set aside on the ground of improvidence and absence of proper professional advice. Also see *Mason* v. *Seney* (1865), 11 Gr. 447; *Hume* v. *Cook* (1869), 16 Gr. 84; *Watson* v. *Watson* (1876), 23 Gr. 70; *Dawson* v. *Dawson* (1866), 12 Gr. 278—which may also be referred to in support of the doctrine in question.

Testing the present transaction by the principles enunciated in the foregoing cases, and assuming that the plaintiff informed McKee that she was giving the money to him for Mrs. Pask, the defendant has failed to prove that it was a voluntary, deliberate act on her part, and that she appreciated its nature.

The plaintiff had been confined to bed by sickness since the day of her arrival at the defendant's house, on the 28th March. During that period, her daughter and Mr. Pask had been constantly with her. She had got the impression that her sons contemplated placing her, if possible, in a lunatic asylum, and getting her money from her, and that to that end doctors were coming to examine her. Doubtless, she thereby became excited and her mind became receptive to suggestions from those around her. She may have told Pask to send for McKee to prepare a will; but the idea did not, I think, originate with her, but with Mrs. Pask, who saw an opportunity of turning the incident to her own advantage. McKee understood that he was sent for merely to draw a will; and, whilst he was in the plaintiff's bedroom engaged in the business, in the presence of Mrs. Pask and Mrs. Johnston, and probably Pask, word came that the doctors had arrived. McKee says that he thinks the plaintiff had already signed the will and cheques. This I doubt; for, whilst

all withdrew from the bedroom during her examination by the doctors, McKee returned to the room after they left. If he had completed the business, there was no occasion for his returning.

He admits not having advised Mrs. Kinsella in regard to the transaction, saying that everything had been arranged between the parties before his arrival, and he simply carried out the arrangements already made. His conduct does not indicate that he was acting in the plaintiff's interest, but against it. He was paid for his services by the defendant.

If any intelligent, fair-minded person had explained to Mrs. Kinsella alone that, in giving her daughter that large sum of money, without obtaining in return any adequate security for her maintenance, and that the next day she might be turned out of the house with only the trifling balance of cash and her home to keep her from want or the poor-house, it is inconceivable that she would have made such an improvident gift. If McKee, an officer of the Court, considered that he was acting for her, his omission to give her proper advice and explanations was a failure of duty on his part. Further, I am of opinion that, no matter in whose interest he was present, his plain duty was to have seen that the plaintiff was safeguarded by proper independent advice before being a party to her alienating, as he says, so large a portion of her means.

The transaction impresses me as a cruel overreaching of a feeble old woman, who was not given by McKee the protection to which she was entitled.

That her mental capacity at the time was open to some doubt is shewn by his advising Mrs. Pask to have two other doctors also examine her as to her mental condition. If he believed that the plaintiff intended the money intrusted to him to be a gift to Mrs. Pask, he would have had such intention set forth in unmistakable language in writing, signed by the plaintiff, after she had had the benefit of full and independent advice, and fully appreciated what she was doing, and its effect and probable consequences. Failure to adopt such a course suggests that, in the interest of Mrs. Pask, he deemed it expedient to obtain control of the money, and to depend on the oral testimony of various witnesses as to Mrs. Kinsella's intentions.

Subsequent events also throw some light upon the transaction.

Mrs. Kinsella continued to reside with the defendant until September, and, as she recovered, she began to make inquiries of the defendant regarding the money, when the defendant told her that it was in the Bank of Ottawa, and in proof thereof exhibited the savings bank pass-book, shewing the deposit there of the $6,800. The name of the plaintiff, as the depositor, did not appear, and the plaintiff called attention to that fact, but was quieted by

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the statement of the defendant that the names of depositors were not shewn in savings bank pass-books; but at no time, whilst staying with the defendant, did the latter make known to her that the money was deposited in the defendant's name. In September, the plaintiff decided to pay a visit to a daughter, Mrs. McLaughlin, in Montreal, and went to the Bank of Ottawa with the pass-book to draw some money for her expenses, and was then told that there was no money there to her credit. Thereupon, accompanied by Mrs. McLaughlin and a grandson, the plaintiff went to McKee and inquired somewhat indignantly of him as to the money, and was told by him that Mrs. Pask had it. She then demanded it of Mrs. Pask, who claimed it as her own, and then this action was brought.

When the plaintiff demanded her money of McKee, her demeanour satisfied him that she thought that he had her money.

So far as appears, McKee, who saw the plaintiff on several occasions, after he handed the $6,600 over to Mrs. Pask, did not report to her that he had done so. Mrs. Pask says that the plaintiff frequently alluded to having given her the money, but this the plaintiff denies; and, in view of the learned trial Judge's finding, I think the fact to be that the plaintiff did not know, until so informed by McKee in September, that the money had been paid over to Mrs. Pask.

It is clear, I think, from the evidence, that the plaintiff did not give the money to Mrs. Pask. Even if she told McKee to give it to the defendant, she had no independent advice and was in a state of mind that prevented her appreciating the consequences to herself of such an improvident gift.

Whatever she did in connection with the transaction was not her voluntary, deliberate, and well-understood act, but the result of a condition of fear and mental excitement and bodily sickness.

I, therefore, think that the defendant has failed to discharge the onus upon her of shewing that the gift was made under such conditions as are necessary in order to its validity.

The defendant says that she has expended moneys in the plaintiff's behalf to the extent of $800, and the plaintiff's counsel consents to that sum being deducted from the amount of the judgment against the defendant.

The judgment may be reduced by that amount, and, subject to that term, this appeal should be dismissed with costs.

Sutherland, J.
Leitch, J.

SUTHERLAND and LEITCH, JJ., agreed with MULOCK, C.J.

Riddell, J.

RIDDELL, J., agreed in the result.

Appeal dismissed.

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Ontario Supreme Court, Meredith, C.J.C.P. March 12, 1913.

1. DISMISSAL AND DISCONTINUANCE (§ I—2)—INVOLUNTARY — NO REASONABLE CAUSE OF ACTION PLEADED.

A motion under rule 261 of the Con. Practice Rules 1898 (Ont.) to strike out a statement of claim and dismiss the action on the ground that no reasonable cause of action is disclosed must be made in court and not to a judge in chambers.

[*Knapp* v. *Carley*, 7 O.L.R. 409, followed.]

2. BETTING (§ I—1)—ON ELECTION RESULT—ACTION TO ENFORCE PAYMENT.

A wager on the result of a parliamentary election was unenforceable at common law; therefore an action does not lie for the amount of a bet made in Ontario on the result of a Dominion parliamentary election, although the bet was made prior to the statute 2 Geo. V. (Ont.) ch. 56, declaring such bets to be unenforceable.

[*Allen* v. *Hearn*, 1 T.R. 56, followed.]

Statement

MOTION by the defendant, under Con. Rule 261,* for an order striking out the statement of claim and dismissing the action, on the ground that the statement of claim disclosed no reasonable cause of action and that the action was frivolous and vexatious.

The statement of claim was as follows:—

1. The plaintiff is a manufacturer, and resides in Toronto.

2. The defendant is a physician, and also resides in Toronto.

3. On or about the 14th day of September, 1911, the defendant promised to pay to the plaintiff the sum of $1,000 immediately upon the return to the Dominion Parliament of the Conservative Party with a majority of twenty.

4. The said sum of $1,000, in pursuance of the defendant's promise to pay, became due and payable on the 21st day of September, 1911.

5. The plaintiff has demanded payment from the defendant of the said sum of $1,000, but the defendant has neglected and refused to pay the same.

6. The plaintiff, therefore, claims payment of the sum of $1,000 and interest from the 21st day of September, 1911, together with the costs of this action.

G. S. Hodgson, for the defendant.

Grayson Smith, for the plaintiff.

Meredith, C.J.C.P.

March 12. MEREDITH, C.J.C.P.:—Consolidated Rule 261 being relied upon as authorising the order sought, the inherent jurisdiction of the Court over all procedure in it is not invoked.

Mr. Smith objects to the motion being made in Court, urging that it should, if regularly made, be made at Chambers; and it is

* 261. A Judge of the High Court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

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proper that that question of practice should be first considered, even though it may, as to the parties to this action, be one affecting costs only.

The power conferred by the Rule relied upon is conferred upon a Judge of the High Court only, not the Court or a Judge, and so the power of the Master in Chambers is excluded: Con. Rule 42 (16); although, under the Rule in England from which ours was taken, a Master has such power; and so the application ought to be made at Chambers there.

But the practice here seems to have been, invariably, to hear the motion in Court: a practice doubtless arising on the ruling of Street, J., in the case of *Knapp* v. *Carley* (1904), 7 O.L.R. 409, in which he said: "Under Rule 261 the power to dismiss for this reason is to be exercised by a Judge of the High Court where there are pleadings; and by sub-sec. 16 of Rule 42 the jurisdiction of the Master in Chambers is excluded in such cases. It is plain that if this application had been made after the delivery of pleadings the Master would have had no jurisdiction. The reason is that the application is equivalent to what was formerly the argument of a demurrer, which was always a Court and not a Chambers matter."

That practice ought not to be disturbed by me now, whatever views I might have as to it. Changes are frequently made in the Consolidated Rules; and, if a change in this respect be desirable, it can easily be effected. I treat the application under Con. Rule 261 as a Court motion.

But I am inclined to think that effect ought not to be given to it, in the way the parties upon the argument of the motion desired, that is, as a point of law arising on the pleadings; that, more regularly, the case should come under the provisions of Con. Rule 259,* which provides for a demurrer in substance, while abolishing a demurrer in name.

The statement of claim was objectionable, and might properly, I think, have been found fault with, under Con. Rule 298. The practice, which has done away with great precision, and has allowed much laxity, in pleading, was not intended to permit pleadings to be used for the purpose of disguising the nature of a claim or a defence, nor even for giving as little information as possible regarding it. As long as pleadings are required, they should be made as useful as possible in disclosing the substance of the claim or defence; and, when they are used for any other purpose, there ought to be no hesitation in having them put to their proper

* 259. A party shall not be at liberty to demur, but shall be entitled to raise by his pleading any point of law, and the point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of a Judge of the High Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

uses, at the cost of him who misuses them, or, in the alternative, struck out.

But Mr. Smith now says that the claim is for the amount of a bet on a parliamentary election won by the plaintiff from the defendant; and upon that statement the argument proceeded, and it was argued that the motion is to be dealt with as a point of law properly raised; that is, whether such a claim can be enforced in the Courts of this Province.

Early in my professional experience, the very question was raised before and considered by a careful and able County Court Judge, who decided that such a bet was invalid at common law; and I have always understood the law to be, and to be administered in this Province, in accordance with such ruling: a view of the law which, apparently, was accepted as accurate by the Supreme Court of Canada in deciding the case of *Walsh* v. *Trebilcock* (1894), 23 S.C.R. 695.

The leading case upon the subject is *Allen* v. *Hearn* (1785), 1 T.R. 56, in which the very learned Judges who sat on that occasion expressed themselves thus:—

"Lord Mansfield, C.J. Whether this particular wager had any other motive than the spirit of gaming, and the zeal of both parties, I do not know: but this question turns on the species and nature of the contract; and if that be in the eye of the law corrupt, and against the fundamental principles of the constitution, it cannot be supported by any court of justice. One of the principal foundations of this constitution depends on the proper exercise of this franchise, that the election of members of parliament should be free, and particularly that every voter should be free from *pecuniary influence* in giving his vote.

"This is a wager in the form of it by two voters, and the event is, the success of the respective candidates. The success therefore of either candidate is material; and from the moment the wager is laid, both parties are fettered. It is therefore laying them under a pecuniary influence; it is making each of them in the nature of a candidate. If this be allowed, every other wager may be allowed. But this is not all—a gaming contract should not be encouraged, if it has a dangerous tendency. What is so easy, as in a case where a bribe is intended, to lay a wager? It is difficult to prove that the wager makes him give a contrary vote to what he would otherwise have done; but still it is a colour for bribery. It has an influence on his mind. Therefore, in the case in *Cowper*, if the wager had been laid with a lord of parliament or a judge, it would have been void from its tendency, without considering whether a bribe were really intended or not. This is of that nature, and therefore void.

"Willes, J., delivered his opinion to the same effect.

"Ashurst, J. It is a very different case from engaging a vote by a *promise* only, because many things may happen to release

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a man from such an engagement with perfect honour, as if the candidate's character were impeached, etc. But the bias occasioned by a wager cannot be so got rid of.

"Buller, J. If you put the case of a wager between a voter and another person who is not one, it is a palpable bribe: it is a sum of money laid to procure a particular vote, and that case cannot be distinguished from the present. The bias is exactly the same: it is a pecuniary compensation. It is true, as the counsel for the plaintiff said, that the law leaves it to the voter to exercise his franchise or not, but it also requires him to be free till the last moment of giving or withholding his vote; which he cannot be, if he has laid such a wager as the present."

The reasons thus set out are none the less, but indeed may be the more, applicable in a case such as this, in which the bet is not upon the result in one constituency but in all.

So far as I am aware, there has never been any judgment in the Courts of England or of this Province in conflict with the case of *Allen* v. *Hearn*.

Mr. Smith's contention that the bet is enforceable because legislation in this Province lagged long behind Imperial legislation in making bets generally unenforceable, so that, at the times when the bet in question was made and won, such Imperial legislation had not been adopted in this Province: see 2 Geo. V. ch. 56 (O.) and R.S.O. 1897, vol. 3, ch. 329; is beside the mark. The want of legislation here making all betting invalid, at the times mentioned, had not the effect of making good that which at common law was bad. The bet in question is not enforceable, quite apart from any legislation on the subject.

It is, therefore, not necessary to consider whether the bet would be void at law under the provisions of sec. 279 of ch. 6, R.S.C. 1906, or unenforceable under 2 Geo. V. ch. 56, because this action was not brought until after that enactment came into force.

My conclusion is, that the plaintiff cannot recover, in the Courts of this Province, upon a claim which he now admits is for the amount of a bet made and won in this Province on the result of a parliamentary election in this Dominion; and so the action will be dismissed, but without costs. The motion as made would not have succeeded to that extent; at the most the plaintiff would have been required to state his case plainly or have his pleading struck out, which relief might have been had on a Chambers motion under Con. Rule 298, and there are other reasons why my discretion on the question of costs should be exercised as I have exercised it.

If either party desire it, he may have a stay of proceedings for thirty days, with a view to an appeal.

Action dismissed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 8, 1913.

1. GIFT (§ III—16)—PRESUMPTION AS TO GIFT FROM DELIVERY OF MONEY.

A gift will not be presumed from the mere delivery of money by one person to another.

2. EVIDENCE (§ II K 1—322)—BURDEN OF PROOF—GIFT.

In order to shew that money delivered by one person to another was intended as a gift the onus rests on the recipient to establish a clear and unmistakable intention on the part of the deliverer to make a gift.

Statement

AN appeal by the defendant from the judgment of Barron, Co. C.J., in favour of the plaintiff, in an action in the County Court of the County of Perth, to recover three sums of money, amounting in all to $800, at one time the property of Mrs. Isabella Johnstone, the original plaintiff, and deposited with or given by her to the defendant, her husband's nephew, George Johnstone. After judgment had been given by the County Court Judge, the original plaintiff died, and the action was revived in the name of her adopted son, the administrator of her estate, Henry Frost.

In her statement of claim, the original plaintiff alleged that the moneys were placed in the hands of the defendant to be repaid when required. By his statement of defence, the defendant denied this allegation; and, by way of counterclaim, alleged that the moneys were paid to him as remuneration for services rendered and to be rendered; that he had rendered to the plaintiff all such services as were contemplated at the times of payment; and that if he should be held liable to her for the moneys received by him, he was entitled to recover $800 as payment for his services.

The learned County Court Judge found that the moneys were not a gift to the defendant or his wife; and that the plaintiff was entitled, after giving credit for certain repayments and sums owing for services rendered, to judgment for $325 and costs.

From the judgment based upon this finding the defendant appealed.

The appeal was dismissed.

Argument

J. C. Makins, K.C., for the defendant, argued that it was clear from the evidence that the money in question was undoubtedly an absolute gift from the original plaintiff, made in recognition of valuable services rendered by the defendant and his wife to the plaintiff.

Glyn Osler, for the present plaintiff, relied upon the finding of the learned trial Judge, and referred to the following cases: *Hagarty* v. *Bateman* (1890), 19 O.R. 381; *Waters* v. *Donnelly* (1884), 9 O.R. 391; *McCaffrey* v. *McCaffrey* (1891), 18 A.R. 599.

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MULOCK, C.J.:—This action is to recover three sums of money, amounting in all to $800, at one time the property

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of Mrs. Isabella Johnstone, and which had come into the possession of the defendant, George Johnstone, her nephew by marriage. After judgment Mrs. Johnstone died, and the action was revived in the name of her sole executor, Henry Frost.

In her statement of claim, the plaintiff alleges that the moneys in question were placed in the hands of the defendant to be repaid when required.

The defendant, by his statement of defence and counterclaim, makes a general denial of this allegation, and, by way of counterclaim, alleges that any moneys paid by the plaintiff to him were for remuneration for services rendered and to be rendered; and he "has rendered to the plaintiff all such services as were contemplated at the time of the payment of such moneys;" and that, if he should be held liable to the plaintiff in respect of such moneys, then he counterclaims from the plaintiff the sum of $800 for such services.

The issue, as fought out at the trial, resolved itself into the question whether the money was a gift from Mrs. Johnstone to the defendant, or a mere deposit to be accounted for, and the learned trial Judge has, in effect, found that it was not a gift, either to the defendant's wife or to the defendant, and that the plaintiff was entitled, after giving credit for certain repayments and credits for services rendered, to judgment for $325 and costs. From this finding the defendant appeals.

From the evidence it appears that the plaintiff and her husband, being childless, adopted one Henry Frost as their son. The husband was a farmer, and died on the 21st December, 1898, owning at the time of his death a farm of 50 acres of land in the county of Perth, which he devised to the plaintiff for life, with remainder in fee to the adopted son, Frost.

The plaintiff, who at the time of her husband's death was about seventy years of age, continued for some years to reside on the farm, Frost managing it for her.

The defendant, George Johnstone, a farmer, was her nephew by marriage, being the son of a brother of her deceased husband, and resided a few miles distant from the plaintiff. He and his wife were apparently on very friendly terms with the plaintiff, and frequently assisted her in the management of the farm and household matters.

The rental value of the farm was from $125 to $150 a year.

In the year 1905, the defendant and his wife were at the plaintiff's, and the plaintiff handed to the wife, but not in the husband's presence, the sum of $410. A year or more later, she handed to her the further sum of $200, and in the year 1907 she sent to the defendant, through Frost, the further sum of $190, making in all the sum of $800, being the moneys in question in this action.

The plaintiff was not indebted to the defendant, nor was he entitled to any claim upon her bounty. Working their respective

farms, they resided several miles apart. As the plaintiff advanced in years, she doubtless became less able to manage her household duties, and at times sought the assistance of the defendant and his wife, who seem to have responded to her wishes, paying her frequent visits and rendering her valuable assistance. These kindly acts appear to have been appreciated by the plaintiff, who came to regard the defendant as taking a substantial interest in her welfare, and it may reasonably be assumed that she reached the conclusion that it would be more to her interest to intrust her money to a tried friend and family connection, than to keep it in her own house or elsewhere. Whatever were her intentions in transferring her money to the defendant, no presumption of law arises that she intended to divest herself of her money (everything she owned, except her life interest in the farm, and the chattel property thereon), and make an absolute gift of it to the defendant. Under the circumstances of this case, the onus is on him to shew that the transaction was a gift; and that must be established by proving a clear and unmistakable intention on the part of the plaintiff to make a gift of money to the defendant.

In weighing the conflicting evidence, it is not sufficient that the preponderance of evidence may turn the scale slightly in favour of a gift. The preponderance must be such as to leave no reasonable room for doubt as to the donor's intentions. If it falls short of going that far, then the contention of a gift fails: *Lehr* v. *Jones* (1902), 74 N.Y. App. Div. 154; *In re Harcourt, Danby* v. *Tucker* (1883), 31 W.R. 578; *Morse* v. *Meston* (1890), 152 Mass. 5, 24 N.E. Repr. 916; *Taylor* v. *Coriell* (1904), 57 Atl. Repr. 810; *Sisenwain* v. *Roque* (1902), Q.R. 23 S.C. 115; *Hall* v. *Kimball* (1895), 5 App. Dist. Colum. 475; *Peirce* v. *Giles* (1901), 93 Ill. App. 524; *Marsh* v. *Prentiss* (1892), 48 Ill. App. 74.

On another ground also, the onus was, I think, on the defendant to establish the gi t. The plaintiff was a widow of 75 years of age, with no means of support excepting a life interest in 50 acres of land and the money in question; nor had she any children or other near relatives upon whom she could rely to take care of her in case of sickness or inability to manage the farm. Under these circumstances, to denude herself of all her money was improvident, and, having regard to the facts the case is one entitling her to the protection of the Court.

I do not question the right of a person of competent understanding, and who fully and intelligently appreciates what he is doing, with its probable consequences, to give away all, or a substantial part, of his property, however unwise such an act may be; but attendant circumstances may be such as call upon the donee to prove to the satisfaction of the Court that the donor fully realised the nature of the transaction and its probable consequences, and was not unduly influenced by the donee or by confidence in him. Acting upon this principle, Courts of equity

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have not hesitated to set aside transactions for value, unless the party benefiting thereby has proved that everything was right, and fair, and reasonable on his part; and, as said by Sullivan, M.R., in *Slator* v. *Nolan* (1876), Ir. R. 11 Eq. 367, 386: "I take the law of the Court to be that if two persons—no matter whether a confidential relation exists between them or not—stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress or recklessness or wildness or want of care, and where the facts shew that one party has taken undue advantage of the other, by reason of the circumstances I have mentioned—a transaction resting upon such unconscionable dealing will not be allowed to stand; and there are several cases which shew, even where no confidential relation exists, that, where parties were not on equal terms, the party who gets a benefit cannot hold it without proving that everything has been right and fair and reasonable on his part."

Commenting, with approval, on this case, in *Waters* v. *Donnelly* (1884), 9 O.R. 391, 401, the Chancellor says: "The method of investigation is to determine first whether the parties were on equal terms. If not, and the transaction is one of purchase, and any matters requiring explanation arise, then it lies on the purchaser to shew affirmatively that the price given was the value."

In *Beeman* v. *Knapp* (1867), 13 Gr. 398, a suit by the donor to set aside a voluntary conveyance, Mowat, V.-C., says (p. 405): "Considering the relation of the parties, the transaction in question could only be sustained on evidence of the fullest information to the grantor as to these possible consequences of what he was doing; and evidence of his having had competent independent advice; and of his having, in executing the deed, acted freely and deliberately, and with full knowledge of the position in which the transaction was placing him."

In *Phillips* v. *Mullings* (1871), L.R. 7 Ch. 244, Lord Chancellor Hatherley says (p. 246): "It is clear, for instance, that any one taking any advantage under a voluntary deed, and setting it up against the donor, must shew that he thoroughly understood what he was doing, or, at all events, was protected by independent advice."

Much more must the donee be obliged to shew the righteousness of the transaction where confidential relations exist between the parties: *Rhodes* v. *Bate* (1865), L.R. Ch. 252.

Here the relationship between the plaintiff and the defendant may fairly be regarded as confidential. The defendant was her nephew by marriage, and she had come to regard herself as entitled to call upon him and his wife frequently to assist her in her various duties. To such appeals they had responded, and their evidence is, that she entertained grateful feelings towards them. Under such circumstances, the defendant was bound to shew, to the satisfaction of the Court, that the transaction in question, in order to

amount to a gift, was her free act, and not the result of undue influence.

The evidence is conflicting. As to the $410, the evidence of the defendant's wife is, that in 1905 she was at the plaintiff's house, when "she" (the plaintiff) "just came out of her room and said, handing me a package, 'Take that home and do just what you like with it.'" The defendant's wife says that this occurred in the kitchen, the defendant then being at the barn. She says that, on reaching home, she and her husband examined the package and found it contained $410, which she delivered to her husband. He deposited it to his own credit in the bank. Asked as to whether the money was given for safekeeping, the wife said "no," and that on various occasions the plaintiff told her to "keep all we had, and if we got her buried, that was all she wanted, that she never had any friends on one side of the house or the other, but George and myself, that we were the only ones, and if we got twice as much it would not pay for the trouble we had."

And further on she says, "Pretty nearly every time she would tell something about it, and sometimes she would not."

The wife says that the $200 was also handed to her in the absence of her husband, the plaintiff telling her to take it home; this she did, giving it to her husband, who also deposited it to his own credit.

According to the evidence of Henry Frost, this money was obtained by the wife shortly before the plaintiff left her farm to go to live with a niece in Toronto; for, in answer to the question, "Do you know if she had any money when she went down?" he said: "When she went down, well there was money in the house, but of course when her niece came there to get her ready to go, the money was missed out of the house, as soon as her niece came there. I cannot tell where it went, or anything about it."

From the wife's evidence it would seem that the plaintiff, without any previous intimation, or consideration, abruptly handed over these (to the plaintiff) very large sums of money, no third person being present; and, from the apparent absence of deliberation, the transaction is more consistent with the theory of a deposit of the fund for safekeeping, than of a final parting with it. It is a significant circumstance that no third person was present on either occasion, and also that no person, except the defendant and his wife, testified to any statements by the plaintiff in support of the defendant's contention. The plaintiff lived for seven years after the $410 transaction; and, if she was constantly referring to it to the defendant and his wife, it is not improbable that she would have referred to it in conversation with others. Nevertheless, no such evidence is forthcoming in corroboration of the defendant's contention; nor can any safe inference be drawn from the fact that the plaintiff obtained no acknowledgment of indebtedness from the defendant, for he

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himself says that in his dealings with the plaintiff it was not the practice to have receipts pass between them.

The $190 was handed by the plaintiff to Frost, who delivered it to the defendant. He gave no evidence as to what was said by the plaintiff when handing him the $190.

Further on in his evidence, Frost stated that the defendant had once told the plaintiff that he was buying a place, and was a little short; but it is not clear whether this conversation was before the $190 transaction, though I think such may fairly be inferred.

Frost's evidence as to what occurred when he handed the defendant the $190 is as follows: "Well, he (the defendant) said he would not give no receipt for that money. He said 'she had no more right to have the money than I had;' and he said 'I won't give no receipt for that money. Any time you want it I will give it to you. If you are a little short, I will give it to you.'"

As to the terms on which the sum of $200 was handed over, the only explanation is that of the wife, that she was "to take it home." The plaintiff was then about to go to Toronto.

Do these circumstances unmistakably establish an intention to make a gift of the money? The wife was merely "to take it home." In view of the confidence of the plaintiff in the defendant, it may fairly be inferred that the money was to be taken home for safekeeping for her. The evidence is as much open to that inference as that a gift was intended.

As to the $190, the defendant evidently did not consider that a gift. He did not refuse to give a receipt on the ground that the money was a gift, but because he was prepared to return it if wanted. And, further, because he seemed to question the plaintiff's right to the money, evidently remembering that it had come to her from her husband, the defendant's uncle, and accordingly thinking that he, a nephew of the deceased husband, had as much right to the money as had his widow. Thus it is quite clear that he did not accept the $190 as a gift. To constitute a gift, acceptance, as well as giving, is a necessary requisite. If either is absent, there is no gift: *Cochrane* v. *Moor* (1890), 25 Q.B.D. 57.

Then it is said that, after handing over the money, the plaintiff frequently alluded to it, telling the defendant that all she wanted out of it was payment of funeral and burial expenses. If she had already divested herself of all interest in the money, it was no longer available for payment of funeral and burial expenses, though she is constantly alluding to it, and giving directions to the defendant in regard to the fund. Apparently she regarded it as still hers. Further, the defendant does not seem to have considered himself as legally entitled to retain the money. When called on for repayment, he paid to the plaintiff various sums, and when examined for discovery, and asked why he objected to paying over the balance, his answer was, "If she is going to

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take it from us and hand it over to somebody else, I think we ought to be paid for our trouble." If he had understood the transaction to be a gift, his obvious answer to the question would have been to have stated what he considered the true position. That, however, does not occur to him, and he appears to have conceded the right of the plaintiff "to take it from us."

Then there is the uncontroverted evidence of Birchall, that the defendant told him that he had money belonging to the plaintiff, which he was keeping for her.

Mrs. Olive Frost swore that "I heard the old lady" (the plaintiff) "ask him" (the defendant), "one day, how much she had coming to her now, and he said $800." The defendant denies thus admitting such indebtedness.

The plaintiff, who was examined *de bene esse*, at the commencement of her examination maintained that she had deposited money with the defendant for safekeeping; but, as the examination proceeded, her mind wandered, her answers became incoherent, and she was evidently labouring under delusions; saying that she had never possessed any money of her own, that the money she had handed to the defendant was money which she had collected from other parties for him. The defendant admitted that there was no foundation for the latter statement. Owing to her impaired mental condition, it would not, I think, be safe to attach any weight to her evidence.

The learned trial Judge, on the conflicting evidence, has found that the defendant received the money under conditions none of which satisfied him that it was either a gift or in payment for services. We are asked to reverse that finding. The defendant, on the evidence of himself and his wife, has failed, I think, to shew that the transaction was a gift. All doubt, however, on the point disappears if the evidence of Frost and his wife is to be believed. The trial Judge evidently accepted their testimony; and, therefore, an appellate Court is not entitled to discredit them.

For these reasons, I think the judgment of the learned trial Judge should be affirmed.

There is nothing in the evidence shewing any overreaching on the defendant's part, nor any design on his part to induce the plaintiff to intrust him with her money, and he seems to have been kind to her, and rendered to her services in excess of the amount allowed to him at the trial. Under these circumstances, although I think his appeal fails, he should not be visited with the costs.

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

Clute, J.
Sutherland, J.

RIDDELL, J. (dissenting):—The defendant received certain moneys, some through his wife, and some through one Frost, the present plaintiff, from his aunt, the widow of the brother of

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his father. This action was brought in her name for the recovery thereof; pending action she died, her adopted son and administrator took out an order to proceed; and the action came on for trial before the Judge of the County Court of the County of Perth on the 13th December, 1912. The learned trial Judge gave judgment for the plaintiff for part of the amount claimed; the defendant now appeals.

The first question simply is, whether the deceased gave the money (by way of gift or payment for services rendered), or placed it in the hands of the defendant as a mere bailee.

Evidence was given at the trial by one Birchall that the defendant told him that "he had some money for old Mrs. Johnstone to keep for"—"to keep for her." His evidence bristles with "I think so," "if my remembrance is right," "I could not be certain"—all of which may be the caution of honesty or the shuffling of dishonesty—we cannot tell which from the dry bones of the evidence, which alone are before us. The defendant says that what he told Birchall was either "she gave me money or that I got money from her . . . I gave him to understand she had given me money."

Olive Frost, too, the wife of the present plaintiff, says, "I heard the old lady ask him one day how much she had coming to her now, and he said $800"—this the defendant denies.

If the learned County Court Judge had based his decision, even in part, upon the evidence of these two witnesses of the plaintiff, I for my part would not have thought we should call on counsel for the respondent—the trial Judge is the final judge of the honesty of witnesses—and, unless there be some document, etc., or he has failed to consider some part of the evidence, or some other unusual circumstance has supervened, his conclusions of fact should be accepted: *Currie* v. *Hoskin* (1912), 4 O.W.N. 492, and cases there cited.

The County Court Judge is well known to be learned and careful: and he must be taken to have done his duty as directed more than once by his appellate tribunal—"the Divisional Courts have more than once said that County Court Judges should give reasons for the conclusions they arrive at:" *Re St. David's Mountain Spring Water Co. and Lahey* (1912), 4 O.W.N. 32, at p. 34.

In the reasons for judgment there is no notice taken of the evidence I have spoken of; but it is manifest, as it seems to me, that the decision is based upon the evidence of the defendant himself—"In view of what he himself has said, surely I must hold him responsible for the full amount of the money which he says he received, $800" (p. 58). We should, therefore, see what the defendant does say—coupling therewith undisputed facts.

Mrs. Johnstone was living on a farm of 50 acres, which had buildings, stock, implements, etc.; she had these for life, with

remainder to an adopted son, Frost, who "ran the place" after her husband's death—Frost did not marry till 1908, Mr. Johnstone having died some seven or eight years before.

On the death of the husband, her niece by marriage (the wife of the defendant) went and stayed with her till after the funeral—the defendant, it is said, lived some seven miles away, but his wife went over from time to time and assisted her aunt. "She would send word for us to come and do this and that and something else," "Get up at four o'clock in the morning and do all our own work—and start out and do a day's work for her, and come home and do our own work after dark." They did not keep track of the services rendered, and there is nothing to indicate that they were not so rendered from goodwill only—and it is fair to the plaintiff to say that it has not been argued or suggested that they were not.

This had been going on for some time, when the widow, one day, at her own house—some time in 1905—handed her niece a package and said, "Take that home and do just what you like with it," "Use it for yourself and do what you like with it." The learned County Court Judge finds that she said, "Here take this home, do what you like with it" (p. 58).

When husband and wife got home—he had been at his aunt's place, but was not present at the handing over of the package—they opened the parcel, found that it contained $410 in bills, and the husband banked it in his own name.

"Some time again," says the defendant's wife, "she gave me $200—a year after or a little more . . . she just told me to take that home with me." She did not at any time say that it was for safekeeping or that she expected the money back.

At another time, Frost was given $190 by the widow to take to the defendant. Frost says: "Once she gave him $190 . . . I knew that for a fact . . . he said 'she had no more right to have that money than I had;' and he said, 'I won't give no receipt for that money. Any time you want it I will give it to you. If you are a little short I will give it to you' . . . I never asked him for a receipt, that is all" the conversation. "He was a little short he was telling her, and was buying a place." If this be true, it seems plain that the defendant was distinguishing between the adopted mother and son; and promising the latter, if he should be "short," to help him financially. It seems more than likely that there was some misapprehension of the defendant's words on this occasion. What the defendant says is: "She would tell us to keep it, that we was to keep this money." "She said I was to keep it—I was to give it to nobody."

Outside of a supposed presumption the main dependence of the plaintiff is placed upon what is alleged to have been an agreement on the part of the defendant to repay on demand.

What the defendant says in answer to the question, "How

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did you come to be paying this money to Mrs. Johnstone?" is: "A. Well she gave me this money, and I told her any time she needed money I would give it to her; that is the reason I gave it to her." This is far from an agreement to repay—it is nothing more than a gratuitous promise made by one who is grateful for past benefits.

In the examination for discovery, when carefully and fairly read, we find the same thing, in my judgment:—

"14. Q. Do you remember telling me that this money that you had got from your aunt, the plaintiff, was a gift to you, that it was your money? A. She told me I was to keep it.

"15. Q. You remember telling me that? A. Yes.

"16. Q. And the understanding being that you were to pay her what she wanted from time to time—what she needed? A. What she needed. She did not ask me to do that, but I told her I would do that.

"17. Q. At the time? A. Yes.

"18. Q. And, therefore, as you told me here, that was a part of the understanding between you? A. Yes."

It seems to me that this means no more than the preceding. If it could be shewn that there was a previous or contemporaneous agreement, the case would be different.

Then it is said that a gift is not pleaded; it was not necessary—and, if it was proper and so far necessary, we have got, I trust, far beyond the realm of technicality in pleading.

The defendant, it is argued, will not say that the money was a gift—on the facts neither would a careful lawyer bind himself to the terminology. What the defendant says is: "She said . . . this money; she gave us the money for what we had done for her." If this is true, what was in the minds of all parties was, that the gift of the money was intended to express the gratitude of the aunt for services rendered gratuitously, and without a contract for reward, although at her request. Whether that is a "gift" or not is a question of terminology and definition which any layman may well be excused for shirking; and it is, to my mind, not against the defendant that he said on his examination for discovery, "I would not swear whether she gave it to us or not."

From all that appears in the case, I see nothing to indicate that the defendant is dishonest—or that he would not have assisted to the best of his ability his aunt, if she required assistance, even if she had not given him money.

The so-called "repayments" are, to my mind, fully and satisfactorily explained.

"Before she went to Toronto—just before she went—I asked her if she would like to have some money, and she said 'no.' She said all she wanted me to do was to see that she was buried. I paid her fare to Toronto."

"Q. From Mitchell? A. Yes.

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"Q. How much was that? A. $3, I think.

"Q. How was it you came to pay that? A. They could not find their purse where the money was. They could not find the money, and the train was coming. So her niece said I would get her ticket.

"Q. Mrs. Johnstone was there? A. Yes; I got her ticket and paid for it . . . paid Alexander Butler $10.

"Q. Who is Alexander Butler? A. Her brother.

"Q. How did you come to pay him $10 and charge it to her? A. She was complaining about this brother she had not heard about, and he was hard up, and she knew he was hard up and had not much to support him. I asked if she would like to send him something, and she said she had nothing to send; she said I could send him something if I liked, and I sent him $10."

I do not pursue the payments further.

The learned County Court Judge seems to think that there is some presumption against these sums being considered a gift—but I can find no authority which indicates that in the circumstances any such presumption arises, and we have been referred to no case so holding. I cannot see why the widow had not the power, if she felt so inclined, to recompense her relatives by marriage by giving them money which she had lying by her, even if the sums so paid were in excess of the value of the services.

While it would not be wise to place too much reliance on the examination *de bene esse*, it is not without significance that the deponent herself says:—

"34. Q. You don't remember how much you got?" (*i.e.*, from the defendant). "A. To put it all together. No, I never kept account, but it didn't amount to much, because I didn't need it, you see. I was with Frost here and got all I wanted, and he gave me the $2—put it into my hand—and that is all I knowed about it.

"35. Q. And you have not any idea how much you gave him? A. Well, I could not tell you that either, but I have given him a good bit of money.

"36. Q. Now how much would you think, Mrs. Johnstone. Do you remember how many times you have given him money? A. No. I could not tell you; I got it easy and gave it easy. I had a little interest in the money."

And again:—

"53. Q. And do you remember telling George that the money you gave him would pay him for what he was doing for you? A. I might, I could not say. There would somebody have to pay; and, if I didn't pay him, it would come on somebody else; but I could not remember.

"54. Q. Did you expect to pay him for the work he and his wife were doing for you? A. No, I didn't.

"55. Q. For staying with them? A. No, I didn't.

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"56. Q. How did you mean some one would have to pay him—what for? A. Because I thought they were always very kind and obliging and neighbourly, and I know if they had come to me I would have kept them as long as they kept me, and I would not have charged them, and that is all I know."

The other feature in the case is the proposition that the giving of the money in question was improvident. The point was not considered by the trial Judge—and was raised for the first time on the argument before us.

Assuming that the rules as to improvident gifts apply to a gift of money—under the circumstances of this case, I do not find improvidence. (It is not out of place to note that there is no pretence of any coaxing or improper means taken to procure the handing over of the money—no suggestion that the defendant should not have received the money—all that is alleged is that he should not keep it.) The farm had been owned by the deceased Johnstone; from that he supported himself, his wife, and from about 1889 also an adopted son, who was in 1889 of the age of nine years; we are told that he left some savings—and, while this does not appear from the evidence, it seems that the money Mrs. Johnstone gave her husband's nephew was savings from the farm, either during her husband's lifetime or after. After her husband's death, her adopted son managed the farm, but she got all the proceeds—"she got the proceeds right along"—and she handled the money, so that Frost had no idea how much she had. She remained there for some time, when, about five years ago, she went to Toronto, remaining in Toronto some two and a half years. When she was in Toronto, Frost sent her $125 a year "out of the proceeds," and calls that "paying for her keep." It is not pretended anywhere that this was all the proceeds.

I cannot find that giving loose money to her dead husband's nephew, having her farm to fall back on, can be held to be improvident—it is not as though she had conveyed the land itself, stripping herself of her resources.

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

It is, I think, fairly apparent that the action was not really instituted by Mrs. Johnstone herself, but by relatives who desired themselves to obtain the money out of the hands of those to whom she had given it.

Leitch, J.

LEITCH, J., agreed with RIDDELL, J.

Appeal dismissed without costs: RIDDELL *and* LEITCH, JJ., *dissenting.*

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Ontario Supreme Court (Appellate Division), Clute, Riddell, Sutherland, and Leitch, JJ. June 25, 1913.

1. PARTIES (§ II A 8—105)—CASES AS TO REAL ESTATE—SPECIFIC PERFORMANCE—PERSON AGREEING WITH VENDOR TO CONVEY TO LATTER'S VENDEE.

A landowner who contracted to sell land to a purchaser, who, in turn, agreed to sell it to the plaintiff, is a proper party to an action for specific performance of the latter agreement, where, with full knowledge of such contract, he had agreed with his vendee to convey the land to the plaintiff in furtherance of the contract of re-sale.

2. CONTRACTS (§ I D 2—52)—MUTUALITY—CONTRACT FOR SALE OF LAND.

Where the defendant, who had contracted to sell land to a purchaser, agreed with him to convey it directly to the plaintiff, to whom the defendant's vendee had re-sold it, upon the remainder of the purchase money due being paid him, there is sufficient mutuality between the plaintiff and the defendant to permit the specific performance of the agreement to convey to the plaintiff.

Statement

APPEAL by the plaintiff from the judgment of Winchester, Co.C.J., dismissing an action (in the County Court of the county of York) for specific performance of a contract for the sale of land.

J. J. Gray, for the plaintiff.

S. H. Bradford, K.C., for the defendants.

Clute, J.

CLUTE, J.:—The action is for specific performance of an agreement in writing made by the plaintiff with the defendant Dunmore through one Moffat, Dunmore's agent.

The defendant Taylor, it is alleged, had knowledge of this agreement, and, he having the legal estate, it was agreed by the parties that Taylor should convey direct to the plaintiff. Taylor signed the deed in question, and, in doing so, attempted to close the matter; but the plaintiff's solicitor objected that no plan had been filed, and that there was an outstanding mortgage. The defendants allege that the plaintiff's solicitor refused to close the transaction, and the deal was off.

The truth seems to be that both parties were ready to carry out the transaction, and there is no reason why it should not have been carried out if the parties and their solicitors had exercised a little more courtesy toward each other.

It is clear, however, that the plaintiff's solicitor never refused to carry out the deal, although he seems to have been abrupt when Taylor called to close the matter—the solicitor then being engaged with other clients.

The trial Judge was of opinion that the plaintiff, "by his agreement, bound himself to treat the agreement as being null and void in case the vendor was unable or unwilling to remove any valid objection to the title which the plaintiff made, and

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having raised the objection, and the defendant not having the fee simple free from incumbrance on the property, he is bound by his agreement, and it should be considered null and void. No deposit was ever paid to the defendant, and no purchase-money tendered to him before the matter was declared off between him and the plaintiff's solicitor. The defendant was unwilling to remove the objection raised by the plaintiff, although, no doubt, he could have compelled his vendor to remove it, had he been able to pay him the balance due under his agreement; this, apparently, he was unable to do, or at any rate was unwilling to do. The action, in my opinion, should be dismissed with costs."

The defendant Dunmore authorised Moffat to sell for him two lots on the south side of Victoria avenue; the number is not given. A formal agreement was drawn up between the defendant, Moffat, and the plaintiff, in which Moffat agreed to sell to the plaintiff 95 feet more or less, on the south side of Victoria avenue, in the village of Weston, at $7 per foot, cash. This agreement provides that the purchaser be allowed twenty days to investigate the title; and, if, within that time, he should furnish the vendor any valid objection to the title which the vendor shall be unable or unwilling to remove, the agreement shall be null and void and the deposit returned to the purchaser; time to be of the essence of the agreement.

This agreement was not signed by Moffat, but was signed by one G. M. Frazer, who appears to have been a clerk in Moffat's office, or interested with him. A cheque for $25 was given upon the purchase, on the same date. The receipt given by Moffat to the plaintiff is as follows: "March 27th, 1912. Received from D. G. Dixon deposit $25 on 95 feet of land, more or less, on south side of Victoria avenue." It appears that Dunmore owned but one lot or 50 feet on the south side of Victoria avenue, in the village of Weston; and on the 29th March, 1912, Moffat wrote to Dunmore for the number of the lot, to which Dunmore replied as follows:—

"West Toronto, March 29th, 1912.

"In reply to yours of to-day, re ground at Weston, the number is lot 2. Yours faithfully, H. W. Dunmore.

"P.S. Dear Sir: Will you kindly let me know the full name of the purchaser, as I can have his name put on the deed, instead of mine, as it will save me a transfer. Yours, etc., H. W. Dunmore."

Dunmore had purchased lot 2 from the defendant Taylor on the 1st November, 1909, for $250, $25 down, and the balance in half-yearly instalments of $25 each, with the option to the purchaser of paying off the balance of the purchase-money at any time. The plan was afterwards registered. There was no

difficulty as to the outstanding mortgage, as Taylor stated that he could get the land discharged from the mortgage at any time, and as a matter of fact the mortgage was discharged before this action was brought, so that there was no reason why the transaction should not have been carried out. If the contract was binding upon the defendant, an outstanding mortgage was no objection to the title, nor did the plaintiff raise the objection as one of title, but desired that before the purchase-money was paid the mortgage should be discharged.

It is also quite clear, I think, that the plaintiff, either by himself or his solicitor, did not relieve the defendant from completing the contract. The plaintiff, while admitting that the defendant could not convey to him the whole of the 95 feet, was willing to take what the defendant had to convey—that is, lot 2.

The sole question, therefore, remains, is there a contract binding in law? There is no question that the parties understood perfectly what was intended to be sold. I do not think that the agreement of the 27th March is indefinite. It appears from the evidence of Mr. Gray, solicitor, that one Miles, who paid the deposit, wished to purchase the 45 feet, and that the plaintiff desired to purchase the 50 feet, being lot 2. The 45 feet was owned by Barker, and the deposit was paid upon both.

In the view I take of the matter, it is unnecessary to decide whether the agreement of the 27th March, 1912, is sufficiently definite or sufficiently signed to make a binding contract between the parties, because, after this instrument was executed, the matter was cleared up, the number of the lot was obtained, it was understood that the plaintiff should take the deed of lot 2, it was agreed by both defendants that such a deed should be given. This deed was prepared and executed by Taylor and his wife; and this deed, together with the agreement of the 27th March, the letter from Moffat to Dunmore and his reply, the cheque for the purchase-money, and the receipt, together form a sufficient memorandum in writing to satisfy the Statute of Frauds.

The defendant Taylor was properly made a party, because, having a knowledge of the agreement to sell, and having consented to make a conveyance direct to the plaintiff, and having that conveyance settled and approved by the plaintiff's solicitor and afterwards signed by himself, he had no right, independent of the other defendant, to declare such an arrangement off. I cannot accept the view of the defendants' counsel, in his able and ingenious argument, that there is any lack of mutuality in such a contract.

Dixon had signed a written agreement to purchase the 95 feet, and was entitled to take so much of it as the defendant had. Dunmore expressly recognised his obligation to convey the lot, by his answer to Moffat, and at the same time requested that the deed might be made direct to the plaintiff by Taylor.

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Clute, J.

Reading all the documents together, the intention of the parties is perfectly clear; and, but for the unfortunate differences that existed between the parties, the contract would have been carried out.

In my opinion, the plaintiff is entitled to succeed, and to have the contract specifically performed.

Reference may be made to the following cases: *Coles* v. *Trecothick*, 9 Ves. 234, as to when there is sufficient evidence to satisfy the Statute of Frauds; it was there held that the vendor was bound by the signature of the agent's clerk; but clerks of agents, in general, have no authority to bind the principal: *Gibson* v. *Holland*, L.R. 1 C.P. 1. "Where there is a complete agreement in writing, and a person who is a party and knows the contents, subscribes it as a witness only, she is bound by it, for it is a signing within the statute:" *Re Hoyle*, [1893] 1 Ch. 84. As to objections to title where there is an outstanding mortgage: *Greaves* v. *Wilson*, 25 Beav. 290, 75 L.T.R. 602. As to the right of amendment when the Statute of Frauds is not pleaded, see *Brunning* v. *Odhams*, in the House of Lords, 75 L.T.R. 602; *McMurray* v. *Spicer*, L.R. 5 Eq. 527. As to the right of the purchaser to take what the vendor has: *McLaughlin* v. *Mayhew*, 6 O.L.R. 174; *Campbell* v. *Croil*, 3 O.W.R. 862; *Bradley* v. *Elliott*, 11 O.L.R. 398.

The judgment of the Court below should be reversed, and judgment entered for the plaintiff, with costs here and below.

Leitch, J. Sutherland, J.

SUTHERLAND and LEITCH, JJ., concurred.

Riddell, J.

RIDDELL, J., agreed in the result.

Appeal allowed.

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June 17.

HITCHIN v. B.C. SUGAR REFINING CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. June 17, 1913.

1. MASTER AND SERVANT (§ II A 4—110)—LIABILITY FOR INJURY TO SERVANT—ELEVATOR—DUTY TO INSPECT.

An employer is answerable for an injury to a servant by the falling of an elevator where there had been negligence of the employer in failing to have it inspected as frequently as the conditions incident to its use required, and such inspection would have disclosed the defect which caused the elevator to fall.

[*Ainslie Mining and R. Co.* v. *McDougall*, 42 Can. S.C.R. 420, followed.]

Statement

APPEAL by the defendant from a judgment in favour of the plaintiff for injuries sustained while in the employ of the defendant, as the result of the falling of an elevator.

The appeal was dismissed.

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

S. S. Taylor, K.C., for plaintiff (respondent).

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MACDONALD, C.J.A.:—I think the appeal should be dismissed. I place my judgment on this short ground: the statute requires proper safety devices on elevators of this character. We have the evidence of Mr. Mathers, and I think the admission of Mr. McPhillips—if I am wrong he may correct me—that the system of inspection adopted by this company was a monthly inspection of the elevators. Mr. Mathers says that in the conditions under which this elevator was operated there should be an inspection twice a week. The reason given is a very sensible and logical one—that where sugar in open barrels is being carried up and down frequently on the elevator, the sugar gets into the grease and oil on the working parts of the elevator, and combining with it forms a sticky substance which prevents the safety devices from performing their functions. Now, if that evidence be accepted, and I think it was accepted by the jury, as indicated by their findings of fact, then there can be no doubt that there was a breach of its duty in this case, that is to say, there was the adoption by the company of a defective system. As a result of that defective system the injury to the plaintiff occurred. The plaintiff, therefore, is entitled to recover at common law. It is therefore not open to the defendant to answer that the accident, if it resulted from any negligence at all, resulted from the negligence of a fellow-servant.

Macdonald, C.J.A.

Under these circumstances, I think the verdict ought not to be interfered with. I am not sure whether Mr. McPhillips is insisting upon the question of excessive damages or not: I rather gathered that he is not.

Mr. McPhillips:—I did not withdraw it; I thought it was excessive, but your Lordships seemed so strongly against me I did not press it. In that admission, all I intended to admit was that that was the course of procedure, their ordinary course of procedure adopted; a monthly inspection by the officers or by the servants of the company. I don't know that I could admit anything further.

GALLIHER, J.A.:—The officials settled that, anyway, and the officer, I think, Rennie, says that was the system, and Rennie was the man to do it. That establishes that the system was a monthly inspection.

Galliher, J.A.

Mr. McPhillips:—So far as my admission goes, it is not carried any further than that.

MACDONALD, C.J.A.:—I think this case clearly falls within *Ainslie Mining and Railway Company* v. *McDougall*, 42 Can. S.C.R. 420, and the cases in which that case has since been followed.

Macdonald, C.J.A.

IRVING and GALLIHER, JJ.A., agreed.

Appeal dismissed.

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JOHN DEERE PLOW COMPANY, Ltd. v. DUCK.

British Columbia Supreme Court, Gregory, J. May 26, 1913.

1. CONSTITUTIONAL LAW (§ II A 2—178)—REGULATION OF BUSINESS — COMPANIES WITH DOMINION CHARTER—PROVINCIAL—RESTRICTIONS ON RIGHT TO DO BUSINESS—VALIDITY.

The B.C. Companies Act, R.S.B.C. 1911, ch. 39, requiring companies organized for gain to be licensed or registered in the province; and providing that no person shall act as agent for or carry on business in behalf of an unlicensed or unregistered company; and that no suit or proceeding shall be maintained in the courts of the province on any contract made therein in whole or in part in the course of or in connection with its business; is not *ultra vires;* and such requirement of registration and license is valid even as to companies incorporated under federal law by the issue of Letters Patent under the Companies Act of Canada, R.S.C. 1906, ch. 79.

2. CORPORATIONS AND COMPANIES (§ VII B—373) — CONTRACTS OF UNLICENSED COMPANIES—VALIDITY.

A contract made in British Columbia with a company incorporated under the Companies Act (Canada), but not licensed or registered as required by R.S.B.C. 1911, ch. 39, is unenforceable in the courts of British Columbia if made in respect of business carried on in the province by such company without provincial license or registration and consequently in contravention of the provincial law.

Statement

TRIAL of action against defendant for breach of contract to accept and pay for certain goods and on a cheque given in part payment of the goods. The action was tried by Gregory, J., on a motion for final judgment on the admissions in the pleadings and exhibits.

The following were the facts:—

The defendant company was incorporated by letters patent issued by the Secretary of State of Canada under the authority of the Companies Act of Canada (R.S.C. 1906, ch. 79), with head office at Winnipeg in the Province of Manitoba; and was authorised *inter alia* to carry on throughout the Dominion of Canada the business of dealers in agricultural implements, carriages, waggons and machinery and a general agency, commission and mercantile business.

The defendant ordered from the plaintiff certain goods to the amount of $5,181.45, to be delivered f.o.b. Vancouver. The order was given at Vancouver to one King, a merchant residing and carrying on business in Vancouver and acting as the agent of the plaintiff company. The defendant gave his cheque for $1,036.29 in part payment of the goods. Subsequently the defendant notified the plaintiff company by telegraph that the order was cancelled and stopped payment of the cheque. The defendant claimed that the transaction in question was in contravention of part VI. of the Companies Act of British Columbia and that the plaintiff company was precluded from maintaining the action because it had not received a license from the registrar of companies for the

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Province of British Columbia as required by the following sections of the Companies Act of British Columbia, R.S.B.C. 1911, ch. 39:—

139. Every extra-provincial company having gain for its purpose and object within the scope of this Act is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the province until such extra-provincial company shall have been licensed or registered as aforesaid.

168. So long as any extra-provincial company remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit or other proceeding in any Court in the province in respect of any contract made in whole or in part within the province in the course of or in connection with its business, contrary to the requirements of this part of this Act.

The defendant alleged, and the plaintiff admitted, that the company had been carrying on business through agents in different parts of the Province of British Columbia. The plaintiff claimed, however, that part VI. of the Companies Act of British Columbia, in so far as it purported to prevent the company from carrying out its objects in the Province of British Columbia and from maintaining the action, was *ultra vires* of the legislature of the Province of British Columbia.

The action came on for trial at Vancouver on May 26, 1913, on motion for final judgment on the pleadings and exhibits. By reason of the constitutional question involved, notice of the hearing was, by direction of the Court, served upon the Attorney-General of British Columbia, but he did not appear.

Sir Charles Hibbert Tupper, K.C., for plaintiff.

H. S. Wood, for defendant.

GREGORY, J., dismissed the action with costs, holding that the British Columbia statute above referred to was not *ultra vires*. No written reasons were handed down.

Gregory, J.

Action dismissed.

[N.B.—An application is being made for leave to appeal direct to the Privy Council.]

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June 23.

BOX v. BIRD'S HILL SAND CO.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 23, 1913.

1. ASSIGNMENT FOR CREDITORS (§ VIII B—75)—UNSCHEDULED SECURITY —PROOF OF CLAIM IN ASSIGNMENT PROCEEDINGS—LOSS OF SECURITY.

A company that proves a claim against an estate assigned for the benefit of creditors does not lose the benefit of security it holds because it was not valued in the assignment proceedings.

[*Box* v. *Bird's Hill Sand Co.*, 8 D.L.R. 768, affirmed.]

2. ESTOPPEL (§ III G 1—85)—BY SILENCE—FAILURE OF COMPANY TO CLAIM LIEN ON SHARES—EFFECT OF PURCHASE ACQUIRING NOTICE BEFORE PASSING OF LEGAL TITLE.

A company is not estopped from claiming a lien on shares of its stock for an indebtedness from the holder to the company, as against a purchaser from the latter, on the ground that the representative of the company consented to the sale without claiming its lien, of which the purchaser did not have notice at the time of sale but of which he was informed before receiving an assignment of the stock certificate, and paying over the purchase money.

[*Box* v. *Bird's Hill Sand Co.*, 8 D.L.R. 768, affirmed.]

3. CORPORATIONS AND COMPANIES (§ V C 3—200)—BY-LAW CREATING LIEN ON SHARES FOR DEBT DUE COMPANY—POWER TO MAKE.

Power to adopt a by-law creating a lien in favour of a company upon the shares of a stockholder in respect to his indebtedness to it is conferred by the Joint Stock Companies Act, R.S.M. 1902, ch. 30.

[*Montgomery* v. *Mitchell*, 18 Man. L.R. 37, followed.]

4. CORPORATIONS AND COMPANIES (§ V C 3—200)—LIEN ON SHARES FOR HOLDER'S DEBT TO COMPANY—PURCHASER WITHOUT NOTICE—DUTY TO INQUIRE.

A by-law of a company creating a lien in its favour on shares of a stockholder in respect to his indebtedness to it, is not binding on a purchaser of shares for value without notice of such by-law; nor need the purchaser make inquiry as to its existence. (Dictum *per* Cameron, J.)

5. CORPORATIONS AND COMPANIES (§ V C 3—200)—LIEN ON SHARES FOR HOLDER'S DEBT TO COMPANY—PURCHASER WITH NOTICE.

The purchaser of company shares takes them subject to a lien of the company for an indebtedness due it from the seller, where the purchaser had notice of the lien before he acquired the legal title to the shares. (Dictum *per* Cameron, J.)

Statement

APPEAL by the plaintiff from decision of Mathers, C.J.K.B., *Box* v. *Bird's Hill Sand Co.* (No 1), 8 D.L.R. 768, refusing a mandamus to compel the transfer of shares on the books of a company, which were bought by the plaintiff from the assignee for creditors of its former holder, and on which the company had a lien under a by-law for an indebtedness due it from the assignor. The company, without valuing such security, proved its claim in the assignment proceedings; and, without disclosing its claim of lien, voted to sell the shares to the plaintiff, who, after the sale, but before paying for them or acquiring title by assignment, received notice of the lien.

The appeal was dismissed.

H. J. Symington, for plaintiff.
R. M. Dennistoun, K.C., for defendants.

HOWELL, C.J.M. :—The by-law under which the company claims is two-fold: 1st, a lien is declared upon the stock of a shareholder who is a debtor of the company; 2nd, registration of a transfer is permitted, but the transferee must take it subject to the lien.

By sec. 31 of the Manitoba Joint Stock Companies Act, R.S.M. 1902, ch. 30, directors are given power to pass by-laws for various purposes, and amongst others, for "the transfer of stock." Sec. 44 is as follows:—

> The stock of the company shall be deemed personal estate, and shall be transferable in such manner only, and subject to all such conditions and restrictions, as herein, or in the letters patent, or in the by-laws of the company, are contained.

It will be observed that the widest possible words of restriction are used in this section, wider if possible than the corresponding section in Ontario.

It seems to me that the Legislature meant something by this very wide and inclusive language. A by-law of the company declaring that a shareholder who is a debtor to his company shall only transfer his shares subject to that debt is, I think, one of the reasonable "conditions and restrictions" contemplated by or within the meaning of that section.

In *Re Panton*, 9 O.L.R. 3, there was no by-law, and in *Re Imperial Starch Co.*, 10 O.L.R. 22, the by-law permitted the directors arbitrarily to refuse registration. *Re McKain*, 7 O.L.R. 241, does not assist, because perhaps the by-law creating the lien was passed while the company was a building society under the Ontario Building Societies Act. The special Act, in addition to incorporating the Dominion Companies Clauses Act, also provides that any by-laws theretofore lawfully passed while a building society are continued.

Re Good & Shantz, 23 O.L.R. 544, was also a case where the by-law gave the directors power to accept or refuse a transfer of shares just as they chose, and yet in a Court of five Judges two thought a clause similar to sec. 44 would permit the passage of such a drastic by-law as the one sought to be supported in that case.

In the case of *Montgomery* v. *Mitchell*, 18 Man. L.R. 37, the present Chief Justice of the King's Bench held that a by-law in terms similar to the one in this case was good.

Lindley on Companies, 6th ed., at page 457, states the law as follows:—

> It need scarcely be observed, that if it is expressly enacted or agreed by the members of a company that the company shall have a lien on their shares for all moneys which may be due from them to the company on any

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account whatever, a lien will be created in cases where it would not otherwise have existed.

This broad statement might of course have been induced by the fact that power to make such regulations is contained in the statutory articles of association in England.

In cases where there are dealings between a company and its shareholders a provision for a charge on the stock may be an advantage to both, and a provision regulating the transfer so that the debt or charge will attach to the stock in the hands of the transferee would seem to me not unreasonable.

I think the power to pass by-laws as to the transfer of stock in sec. 31 is explained and qualified by sec. 44, and that the "conditions and restrictions" whereby the lien for the debt due the company is attached to shares transferred are reasonable. I think the company had power to pass the by-law.

I agree with my brother Cameron that the plaintiffs had notice of the by-law, and that there is no estoppel because the defendants did not value their security.

The appeal must be dismissed with costs.

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

RICHARDS, and PERDUE, JJ.A., concurred.

Cameron, J.A.

CAMERON, J.A. :—This action is brought by the plaintiffs to compel the defendant company to register them as the holders of a certificate of twenty-five shares of stock in the company purchased by them from the assignee of one Dunn, the original owner. The defendant company alleges that Dunn was indebted to it in the sum of $907.51, and that under the by-laws of the company, it has a lien on the shares for that amount. The facts are set forth in the judgment of the learned Chief Justice of the King's Bench, who dismissed the action without costs.

The first question raised upon the argument involves the validity of by-law No. 25 of the company, which is in the following terms:—

> 25. The company shall have a first and paramount lien upon all the shares registered in the name of such shareholder whether solely or jointly with others for his debts or liabilities solely or jointly with any other person to the company whether the period for the payment, fulfilment and discharge thereof shall have actually arrived or not, and such lien shall extend to all dividends from time to time declared in respect to such shares. Unless otherwise agreed upon the registration of a transfer of shares shall not operate as a waiver of the company's lien, if any, on said shares.

By-law No. 26 sets out the method of enforcing the lien so created by sale after notice.

These by-laws were duly confirmed at a general meeting of the company.

Under the Manitoba Joint Stock Companies Act, ch. 30,

R.S.M., the affairs of every company incorporated thereunder shall be managed by a board of directors (sec. 25) who

shall have full power in all things to administer the affairs of the company; . . . and may, from time to time, make by-laws, not contrary to law nor to the letters patent of the company, to regulate the allotment of stock . . . the issue and registration of certificates of stock . . . the transfer of stock . . and the conduct in all other particulars of the affairs of the company: sec. 31.

By sec. 44, the stock of the company is to be deemed personal estate, transferable in such manner only and subject to the conditions and restrictions as in the Act or letters patent, or in the by-laws, contained.

By sec. 55, no shares shall be transferable until all previous calls have been paid thereon, and by sec. 58, the directors may refuse to allow the entry of any transfer whereon there may be an unpaid call.

The validity of this by-law was assumed by the Chief Justice, who had dealt with one similar in terms in *Montgomery* v. *Mitchell*, 18 Man. L.R. 37. This conclusion is disputed by plaintiff's counsel, who argued that, in the first place, the provisions of the statute did not afford foundation for a by-law creating a lien for indebtedness due to it by a shareholder, and in the second place, that the by-law does not, and cannot be said to "regulate" the transfer of shares.

At common law a company has, apparently, no lien against a shareholder which would restrict the transferability of its shares: if such a lien be claimed, authority therefor must be sought in the legislation: Cyc., vol. 10, 580.

The Companies Act of 1862, the governing statute in England, expressly provides that the articles of association may declare a lien on the shares of a shareholder debtor of the company. We have no such provision, and the power must, if found at all, be inferred from the general words of our Act, particularly those of sec. 31. The Chief Justice in *Montgomery* v. *Mitchell*, 18 Man. L.R. 37, so inferred the authority, following *Child* v. *Hudson's Bay Co.*, 2 P. Wms. 207, and *Société Canadienne Francaise* v. *Davelny*, 20 Can. S.C.R. 449.

There can certainly be nothing unlawful in the shareholder of a company and the company agreeing that his shares shall be subject to any indebtedness from him to the company. Such an agreement would surely be upheld, and it is not going very much further to say that the shareholders of a company can pass a by-law stipulating that their shares shall be subject to a charge for any indebtedness by them to the company.

It need scarcely be observed that if it is expressly enacted or agreed by the members of a company that the company shall have a lien on their shares for all moneys which may be due from them to the company on any account whatever, a lien will be created in cases where it would not otherwise have existed: Lindley on Company Law, 6th ed., vol. 1, 457.

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By-laws creating a lien are part of the contract between the society (company) and the shareholder: *per* Patterson, J., in *Société Canadienne Française* v. *Davelny*, 20 Can. S.C.R. 449, at 470.

In England the articles of association which in some cases may, and in others must, accompany the memorandum have the effect of a contract though the nature of it is difficult to define: *Allen* v. *Gold Reef of West Africa*, [1900] 1 Ch. 656 at p. 671, *per* Lindley, M.R. *Re McKain*, 7 O.L.R. 241, a by-law purporting to give a lien for indebtedness of the shareholder to the company, was held not applicable to a purchaser in good faith. There the validity of the by-law was apparently conceded by Mr. Justice Ferguson in the first instance, and by the Divisional Court on appeal. The company in that case was incorporated by a special Act of Parliament, and the clauses of the Companies Clauses Act, ch. 118, R.S.C. 1886, were thereby made applicable. The Companies Act, ch. 119, R.S.C.1886, contains the provision, sec. 52:—

> The directors may decline to register any transfer of shares belonging to any shareholder who is indebted to the company.

This provision was carried into the revision from 40 Vict. ch. 43, sec. 5, and is now to be found in sec. 67 of the present Act, ch. 79, R.S.C. 1906. It is, however, not to be found in the Companies Clauses Act, ch. 118, R.S.C. 1886. This section, therefore, had no application in the *McKain* case (*supra*), where the Act of incorporation was a special statute of the Dominion Parliament. Now, it may be regarded as significant that no question as to the validity of the by-law creating the lien was raised in that case. On the contrary, its validity was taken for granted by all the Judges who heard it. At the same time the reason for that view may well have been that pointed out by the Chief Justice of this Court, whose judgment I have read.

That the validity of such by-laws has generally been assented to, is shewn by the following extract from Morawetz on the Law of Private Corporations (published in 1882) at p. 332:—

> It seems that a majority in a stockholders' meeting have an implied authority to enact a by-law giving the company a lien upon the shares of its members, and to prohibit a transfer of shares from being executed upon the books while the holder is indebted to the corporation,

quoting in support of this statement a large number of cases decided in various jurisdictions in the United States, and also *Child* v. *Hudson's Bay Co.*, 2 P. Wms. 207, already referred to, which was decided by Lord Macclesfield in 1723.

Upon consideration of the authorities and the statute therefore, it seems to me that a by-law of a company, incorporated under our Act, creating a lien upon the shares of a shareholder in respect of his indebtedness to the company is a reasonable and proper

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exercise of its powers as set forth in the Act, and that, as between the shareholder and the corporation of which he is a member, it must be valid and enforceable.

If this by-law thus be valid, in what position is a purchaser for value of shares without notice of the by-law? Mr. Masten gives it as his opinion that the rule with respect to strangers being affected with knowledge of a company's by-laws is different in England from that in Canada. In England the articles of association are filed with the memorandum and are easily accessible. In Canada, on the other hand, this is not so. By-laws being private records are not at the disposal of strangers to the company. The Joint Stock Companies Act, and the letters patent of incorporation, are open to all.

> But it also appears to be reasonably clear that, except in British Columbia and Nova Scotia, where the Imperial form of Act obtains, outsiders dealing with the company are not affected with constructive notice of its by-laws or want of by-laws: Masten on Company Law 161.

This was the view of Mr. Justice Killam in *McEdwards* v. *Ogilvie Milling Co.*, 4 Man. L.R. 1 at 6:—

> In this case, of course, the plaintiff must be taken to have notice of all the provisions of the Joint Stock Companies Act, under which the defendant company was incorporated; and it may be, also, that he must be taken to have notice of the contents of the letters patent incorporating the company, as he could become acquainted with them by search in the office of the proper department; but farther than that he could not be expected to go.

Which is very much the same as was stated to be the law in England by Jervis, C.J., in the well-known case of *Royal British Bank* v. *Turquand*, 5 E. & B. 248, and 6 E. & B. 327, cited in *McEdwards* v. *Ogilvie*, 4 Man. L.R. 1:—

> We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more.

The conclusion would seem to be that there was here no duty imposed on the plaintiffs to inquire further into the rights and powers of the company than to examine the Act and the letters patent. But if they were not affected with knowledge of the by-law in question, to what extent and when did they become affected with knowledge of the company's claim against shares? The Chief Justice of the King's Bench found that they had notice of the lien, but not prior to their acceptance of the offer to purchase, August 28. Mention was made of the claim at a meeting of July 24, but this, he held, could not affect the plaintiffs. Mr. Laing, however, had notice of the claim some time after August 28, and on or before November 10. The transfer was executed December 27, and then forwarded to the company for the purpose of being registered. The Chief Justice held that, as, on the date

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of the meeting of November 10, the plaintiffs owed the assignees on account of the purchase the sum of $30,059.74, they still had ample funds out of which they could discharge the lien on the shares, a clear title to which had been guaranteed by the assignees. It was on this ground that he held the defendants not debarred from asserting their lien and dismissed the action.

The equitable doctrines relating to purchasers for value without notice apply to shares as to other property, but, in applying these doctrines, it is to be remembered that the purchaser must have acquired the legal title to the shares or, at all events, an absolute and unconditional legal right to be registered in respect to them: Lindley 658; and this legal title or right must have been acquired without notice of the equitable title affecting the shares and if it be acquired with notice then the prior equity must prevail: *Ibid.* 659.

Under sec. 57 of our Act a book is to be kept to record all transfers of stock with particulars thereof, and under sec. 59 no transfer shall be valid for any purpose whatever until the entry thereof is duly made in such book, save as exhibiting the rights of the parties *inter se* and as rendering the transferee liable jointly with the transferor to the company. The stock certificate in this case on its face says that the shares are transferable only on the books of the company upon the surrender of the certificate, so that not until after the execution of the transfer on Dece a b27, 1911, and not until the actual surrender of the certificate did these plaintiffs acquire "a present, absolute, unconditional right to have the transfer registered": *per* Lord Selborne in *Société Générale de Paris* v. *Walker*, 11 A.C. 20 at 29. The plaintiffs in this case (deriving their title from assignees for the benefit of creditors) have not shewn legal title to the shares or an absolute and unconditional right to be registered in respect thereof before they were affected with notice of the company's claim upon the shares. They are not, therefore, in a position to have that claim nullified or postponed.

It is contended that the defendant company by its acts and conduct elected to abandon its security by way of lien in filing an affidavit of claim without stating that security, by voting thereon at meetings of creditors, and by accepting a dividend on the claim as proved. In *Re Barned's Banking Co., Kellock's Case*, L.R. 3 Ch. 769, it was held that a secured creditor is entitled to prove for the amount due at the time his claim is sent in without regard to securities realized by him between sending in his claim and its being adjudicated upon.

> The bargain by my debtor is that he will pay me, and I am entitled to insist upon that. I have also a pledge in my hands, which no one can take away from me without paying me in full, and it is for me to say when I will choose to realise that pledge: at 776.

That is to say, the position of the creditor was not altered

in this respect by the winding-up proceedings to which the Chancery rule applied. The nature of the contract between the parties is not varied by the insolvency of the debtor, and in this respect the Chancery rule is followed. Unless therefore, the creditor is here barred by the effect of the statute, its legal position is not altered. The provisions of sec. 29 are imperative, as were those of rule 8 of schedule 1 of the Companies (Winding-Up) Act, 1896, referred to in *Re Henry Lister* [1892] 2 Ch. 420; but in the case of that rule the creditor is deemed to have surrendered his security unless he procures further time to remedy the omission. There is no such penalty imposed by sec. 29. There is no provision that the creditor shall, because of his omission to state his security, forfeit either his security or his original claim. We would hardly be justified in reading words into the section which would impair a creditor's rights under the existing law, or take away his property on account of some act or omission on his part wholly devoid of wrongful intent. Section 31 provides that where a creditor fails to value his security he may, after certain proceedings have been taken before a Judge, be wholly barred as against the estate. In default of an express provision as to forfeiture in the statute I can see no reason for holding that the omission to mention the security in the affidavit can be taken to constitute an abandonment by the company of its security. The omission was, after all, an oversight, and there is no difficulty in remedying, at this stage of the assignment proceedings, whatever difficulties have arisen from it.

The defendant, having by its representative, consented to the sale, is, it is urged, estopped from now questioning it. But it does seem to me that it is not open to the plaintiffs to take this ground. If at the time they agreed to purchase, to wit, on August 28, they received, as part of the transaction, the certificate of stock and a duly executed transfer, which they had forthwith presented to the officers of the company for registration, then their position in this aspect of the case would seem to me unassailable. But it was not until after they received notice of the defendant's claim that they procured a transfer of the certificate and attempted to secure its registration, and, as the Chief Justice points out, they had notice of the defendant's claim before paying over the whole of the purchase money. I consider, therefore, that the defendant has a lawful lien on the shares in question of which the plaintiffs had due notice and that the defendant's right of property cannot be impaired unless the conduct of the company or its representatives in the transaction has placed the plaintiffs in a position where they must, by reason of such conduct, sustain a loss. But that is not the case here, where it is still feasible to administer the estate without injustice to anyone.

The by-law does not expressly give the directors power to decline to receive the transfer for registration, because of an exist-

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ing indebtedness of the registered shareholder. Indeed if it attempted to do so it would apparently be nugatory on the authority of such cases as *Re Panton and Cramp Steel Co.*, 9 O.L.R. 3, and *Re Imperial Starch Co.*, 10 O.L.R. 22 at 25. The restriction that can be so imposed are merely of a formal character. But here we have a transfer of a certificate of shares, upon which the company has a lien knowledge of which has come to the transferee before the execution of the transfer, and before the transaction of purchase is finally completed by payment, presented to the company with a peremptory demand for its registration. Surely the company must have the right to say that it will agree to register the certificate upon recognition, or payment, of the lien and not before.

I think the Chief Justice was right in dismissing the action.

HAGGART, J.A. :—I agree with Mr. Justice Cameron and can add little to the reasons given by him.

It is not surprising that the validity of such by-laws as that in question here should have been generally assumed, when we recognize that such a by-law is reasonable, in the interests of the company, and for the benefit of every shareholder excepting the delinquent debtor.

I think it is within the statutory powers conferred by sec. 31, ch. 30, R.S.M. It is "not contrary to law nor the letters patent." It relates to the "issue and registration of certificates," "the transfer of stock" and "the conduct in all other particulars of the affairs of the company."

If there were any doubt as to the authority given under sec. 31 it would be removed by sec. 44, which says:—

> The stock . . . shall be transferable in such manner only and subject to all such conditions and restrictions as herein or in the letters patent or in the by-laws of the company are contained.

The by-law is not a prohibition as contended by the plaintiffs. It is a regulation providing for the formality of paying any debt owing to the company by a shareholder before he can sever his connection with the company and substitute whomsoever he likes as his successor.

I do not think what the defendants did constituted a final and valid election. It was not a deliberate and decisive act with knowledge of all their rights and of all the facts. The filing of the claim in its original form with the assignee was a mistake by a member of the firm of solicitors who was not instructed as to all the facts. Even if by mistake an action is actually commenced it is not conclusive.

> A person who prosecutes an action or suit based upon a remedial right which he erroneously supposes he has, and is defeated because of the error, has not made a conclusive election and is not precluded from prosecution or suit based upon an inconsistent remedial right.: Cyc. 10, vol. 15, p. 262.

The plaintiffs chain of title shews that they can have no rights as against the defendants superior to those of Dunn. They hold Dunn's property subject to the obligations imposed upon it by Dunn. I would dismiss the appeal.

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Appeal dismissed.

FREDERIKSEN v. STANTON.

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Saskatchewan Supreme Court, Lamont, J. July 9, 1913.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR SALE OF LAND—FORFEITURE—RELIEF—LACHES.

Specific performance of a contract for the sale of land will be denied where the vendee does not seek relief or tender payment for more than three years after notice of the forfeiture of the contract for non-payment.

[*Wallace* v. *Hesslein*, 29 Can. S.C.R. 171; *Tilley* v. *Thomas*, L.R. 3 Ch. 61, 67, and *Kilmer* v. *B.C. Orchard Lands Co.*, 10 D.L.R. 172, [1913] A.C. 319, specially referred to.]

Statement

ACTION for the specific performance of a contract for the sale of land.

Judgment was given for the defendant.

H. Y. McDonald, for plaintiff.

H. V. Bigelow, for defendants.

Lamont, J.

LAMONT, J.:—In this action the plaintiff seeks specific performance of an agreement for the sale of land. On October 26, 1903, the Scandinavian Canadian Land Company, by an agreement in writing, agreed to sell to the defendant Stanton the east half of section 17, township 34, range 3, west of the 2nd meridian, for $2,560, payable $640 cash and the balance at the rate of $213.33 per year for nine years beginning March, 1905, together with interest thereon. Stanton made the cash payment. On December 3, 1904, the Scandinavian Canadian Land Company assigned all its interest in the above-described lands and its agreement with Stanton to the defendant Richards and his partner Urquhart. Subsequently Urquhart assigned his interest to Richards, and thus became the beneficial owner of the land subject to Stanton's agreement. The agreement with Stanton contained a clause giving the vendor the right to declare the contract null and void if the purchaser failed to make the payments upon the dates and time set out in the agreement, and time was made of the essence of the contract. Stanton did not make the payment falling due March 1, 1905. That payment, with interest, amounted to $366.93. On March 30, 1905, Richards wrote to Stanton insisting upon immediate payment of the instalment. Stanton replied that he could not raise the money; whereupon Richards threatened to cancel the contract unless the

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payment was forthcoming. On August 23, 1905, Stanton gave Richards a team of horses, which Richards accepted at $240, and applied this on the overdue payment, and agreed to extend the time for the balance of the payment until December 1. Stanton did not pay the balance on December 1. On March 1, 1906, the next payment fell due, and this, also, Stanton failed to meet. On March 12th, Stanton wired for an extension of time, but this Richards would not grant. On March 30, and again on May 24, Stanton wrote Richards that he was unable to raise money to make the payment then in arrears. No further payments being made, Richards, in September, 1907, caused a notice of cancellation to be sent to Stanton. Stanton informed the plaintiff of this notice, and the plaintiff, on December 22, 1908, advanced Stanton $200 to be forwarded to Richards to apply on the contract. Richards refused to accept, claiming that the contract was at an end. On December 4, 1909, by an agreement in writing, Stanton agreed to sell to the plaintiff the land in question for $1,000 and the assumption by him of the amounts still due to Richards under the original agreement. In 1910 the plaintiff approached Richards with a view of getting him to accept the amounts remaining unpaid under Stanton's agreement. Richards refused. The plaintiff then opened negotiations with Richards for the sale of the land to him direct at an increased price, and it was agreed between them that Richards would sell the land to the plaintiff for $10 per acre subject to the plaintiff getting a quit claim deed from Stanton. Stanton refused to execute the quit claim deed unless the plaintiff would pay him the $1,000. This the plaintiff was unable to do, and the deal fell through. Subsequently, in November, 1910, the land having in the meantime increased in value, the plaintiff made a tender to Richards of the amount which would then have been due under the Stanton contract. This Richards refused to accept; and, in August, 1912, the plaintiff brought this action.

For the plaintiff it is contended that the provisions in the contract relating to cancellation and forfeiture were in the nature of a penalty against which the Courts should relieve, and consequently, that laches was no bar to the plaintiff's claim, because the plaintiff or his predecessors in title had been and were in possession of the land, and that the defendant Richards had not changed his position by reason of the non-payment of the instalments. That the provision in the contract providing for the cancellation of the contract and the retention of the moneys paid thereunder by the vendor as a penalty clause against which the Courts have power to grant relief seems to have been settled beyond controversy by the recent decision of the Privy Council in *Kilmer* v. *B.C. Orchard Lands, Ltd.*, 10

D.L.R. 172, [1913] A.C. 319. But although the Court has jurisdiction to relieve a purchaser from consequences arising from his failure to carry out the terms of the contract, it will not exercise that jurisdiction and grant the equitable relief of specific performance unless a proper case is made out for its interference. The principle upon which the Court will act in granting relief is laid down by Lord Cairns, L.J., in *Tilley* v. *Thomas*, L.R. 3 Ch. 61, at 67, as follows:—

> A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry*, 3 DeG. M. & G. 284, 22 L.J. Ch. 398, there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances," which would make it inequitable to interfere with and modify the legal right.

In *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171, the Supreme Court said at page 174:—

> In order to entitle a party to a contract to the aid of a Court in carrying it into specific execution he must shew himself to have been prompt in the performance of such of the obligations of the contract as it fell to him to perform, and always ready to carry out the contract within a reasonable time, even though time might not have been of the essence of the agreement.

And in Fry on Specific Performance, 5th ed., 539 (paragraph 1100), the learned author says:—

> It is now clearly established, that the delay of either party in not performing its terms on his part, or in not prosecuting his right to the interference of the Court by the institution of an action, or lastly, in not diligently prosecuting his action, when instituted, may constitute such laches as will disentitle him to the aid of the Court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract.

These authorities shew that, to entitle the Court to interfere with the contractual rights of the parties and to grant the equitable relief of specific performance after default has been made by the purchaser in the performance of the contract, it must appear that such can be done without doing an injustice to the vendor. It must also appear that the purchaser not only has been able and willing, but also has offered to carry out the provisions of the contract within what, under the circumstances, was a reasonable time from the date specified for the performance of his obligations. Further, the purchaser, as soon as he learns that the vendor has cancelled or repudiated the contract for default, must be prompt in making his application to the Court for relief against the penalty provided for in the contract. If these conditions are not established, I am of opinion that the

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Court should not grant relief. In this case the plaintiff has failed to carry out any one of them. He cannot stand in any better position than his predecessor in title, Stanton. Stanton was in default from December 1, 1905, and never at any time remedied or offered to remedy that default, although insistent demands were made upon him. In the fall of 1907 he was served with a cancellation notice. Notwithstanding this, he made no application to the Court to be relieved from the effect of that notice. The reason for this was because he was totally unable to remedy his default and make the payments due. In 1908 the plaintiff knew of the cancellation of the contract; and in 1909, with that knowledge, he took over the interests which Stanton had in the land. Even then it was not until November, 1910, that he made any tender of the arrears, and not until 1912 that he brought his action for relief. To allow specific performance under these circumstances would, as was said in *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171, to set at naught all the principles applicable to the exercise of the equitable jurisdiction of the Court.

There will, therefore, be judgment for the defendants with costs.

Judgment for defendants.

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LONGMAN v. COTTINGHAM.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. June 13, 1913.

1. APPEAL (§ VII L 2—476)—REVIEW OF FACTS — NEGLIGENCE CAUSING DEATH—CIRCUMSTANTIAL EVIDENCE.

Where, in an action for negligently causing death there is a *primâ facie* case to go to the jury, their function in weighing the probabilities of the case upon circumstantial evidence is not to be interfered with on an appeal from the verdict unless the court can say that the jury could not reasonably have come to the conclusion which the verdict involves.

[*Grand Trunk R. Co.* v. *Griffith*, 45 Can. S.C.R. 380, referred to.]

Statement

APPEAL by the defendant from a judgment for the plaintiff in an action for damages for the negligent killing of a city employee who was struck by an automobile while cleaning snow from a bridge.

The appeal was dismissed.

S. S. Taylor, K.C., for defendant, appellant.

G. E. McCrossin, for plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal. The evidence upon which I rely principally in coming to that conclusion consists of, first, the evidence of the defendant himself, who says that he passed the four-horse sleigh between the south end

of the bridge and the place of the accident. That is followed by the evidence of the driver of the sleigh, who says that the only automobile that passed him between the south end of the bridge and the place of the accident was the auto which killed the unfortunate deceased. That evidence is not really broken down on cross-examination. He qualified it slightly by saying that he did not notice any other autos passing during that time, but he says, had any other auto passed during that time, "I would have noticed it," so that the evidence stands practically intact after cross-examination. That is corroborated by Fleming, one of the men employed by the city shovelling snow, one of the fellow-employees of the deceased. He says he looked at his watch at three minutes to twelve. He gives the reason—they proposed to have lunch at twelve o'clock—looked at his watch at three minutes to twelve, and says no auto passed over that bridge from the south going north from three minutes to twelve to the time of the accident from which this man died. That is slightly broken down on cross-examination. In cross-examination he says that he will not swear to that, but he says, "I can almost swear to it." While that evidence is not as strong, not nearly as strong as the evidence mentioned above, yet it appears to be the evidence, and, at all events, the impression of an honest witness, and it is such as is entitled to respect. Now, taking those three pieces of evidence, there is clearly a *primâ facie* case made out; more than that, to my mind a very strong case made out of the identification of this car as the car that did the injury. I think it relieves us from a minute consideration of the other evidence as to identification. There is, undoubtedly, a great deal of conflict between the evidence for the plaintiff and the evidence for the defendant with regard to the colour of the top of the car, and as to whether it was up or down; and with respect to the tail light. There is conflict, and the jury were entitled to discard any portion of that evidence they did not believe. But we have the essential facts, I have already stated the essential facts, which, if the jury believed, entitled them to come to the conclusion they have come to in this case.

IRVING, J.A.:—My conclusions are based on what I have heard from Mr. Taylor in his argument. I was inclined to the opinion last night, that there was no case to go to the jury, but on reflection I have come to the conclusion that the Judge was right in letting the case go to the jury. The evidence, in my opinion, is sufficient. The accident took place at night; the defendant read an account of it in the morning's paper; he did something from which it could be inferred that it was necessary for him to ascertain from the man who was driving

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his car whether they had struck anybody on the bridge that night. That is one point. Then there was the concealment from the police of the names of the other persons in the car; then there was other evidence suggesting fabrication of evidence in that the defendant had, notwithstanding the rain, brought his car into the garage with the hood down. Again the buffer had been mended under circumstances which called for explanation. The evidence shewed clearly enough that this car was at the scene of the accident about or at that time. On the whole I think the Judge was right in letting that case go to the jury.

Once it got to the jury there was a conflict of evidence. All we have to be satisfied with is, that the evidence is such that eight reasonable men could reach the conclusion they have reached. It is not necessary for us to express any opinion as to whether we agree with them or not. On that point I have not made up my mind. The incidents referred to by counsel as having occurred at the trial are not such as would justify this Court in ordering a new trial.

Martin, J.A.

MARTIN, J.A.:—I am satisfied that there is evidence for the jury to reasonably return this verdict.

Galliher, J.A.

GALLIHER, J.A.:—I agree that the appeal should be dismissed. I think there was evidence to go to the jury under the principle laid down in *Grand Trunk R. Co.* v. *Griffith*, 45 Can. S.C.R. 380, that where there are probabilities that might be weighed by a jury it is proper that such a case should go to a jury. I do not express any opinion as to my view of the evidence. I feel very much as my brother Irving does, that having once established a case to go to the jury, and having gone to the jury, that I cannot say that the jury could not reasonably have come to the conclusion to which they did come. It probably may be sailing close to the wind, but that is one of the jury's privileges, and I would not disturb their verdict.

Appeal dismissed.

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HALLREN v. HOLDEN.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. June 10, 1913.

1. NEW TRIAL (§ I—1)—TRIAL — IMPROPER CONDUCT OF COUNSEL INFLUENCING VERDICT.

If it appears that counsel for the plaintiff throughout the trial had systematically sought in various ways to inflame the minds of the jury against the defendant, in a slander action, and this has resulted in an excessive verdict against the latter, a new trial will be ordered on appeal.

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APPEAL by the defendant from a judgment against him in an action for slander.

The appeal was allowed and a new trial ordered.

S. S. Taylor, K.C., for defendant, appellant.

R. M. Macdonald, for plaintiff, respondent.

MACDONALD, C.J.A.:—I think there should be a new trial. The plaintiff, prior to bringing the action, was divorced by her husband for adultery committed with one Denis Hallren, who has since married her. After the divorce Hallren wrote scandalous and obscene letters respecting the defendant to the defendant's children. On this charge Hallren was arrested; we have not heard any statement as to whether he was acquitted or not. The "Sun" newspaper published an account of the trial of Hallren, and the defendant, over the telephone, complained to the editor that the report did not shew that the arrest of Hallren was made in plaintiff's bedroom, which he asserted was the fact. It was for this statement that the action is brought. The trial was conducted in a very unsatisfactory manner. Counsel for the plaintiff, as appears to me, systematically sought by propounding inadmissible questions, and by improper suggestions, to inflame the minds of the jury. The jury awarded $25,000 damages. The answer of the foreman to the question, "Have you arrived at your verdict?" was, "We certainly have." And the amount of the verdict shews how successful were the efforts along the line I have just indicated. I think it was alimony that the jury was awarding, not damages for slander. As I think there should be a new trial principally on the ground of excessive damages, which alone would lead me to grant a new trial—I will not say anything further about the facts of the case—I think the tactics pursued at the trial may have had a great deal to do with the excessive damages arrived at by the jury. I think there has been a mistrial in this case, and it should go back.

With regard to the costs, the costs of this appeal, of course, will go to the appellants. As to the costs thrown away by reason of the abortive trial, I shall be pleased to hear what counsel have to say on that.

IRVING, J.A.:—In my opinion there was a case to go to the jury; the words used were capable of being construed by a jury as an imputation against the woman's chastity. I cannot say that the evidence was not sufficient to support a verdict.

Irving, J.A.

The assessment of damages by the jury, $25,000, seems to me extraordinarily heavy, but, speaking for myself, I would not order a new trial on that ground only. But there were very inflammatory statements made by counsel for the plaintiff, and

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also statements by same counsel not supported by evidence, and there was throughout the trial a failure to a very great extent to sheet home to Hallren as the person responsible, the so-called "spying" and other acts of aggravation. Having regard to the conduct of counsel and the extraordinarily heavy damages, I think we ought to order a new trial. The failure of counsel for the defendant to object to going on with the trial is, to my mind, very serious. But, having regard to the whole trial, I think that justice will be done by setting aside the verdict and ordering a new trial. I think the suggestion of the Chief Justice as to costs is correct.

Martin, J.A.

MARTIN, J.A.:—I am of opinion there ought to be a new trial on the ground of excessive damages. While I concur in what my learned brothers have said in regard to the conduct of plaintiff's counsel at the trial, yet, at the same time I do not think that of itself is sufficient to warrant a new trial being ordered, because the counsel for the defendant did not do what I think, strictly speaking, he ought to have done, viz., ask the learned Judge to discharge the jury on account of the prejudice which he alleges was created in their minds. It is, I think, in this case at least, too late for him now to rely upon that as a ground for a new trial.

I agree with what has been suggested with regard to costs.

Galliher, J.A.

GALLIHER, J.A.:—I also think there should be a new trial. I do not know that I can usefully add very much to what has been said by my learned brothers. I think it is unfortunate that possibly counsel—and sometimes it may inadvertently be done—allow themselves to be carried away by the bitterness that exists between the parties, and in that way are, possibly inadvertently, led into a course during a trial, that if they took a cooler view of matters, would not occur. If it were only one or two isolated instances in the trial, I do not think that would be sufficient to place very much weight upon. But when the general trend of the trial shews what does appear here to be a systematic course followed along those lines, then I think it really amounts to a case that has been mistried. The real facts have not been left fairly before the jury unencumbered by suggestions or attempted introduction of evidence that was not admissible.

I do not say anything about the question of damages, for this reason, that it is very hard indeed to say; that depends entirely on the circumstances what damages are adequate in a case of that kind. It may very well be that, even although this woman has been divorced on the grounds stated, that she still has friends that believe in her innocence, and believe in her in-

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nocence in that connection; and it might indeed be a serious thing to that woman, if an attempt is made to shew that even after a divorce was obtained she is continuing the conduct that she is alleged to have indulged in before a divorce was obtained. Under those circumstances it is pretty hard to say just what is excessive damages, and what is not excessive damages, therefore I express no opinion on that matter at all.

But I agree in the main with my learned brothers, there should be a new trial. As to the question of costs I do not dissent from the views that have been expressed in regard to that.

THE COURT heard the argument of *Mr. Taylor* and *Mr. Macdonald*, on the question of costs.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—We are all agreed that the plaintiff should pay the costs thrown away by reason of the abortive trial. We do that principally for this reason, that we think we ought to emphasize our disapproval of the course that was adopted by plaintiff's counsel in this case, by ordering her to pay the costs of the abortive trial; of course, those will only be the costs that have been thrown away.

New trial ordered.

JACKSON v. IRWIN & BILLINGS CO. Ltd.

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June 4.

(Decision No. 2.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. June 4, 1913.

1. MISTAKE (§ III D 3—50)—QUANTITY OF SUBJECT-MATTER — LANDS — RECTIFICATION BETWEEN VENDOR AND PURCHASER.

Where by mutual mistake of both vendor and purchaser land sold at an acreage price was dealt with on the sale as being of a much larger area as erroneously described in one of the documents of title (*ex. gr.* 87 acres, instead of 25 acres), rectification will not be ordered on the purchaser discovering the mistake subsequent to conveyance, if the parties cannot be replaced in their original position because of subsequent dealings with the property by the purchaser before discovering the mistake and of alterations made thereto.

[*Jackson* v. *Irwin*, 11 D.L.R. 188, reversed on appeal.]

Statement

APPEAL by defendant from the judgment at the trial, *Jackson* v. *Irwin*, 11 D.L.R. 188.

The plaintiff claimed damages, or in the alternative, the return of money paid for land in excess of the quantity he received on a purchase of land. The trial Judge found that, as the result of a mutual mistake as to the quantity of land purchased by the acre, the plaintiff got but 25 acres instead of the 87 acres he paid for, which he did not discover until after the execution of the conveyance, and he had entered into possession of the

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land. The defendant was not aware of such deficiency when the sale was made; and did nothing on which the plaintiff relied, except to exhibit a grant from the Crown shewing that the parcel sold contained 87 acres.

There was judgment at the trial for the plaintiff for the return of the purchase money in respect of the deficiency.

The appeal therefrom was allowed and the action dismissed.

Hart McHarg, for defendant, appellant.

R. M. Macdonald, for plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be allowed. Without expressing any opinion as to what course might have been adopted by the Court had the purchaser been in a position to reconvey, when it is apparent that he was not in a position to reconvey and has not offered to re-convey, no relief can be afforded. Plaintiff insists on the right to compensation for deficiency in acreage. I do not think that after conveyance that is a remedy that can be given.

Irving, J.A.

IRVING, J.A.:—I agree. The main points which seem to have been overlooked by the learned trial Judge were these: that there was no preliminary contract for compensation, and the conveyance had been executed. Therefore I do not think that the plaintiff is entitled to maintain this action. I will not say that he would not have been entitled to apply for rescission; it is unnecessary to express any opinion on that point.

Martin, J.A.

MARTIN, J.A.:—I agree.

Galliher, J.A.

GALLIHER, J.A.:—I agree.

R. M. Macdonald, for the plaintiff, asked for leave to be reserved to take future action.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—After you have gone to trial on the basis you did here, after you have conceded that you cannot reconvey, and have come to this Court and had the matter litigated in due course, surely it would not be proper for us to leave the door open for further litigation. If plaintiff can get the property back from his vendee, and you can agree upon it, it seems to me quite a proper case for a compromise such as Mr. McHarg offered to make, that is, to pay back the purchase money on re-conveyance of the property. If you can agree, that is a matter between yourselves; I do not see how the Court can assist you in that.

The appeal will be allowed with costs and the action dismissed.

Appeal allowed.

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1913
June 30.

FARR v. GROAT.

Alberta Supreme Court, Walsh, J. June 30, 1913.

1. MECHANICS' LIENS (§ IV—15)—FOR WHAT WORK — EXCAVATING FOR FOUNDATION OF BUILDING.

One who makes an excavation for the foundation of a building is entitled to a lien for his services under sec. 4 of the Alberta Mechanics' Lien Act, Alberta Statutes, 1906, ch. 21.

[For Annotation on parties having right to a mechanics' lien, see 9 D.L.R. 105.]

Statement

THE plaintiffs sued, claiming a lien on the lands of the defendant company for work done by them in excavating the basement of a building being erected upon the same. The question for decision was whether or not this is work of such a character as entitles the plaintiffs to a lien.

Judgment was given for the plaintiffs.

C. C. McCaul, K.C., for the plaintiffs.

O. M. Biggar, K.C., for the defendant.

Walsh, J.

WALSH, J.:—Under sec. 4 of the Mechanics' Lien Act a lien is given for the price of work done upon "the construction, erection, alteration or repairs" of any building. Of course no lien can attach to the land for work done on a building unless it is of a class which can properly be described as either construction, erection, alteration or repairs. The basement is as much a part of a building as is the ground floor or any of the floors above it. The completed building consists of the basement and the superstructure. In the case of a building whose basement is constructed by being let into the ground, as is the case here, it can only be constructed by the removal of the earth to the required depth from the area to be covered by the building. This may appear to be destruction rather than construction. If so it is destruction of the earth, but construction of the basement. With the removal of the earth and the laying of the floor where one is contemplated and the building of the walls which enclose it the basement is complete. Each one of these works is a separate and distinct act in its construction and each of them is essential to its complete construction. In my opinion the work of excavating is a work of construction within the Act.

The fact was emphasized by Mr. Biggar that these words of the section apply to a tramway or railway as well as to a building and that by the words which immediately follow a lien is in express terms given for excavating in respect of a tramway or railway. The argument is made from this that if the work of excavating was intended to be included in any one of the words "construction, erection, alteration or repairs," it would not have been necessary to use the word "excavating" in the following sentence to create the right to a lien for that

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class of work on a tramway or railway. If this following part of the section applied only to a tramway and a railway this argument would have great force, but that is not the case. It deals with many classes of construction besides tramways and railways which are not covered by the earlier part. It covers mines, sewers, drains, ditches, flumes, or other works or improving street, road or sidewalk adjacent thereto. It was necessary to describe the different kinds of work in respect of these additional classes of construction for which a right to a lien is given, and they are "clearing, excavating, filling, grading, track-laying, draining or irrigating." If the word "excavating" had not been used there would not have been given any right to a lien for that kind of work in respect of any of these added classes of construction, for none of the other words used to denote the various works is broad enough to cover the work of excavating. There was, therefore, the absolute need to use that word to create a lien for that kind of work with respect to the different kinds of construction thus specified other than a tramway or railway. If the word "excavation" had been used in the earlier part of the section the word "excavating" would still have been required in the second part of it to cover these other classes of construction. I think, therefore, that its use in the section in its present form cannot have the effect contended for by Mr. Biggar. It is true that if the word "construction" includes, as I think it does, the work of excavation the use of the word "excavating" is, so far as a railway or tramway is concerned a repetition of that word, but it is a repetition which was absolutely necessary to create the right to a lien for that kind of work upon all of the other classes of construction so specified.

This is hardly a case for the application of the maxim "*expressio unius exclusio alterius,*" but even so I think that the words of Wills, J., in *Colquhoun* v. *Brooks*, 19 Q.B.D. 400, at 406, in discussing that maxim might be applied here. He says:—

> The failure to make the "expressio" complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind.

This remark was concurred in by Lopes, L.J., in the same case, *Colquhoun* v. *Brooks*, 21 Q.B.D. 52, at 65. I do not think that it ever occurred to the draftsman of this Act, that in order to give the right to a lien for work done in the construction of the particular part of a building known as the basement the word "construction" was not broad enough and that the additional word "excavation" should be employed.

In my judgment the plaintiffs are entitled to a lien in respect of this work.

Judgment for plaintiffs.

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SCHARF v. WARNER.

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July 9.

Saskatchewan Supreme Court. Trial before Lamont, J. July 9, 1913.

1. ASSIGNMENTS (§ III—26)—PRIORITIES BETWEEN ASSIGNEES — ASSIGNMENT OF INTEREST OF VENDEE IN CONTRACT FOR SALE OF LAND—KNOWLEDGE OF VENDOR—SUBSEQUENT ASSIGNMENT.

Where the plaintiff to the knowledge of the vendor, in consideration of an assignment to him of the vendee's interest in a contract for the sale of land, furnished the latter with money to make his first payment, and the plaintiff covenanted in consideration of the acceptance of the assignment by the vendor without a formal execution of it, to make future payments as they became due, the rights of the plaintiff in the land are entitled to priority over those of a third person who, without the knowledge of the plaintiff, advanced the vendee money for a subsequent payment and received as security an assignment of his interest under the contract, in which the vendor joined without disclosing the prior assignment; although the plaintiff's rights will be on condition that he make the payments as he had covenanted to do.

Statement

ACTION to declare a lien by virtue of an assignment of the interest of the vendee in a contract for the sale of land.

A conditional judgment was given for the plaintiff.

G. E. Taylor, and *W. E. Seaborn*, for plaintiff.

J. A. Gross, and *R. W. Hugg*, for defendants Busby, Daniels and Frost.

N. Craig, for defendant Warner.

Lamont, J.

LAMONT, J.:—In March, 1911, the defendant Warner purchased from the defendant Busby the southeast quarter and the east half of the southwest quarter of section 17, township 12, range 23, west of the 2nd meridian, for $9,600, payable $2,000 in cash and the balance in three equal annual payments, with interest at 7 per cent. payable on January 1, in each of the years 1912, 1913, and 1914. An informal agreement to this effect was drawn up and signed. Warner made a deposit of $50, but was unable to raise the balance of the $2,000 cash payment. It was then agreed between the parties, that, if Warner would pay the further sum of $550 in cash, Busby would give him three months to raise the balance of the $2,000. Warner paid the $550. Before the expiration of the three months Warner approached the plaintiff for assistance in making the balance of the $2,000 payment. The plaintiff agreed to advance the money if Warner would assign to him his interest in the land and in the crop which Warner had put in on the land. To this Warner agreed, and on June 14, 1911, a formal agreement of sale between Busby and Warner was drawn up by one G. R. Morse, a solicitor acting for all parties. Morse also drew up an assignment to the plaintiff of all Warner's interest under the contract. The plaintiff was not present when Busby and

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Warner executed the agreement of sale in Morse's office, but he had left his own cheque for $1,400 in Morse's hands to be given to Busby on the execution by him of the agreement of sale to Warner and the execution by Warner of the assignment to himself. The documents were all executed, and Morse handed to Busby the plaintiff's cheque. The assignment from Warner to the plaintiff contained a clause by which, in consideration of the assignment being accepted by Busby, which acceptance could be without any formal execution of an assignment by him, the plaintiff covenanted and agreed to pay to Busby the purchase money as and when the same became due under Warner's agreement. The next payment fell due on January 1, 1912. Prior to that date Warner had approached the defendants Daniels and Frost for an advance of the amount necessary to make the payments. They agreed to endorse his note to the bank for the amount required, and thus enable him to obtain the money, on condition that he would assign to them all his interest in the land under his contract with Busby as security for the amount of the note and an additional sum of $300 which he had agreed to give them as a bonus. Warner agreed to this, and an assignment of his interest in his contract from Busby was made to the defendants Frost and Daniels. In that assignment Busby joined. On hearing of this assignment the plaintiff brought this action, and seeks a declaration that he has a good and valid lien on the land in priority to any claim on the part of Daniels and Frost. For the defendants it is contended that as they obtained the approval of the defendant Busby to the assignment, thus giving them a right to call for the legal title, their equity is a superior one to that of the plaintiff. For the plaintiff it is contended that, as Busby had actual knowledge of the plaintiff's assignment, his approval of the assignment to Frost and Daniels was a fraudulent action on his part, and therefore cannot be relied on to give Daniels and Frost a better equity than that of the plaintiff, and that as the plaintiff's assignment was first in time, it should prevail.

That Busby had actual knowledge of the assignment of Warner's contract to the plaintiff is in my opinion established. Morse, who witnesses the signature, is an independent witness, and he swears positively that he told Busby the contract was being assigned to the plaintiff. Furthermore the circumstances testified to by Morse as leading up to his telling Busby are exactly what one would expect to take place in such a case, and they lend colour to the correctness of Morse's testimony, which I accept. Having actual knowledge of the assignment by Warner to the plaintiff of all Warner's interest in the land, his acceptance of the plaintiff's cheque for part of the purchase-

money was an approval by him of the assignment to the plaintiff; and his subsequent approval of another assignment to Frost and Daniels could not avail to deprive the plaintiff of his prior right. Such approval on Busby's part as against Frost and Daniels could be nothing less than fraudulent, entitling them to set aside the whole transaction and to obtain from Busby a return of the payments which he obtained by virtue of such approval. At the trial, counsel for Frost and Daniels stated that they did not desire to obtain possession of the land, but only sought a return of the payments made or guaranteed by them. In so far as the two payments of purchase-money and interest made by them to Busby are concerned, they are entitled to have them returned. The plaintiff in his assignment covenants to pay Busby the instalments of purchase-money as the same became due. This he has not done. If he pays these instalments and interest, the moneys advanced by Frost and Daniels can be returned to them. In so far as the bonus of $300 is concerned they will have to look to Warner or to the interest which he has in the land after satisfaction of the plaintiff's claim.

There will, therefore, be a reference to the local registrar to ascertain the amounts which under his assignment is due from the plaintiff to Busby. If within sixty days from the registrar's report the plaintiff pays into Court the amount so found to be due there will be a declaration that the plaintiff has a lien upon the land for the amount set out in his assignment and the other payments made by him in priority to any claims on the part of Daniels and Frost. In that case the defendant Busby, who has caused the whole litigation by his act in consenting to the assignment to Frost and Daniels after approving, as I have found, of the assignment to the plaintiff, will pay the plaintiff's costs. If the plaintiff does not pay such amount into Court within sixty days his action will be dismissed with costs as against Frost and Daniels. If the plaintiff pays the moneys found to be due into Court, so much thereof as represents the purchase-money paid by Frost and Daniels to Warner under Warner's assignment to them, with interest thereon, may be paid out to the order of these three defendants, and the balance to the defendant Busby. If further directions are necessary, application may be made to me therefor.

Judgment accordingly.

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1913

July 16.

RAINY RIVER NAVIGATION CO. v. WATROUS ISLAND BOOM CO.

Ontario Supreme Court, Trial before Britton, J. July 16, 1913.

1. WATERS (§ I C 5—52)—OBSTRUCTION TO NAVIGATION—BOOMS AND LOGS—DELAYING PASSAGE OF BOATS—LIABILITY.

The right to float or drive logs down a navigable river where conducted without negligence or wilful obstruction is equal to the right of navigation; and a boat-owner whose boat is detained in its course by a boom of logs is not entitled to demand more than that an opening be made within a reasonable time for the boat to proceed.

Statement

ACTION for damages for delays occasioned the plaintiff's steamboats by saw-logs and booms of the defendant in a navigable stream.

The plaintiff company alleged that the defendant company, on or about the 18th June, 1911, by their saw-logs floating on Rainy River, and by their booms used to gather and keep the saw-logs in control, delayed the steamer "Agwinde," belonging to the plaintiff company, for several hours when on her regular route in navigating Rainy River; that the same steamer, on her return trip, was in this way delayed for several hours; and, again, that the same steamer was similarly delayed on the 23rd, 24th, 25th, and 27th June. It was charged that the defendant company placed piers in the middle of the channel, which further obstructed and delayed the "Agwinde," by reason of which the plaintiff company sustained damage; and a claim was made for $10,000.

I. F. Hellmuth, K.C., and *A. R. Bartlett*, for the plaintiffs.
Glyn Osler, for the defendants.

Britton, J.

BRITTON, J., said that in this case there was no evidence that the defendants erected piers in Rainy River, or that any pier in such river so obstructed navigation as to delay the steamer "Agwinde" as charged; that the defendant company in floating its saw-logs, and in using the boom or booms as it did, was using the river in a reasonable way, in all the circumstances, and that there was no wilful or wrongful obstruction of navigation; that the defendant company so opened its booms and so moved its logs as to inconvenience the steamer of the plaintiff company as little as possible; that it did all that could reasonably be expected in making way for the steamer. The defendant company was not guilty of any negligence or of any wilful wrongdoing; and the plaintiff company, although delayed for a short time on certain occasions when passing the logs, did not incur any appreciable or measurable damage by reason thereof. The defendant company's logs had, subject to reasonable limitations, an equal right upon the river with the steamer. The steamer must be so navigated and used as not measurably to prevent the defendant

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company from keeping together and moving the saw-logs to their destination. The defendant company must not so fill the river with logs and booms as to prevent navigation by the steamer; there must be give and take. In this case the defendant company's servants made the openings within a reasonable time and gave the plaintiff company reasonable facility in navigating the steamer. The plaintiff company's claim in this action was quite inconsistent with the claim in the other, where damages were, at least in part, sought for detention of the same vessel, covering the same period, because of keeping back the water necessary for navigation purposes. Action dismissed with costs.

Action dismissed.

BAXTER v. BRADFORD.

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C. A.
1913

June 23.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, JJ.A. June 23, 1913.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR SALE OF LAND—DEFENCE NOT SET UP IN STATEMENT.

Specific performance of a contract for the sale of land will not be denied to the purchaser on the ground that an unconscionable advantage was taken of the vendor, or of inadequacy of consideration, where the statement of defence admits that the defendants had asked the plaintiff to carry out his agreement and sets up in answer to the action that he had then refused to complete the purchase.

Statement

APPEAL by the defendant from a judgment for the plaintiff in an action for the specific performance of an agreement for the sale of land.

The appeal was dismissed.

W. J. Taylor, K.C., for the defendant, appellant.

R. M. Macdonald, for the plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal must be dismissed, I have some doubt as to the question of inadequacy of consideration as shewing unfair dealing on the part of the defendant, but in view of the fact that in the statement of defence the defendants say that the plaintiff refused to carry out the bargain when performance was demanded on his part, it seems to me that is an end of it. They cannot say they were taken advantage of; they cannot say that now after the son has had an opportunity of consulting his father. They said, "We wanted you to carry out this bargain and you didn't do it."

Irving, J.A.
Martin, J.A.

IRVING, and MARTIN, JJ.A., agreed.

Appeal dismissed.

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June 24.

CANADIAN LOAN & MERCANTILE CO. Ltd. v. LOVIN.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. June 24, 1913.

1. BROKERS (§ II B 2—16)—REAL ESTATE BROKERS—COMPENSATION—FAILURE TO COMPLETE.

Where an employee of a real estate brokerage company having property listed for sale, introduced a probable buyer who paid for a ten-day option signed by the owner's representative or agent, and on the option holder electing to buy within the limited period it was discovered that the owner himself had sold the property in the interval, and the company's employee received from the owner's representative a sum of money in lieu of commission as compensation for having lost the sale of the property, the money so paid must be accounted for to the brokerage company without deduction for any payment thereout made by the employee to the option holder without the company's authorization. (*Per* Macdonald, C.J.A., and Martin, J.A.)

Statement

APPEAL by defendant from the judgment at trial in favour of plaintiff for money had and received. One Wright, listed the property in question with the defendant. There was no sale, however, up to the time the defendant entered the plaintiff company's employ. Subsequently defendant made another arrangement with Wright, as to the price of the property, and secured a conditional contract of purchase from one Cohen on option to the latter, for ten days for which Cohen paid Wright $5. Two days later Wright's principal (the owner) sold to other parties. Wright then paid defendant $250, and obtained back the option given Cohen. Defendant then paid Cohen the $250 less $15 retained for his services.

M. B. Jackson, for the plaintiff, respondent.

D. S. Tait, for the defendant, appellant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be dismissed. There is no question about it that this listing was obtained by the defendant for his employers, the plaintiff. He was told to push the sale of the property, and suggested that some advertising be done by the plaintiff; he was told that it was a matter that should be energetically put upon the market. He says that he went to Cohen, got $5 from Cohen, obtained an option from Wright for Cohen on payment of a deposit of $5. Afterwards, when Cohen was ready to pay the balance and take up his option, it was found that the owner, on whose behalf Wright purported to have given the option, had sold the property to someone else. Defendant then asked Wright what was to be done about it, and Wright told him to bring the option. The option was brought and Wright offered to pay $250 for services. That is what Wright says, and that is what Lovin says in the document he signed at that time. The learned trial Judge chose to believe that those were the true facts, that is to say, what was

stated by Wright and in the receipt signed by Lovin. I don't think I could disagree with his finding of fact. He saw the witnesses. He is the best judge of that—having the advantage of seeing the witnesses and their deportment in the box. That being so, his judgment ought not to be disturbed. The $250, according to that finding, were paid for services performed by Mr. Lovin in and about this option; perhaps, not strictly a commission, but in lieu of commission he lost for the sale of the property over his head. Being in the employ of the plaintiffs, he was bound to account for what he received, and the learned trial Judge says he was to account for the $250. I cannot say that the learned trial Judge was wrong in finding the facts as he did.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal. The plaintiff's claim never fell within the terms of the defendant's retainer, unless possibly to the extent of $15. There is no doubt the defendant introduced the matter to Cohen and obtained for him an option, and that the deal fell through under such circumstances that Wright or his principal might have found themselves involved in a lawsuit. Wright settled that possible lawsuit by paying $250. That sum was really paid to settle Cohen's claim—not the plaintiff's—because Cohen was the only person who had any cause of action against him. Wright says that it was for Lovin's time. Well, he may have been influenced by that, but what Wright says is in contradiction to what Wright did. Wright could have paid Lovin for his time by giving him a cheque for $250, but we know that he would not pay until his option contract was returned to him, and all danger of a lawsuit had disappeared. I have no difficulty in dealing with what the County Court Judge has found. What Wright paid the $250 for was to settle Cohen's claim, and Cohen had, in turn, to settle with his broker, the plaintiff.

For these reasons it does not seem to me that this settlement for $250 was within the defendant's retainer. But for obtaining that settlement, what would be a fair commission for Cohen to allow him? $15 I think would be fair. The defendant, having regard to the fact that the plaintiff was entitled to a percentage, would not be entitled to receive from the plaintiff as much as $10 out of the $15. If I had been the County Court Judge I think I would have held that the plaintiff had misapprehended the facts of the case, and it was not really within the agreement. I would have dismissed the case. It may well be that there are reasons justifying the plaintiffs in dismissing Lovin for undertaking work of this kind, but this claim ought to have been dismissed.

Martin, J.A.

MARTIN, J.A.:—It is obvious that the plaintiff is entitled to something, and I think the trial Judge has taken the broad and

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CANADIAN LOAN AND MERCANTILE CO. v. LOVIN.

Galliher, J.A.

proper view of this case by giving judgment for the full amount. In my opinion the appeal should be dismissed.

GALLIHER, J.A.:—My brother Irving has put into words, I think, my view of the matter, very much along the lines I suggested to Mr. Jackson at the close of his address. It seems to me it centres all round what the money was paid for, and in that I think, when we take everything into consideration, we are not altering, in any way, the finding of the Judge. I would allow the appeal.

The Court being equally divided, the appeal stood dismissed.

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EASTERN TRUST CO. v. FRASER.

Nova Scotia Supreme Court, Graham, E.J. May 3, 1913.

1. WILLS (§ III G 9—166)—REMAINDERS—BEQUEST TO SURVIVORS OF CLASS—VESTING.

Under a bequest of a remainder to a class providing that, if any of the class shall die, his or her share shall be divided among the survivors, the right of survivorship becomes fixed at the termination of the life estate.

[*Maddison* v. *Chapman*, 1 J. & H. 470, 478; *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. R. 209; *White* v. *Baker*, 2 DeG. F. & J. 55, 63; and *Re Pickworth*, [1899] 1 Ch. 642, referred to.]

2. WILLS (§ III H—170)—LEGACY—CORPUS — PAYMENT—BEQUEST TO WOMAN FREE FROM CONTROL OF HUSBAND.

The corpus of a legacy that was given a woman free from the control of her husband, if married, cannot be paid her during coverture, where the testator directed that the fund out of which the legacy was payable should be placed in bank for the benefit of the several legatees.

[*Foot* v. *Foot*, 15 Can. S.C.R. 699, and *Tullett* v. *Armstrong*, 1 Beav. 1, 4 Myl. & C. 377, referred to.]

3. WILLS (§ III H—170)—LEGACY — CORPUS — PAYMENT TO UNMARRIED WOMAN—BEQUEST FREE FROM CONTROL OF HUSBAND.

A woman, if unmarried at the termination of a life estate, is entitled to the corpus of a fund bequeathed her free from the control of her husband, if married, where the testator directed that the fund should be placed in bank for the benefit of the several legatees; although, if at the time of payment she was about to be married, a different question would arise.

[*Wright* v. *Wright*, 2 J. & H. 647, 655, referred to.]

4. WILLS (§ III G 4—137)—BEQUESTS—CONDITION FORFEITING IF MINOR LEGATEE ELECTS TO LIVE WITH PARENT—DURATION.

A condition that a gift to a testator's grandchildren should be forfeited if, at the death of the grandmother, with whom they were living at the execution of the will, they should elect to reside with their father, is limited to the period of minority of such legatees.

[*Jeffreys* v. *Jeffreys*, 84 L.T.N.S. 417, referred to.]

Statement

HEARING of an originating summons for a declaration of the rights of parties entitled under the last will of George Watson.

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E. P. Allison, for the trust company.

J. A. Chisholm, K.C., *O'Mullin*, and *J. L. Barnhill*, for parties entitled.

GRAHAM, E.J.:—Upon an originating summons I have to construe the following provision of the will of the late George Watson, of October 3, 1900.

I bequeath to my wife Rebecca all my real and personal property with money on interest and also in bank for her own use during her lifetime.

The property on Upper Water street she is authorized to sell. To my three grandchildren, daughters and son, namely, Rebecca W., Ida V., and Arthur Fraser, children of my deceased daughter Rebecca Fraser, I bequeath the proceeds of the sale of the within-named property with whatever money is in the bank at their grandmother's death; is to be placed in bank for their benefit, and to be free from all control or influence of their father or husband, if they should marry, and if either of them should die, his or her share shall go to the survivors. But, if their father, at their grandmother's death, shall come to claim them, and that they should be willing to go with him, they will lose their share and will revert to my two granddaughters, Ethel B. and Elma Brinkman. At my wife's death, I bequeath to my daughter Helen A. Brinkman the house now occupied by me, with all its appurtenances and $2,000 that is out on interest. She is also to look after the welfare of the above-named grandchildren, Rebecca A., Ida V., and Arthur Fraser, until they are able to do for themselves. I appoint my wife sole executrix of this my last will.

There is a fund of $4,449 arising from the sale of the Upper Water street property. The three grandchildren survived their grandmother, and are all over 21 years of age. Rebecca, too, has inter-married with one McLaughlan. The Eastern Trust Company was appointed trustee before the death of the grandmother, in her place, she having become too aged to hold that position. In the first place, I am of opinion that the provision does not mean that whoever of the three children lived the longest, was to take the capital. The testator used the plural "survivors," and that contemplated that there might be more than one at the time of survivorship. I think that the period of survivorship was to be fixed with reference to the death of the grandmother. The testator seems to have meant that if either of the grandchildren should die during the lifetime of the grandmother, then the survivors should take the share that the one who died would have taken.

I refer to *Maddison* v. *Chapman*, 1 J. & H. 470, at 478; *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. R. 209; *White* v. *Baker*, 2 DeG. F. & J. 55, at 63, and *Re Pickworth*, [1899] 1 Ch. 642.

Then there are trusts to be performed after the death of the grandmother, such as investment and so on. The testator apparently had in mind the possibility of the grandchildren being infants at the time of the death of the grandmother, and

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he must have had in mind the possibility of the marriage of the girls and a desire to prevent the husbands interfering with the control of the property when he provided for them taking for their separate use. As to the granddaughter who has married, Mrs. McLaughlan, I am of opinion that the trustees would not be justified in paying over to her during coverture her share: *Foot* v. *Foot*, 15 Can. S.C.R. 699; *Tullett* v. *Armstrong*, 1 Beav. 1, 4 Myl. & C. 377.

Apparently there is a difference in the case of Ida V., who is unmarried: *Wright* v. *Wright*, 2 J. & H. 647, at 655, and the trustees might be compelled to part with the capital to her. I have no evidence before me as to the facts about her, but if she is contemplating marriage presently with some person and is seeking to recover this share with a view to removing it from this provision before she marries, there might be a different consideration for the trustees. If she is wise, I think she will leave the share invested where it is and respect her grandfather's intention, although ineffectual.

Nothing of this kind applies to Arthur Fraser, except, of course, the provision which applies to all three, namely, the forfeiture and gift over to the Brinkmans upon a certain condition.

That condition has given me some difficulty. But I think it would only be considered a reasonable condition if it would happen during the minority of any of the children. Because the control of a father lasts, under ordinary circumstances, until, and in all cases ends, when the child attains the age of twenty-one years, after that they become emancipated, and the testator was, I think, contemplating a case of the grandmother dying during the minority of any of them. It would be unreasonable to extend the condition as applying to a period, say when the young man became fifty.

A father could not very well come to claim him then, nor would the expression, "be willing to go to him" be apt in respect to a person of that age. Then, taking the expression "at their grandmother's death" as one terminus of the period and fifty years of age as the other, when could the Court say with precision he is "willing to go to his father," or he has met his father or he is permanently residing with his father? The share now goes to the Brinkmans; that act was to work a forfeiture. I am of opinion that the provision construed with reference to a period subsequent to minority would be void for uncertainty. I refer to the case of *Jeffreys* v. *Jeffreys*, 84 L.T. N.S. 417, Farwell, J., and the cases cited—that was a case of a forfeiture and gift over if "she (the daughter) shall in any way associate, correspond or visit with any of my present wife's nephews or nieces."

In one of these cases cited, there was said:—

> When a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine. . . . . .

Even as conditions subsequent to defeat vested estates, they must be construed strictly, and to work a forfeiture there must be shewn a breach of a defined line of conduct which the parties concerned must reasonably have known would work a forfeiture, and Farwell, J., continues: "Here, therefore, I think, the test is whether you can predicate with certainty what the individual may, or may not do." Later, citing the case: "There is great difficulty in saying that a forfeiture was incurred when the Court cannot clearly see what it was the testator meant."

One avoids this uncertainty by restricting the condition in this case as applicable to a state of minority of the children upon the grandmother's death, when a parent has a parent's control over his children, and was exercising control, and not after the emancipation of the children.

For this reason I think the time for a breach of the alleged condition has passed and that the gift over to the Brinkmans cannot now take effect. The Brinkmans, who are parties, appeared by counsel before me and good naturedly agreed to release any right if the three persons in question would undertake not to come under the influence of their father, who, I think it was stated, was resident out of the jurisdiction, and they were willing to so undertake. I think it is too difficult for me to provide the terms of any such undertaking in making a declaration.

I am of opinion that in the case of Arthur Fraser and in the case of Ida V., subject to what I have already said, the trustees are justified in now paying over to each one his one-third share of this fund.

Trustees' costs and one set of costs to the three children to be paid out of the estate.

Declaration accordingly.

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HILL v. RICE LEWIS & SON Limited.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 18, 1913.

1. NEGLIGENCE (§ I B 2—16)—DANGEROUS AGENCIES — DEFECTIVE CARTRIDGES—LIABILITY OF SELLER.

A retail vendor is not answerable for personal injury sustained by the purchaser of a sealed box of cartridges of a certain description and make, as the result of the box containing one cartridge of a different kind and of the explosion of the cartridge after it had missed fire because of its being the wrong size, where the plaintiff relied solely on his own judgment and not that of the vendor, in making the purchase.

[*The Moorcock*, L.R. 14 P.D. 64, and *Hamlyn* v. *Wood*, [1891] 2 Q.B. 488, applied.]

Statement

APPEAL by the plaintiff from the judgment of Denton, Jun. Co.C.J., dismissing an action, brought in the County Court of the County of York to recover damages for breach of an implied warranty or condition upon the sale by the defendants of a box of cartridges to the plaintiff. One of the cartridges in the box proved to be defective or unsuitable for the purpose for which it was bought, and that was said to be the cause of an explosion by which the plaintiff was injured.

The appeal was dismissed.

Argument

J. W. McCullough, for the plaintiff, argued that the sale was one of goods by description, and that there was an implied warranty that each cartridge should correspond with the description.

J. D. Montgomery, for the defendants, argued that the plaintiff's case rested entirely upon an implied warranty, and that no negligence on the part of the defendants had been charged, or established, and no liability made out at common law. The case at the bar comes within the 4th proposition in *Jones* v. *Just* (1868), L.R. 3 Q.B. 197, 202, which is decisive on the point. [RIDDELL, J., referred to *Grocers' Wholesale Co.* v. *Bostock* (1910), 22 O.L.R. 130, 141]. Here there were no means of inspection, which was, as a matter of fact, refused.

McCullough, in reply, referred to *Jackson* v. *Watson & Sons*, [1909] 2 K.B. 193, 196; *Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284, 297.

Mulock, C.J.

March 18. MULOCK, C.J.:—This case was tried with a jury, and the learned trial Judge, after taking the opinion of the jury on certain questions, dismissed the action; and from that judgment the plaintiff appeals.

The facts are as follows. The plaintiff went to Parry Sound to hunt deer, using for such purposes a 38-40 Winchester rifle. Before going, he purchased from the defendant company a box

of cartridges intended for his rifle. One of them proved unsuitable, being too small, and, not discovering its unfitness, the plaintiff put it in his rifle, and, when aiming at a deer, snapped the rifle, but the cartridge, because of its unsuitable character, failed to explode. Thereupon he opened the breech, looked into the barrel, and, not seeing the shell, endeavoured to put in another cartridge; but, in doing so, the latter exploded and caused him injury, and for the damage thus sustained this action is brought.

For the plaintiff it was contended that the defendants were liable for breach of an implied warranty that each cartridge was suitable for the plaintiff's rifle; also that it was a sale of goods by description, and that there was an implied condition that each cartridge corresponded with the description.

The first question to determine is, what was the contract between the parties? Did the plaintiff buy a number of cartridges contained in a sealed box, relying on an implied warranty on the part of the defendant company that they were each of a certain kind, or did he buy a specific article, viz., a sealed box, supposed to contain cartridges all of a certain kind, on his own judgment, not relying upon the defendants as to the contents of the box?

The onus is on the plaintiff to establish the implied warranty or condition, and such implication must rest on the presumed intention of the parties: *The Moorcock* (1889), 14 P.D. 64, 68; or, as put in another way by Meredith, J.A., in *Barbeau* v. *Piggott* (1907), 10 O.W.R. 715: "Contracts are to be implied according to, not contrary to, the intention of the parties."

Where it is a question of implied warranty, surrounding circumstances may be shewn in evidence in order to aid the Court in discovering the intention of the parties: *Behn* v. *Burness* (1863), 3 B. & S. 751; and those circumstances, together with the plaintiff's evidence, make it, in my opinion, abundantly clear that what the plaintiff wished to buy, and did buy, was a sealed box of a certain design and description, and bearing on it a printed guarantee of the manufacturers (who are not the defendant company), and supposed to contain cartridges of the kind desired by the plaintiff.

It appears that for some years the plaintiff owned a 38-40 Winchester rifle, and had been in the habit of buying for it, by the box, a certain make of cartridge, viz., those manufactured by the Union Metallic Company.

The boxes of 38-40 cartridges put on the market by that company had certain printed matter on their outside, and they corresponded in appearance, including the printed matter on the outside, with the box in question in this action.

One of these boxes, exhibit 4, was put in at the trial, and has on the upper side the following printed matter:—

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".38 WINCHESTER
"50 Central Fire Cartridges
"U.M.C. 40 grs. Powder
"U.M.C. .38 Winchester 180 grs. Bullet
"Manufactured by
"THE UNION METALLIC CARTRIDGE CO.
"Bridgeport, Conn., U.S.A."

On each of three sides of the box, in large white letters, on a red circular background, are stamped the letters "U. M. C."

On one side are the following printed words:—

"Adapted to .38 Winchester, Marlin, Colt, and other Rifles and Revolvers.

"Are sure fire and accurate.

"The U.M.C. Co.

"See guarantee on bottom of box."

On another side are printed these words:—

"These cartridges are especially made for Winchester, Marlin, and Colt Rifles.

"They have been thoroughly tested in these arms for accuracy and penetration, and are guaranteed to be superior to any other brand on the market.

"Union Metallic Cartridge Co."

And on the bottom is printed the following guarantee:—

"We hereby guarantee these cartridges, also the following arms when used with them, to the full extent of the makers' guarantee, viz., Smith & Wesson, Colt, Winchester, Marlin, Remington, Savage, Stevens, and all other properly constructed arms.

"Trade Marks Reg. U.S. Pat. Office.

"Union Metallic Cartridge Co."

And on each end of the box, in large figures and letters, are printed: ".38 Winchester, U.M.C. Black Powder."

The plaintiff had enjoyed several years' experience with these goods, and in no case had he found a single defective cartridge in any box that he had purchased; and, before going to Parry Sound, he decided to buy another box, although having still on hand about half of a box full.

Accordingly, he went to the store of the defendant company, who sold these goods, and there asked for, and got, another box.

The following is his evidence as to what transpired in connection with the purchase:—

"Q. This is the kind of cartridge that you asked for, is it not, and received (shews a box of 38-40 rifle cartridges)? A. Yes, that is the kind of cartridge.

"Q. In a sealed box, like this? A. Yes.

"Q. Trade-mark 'U.M.C.' on it? A. Yes.

"Q. 38-40 Winchester, centre-fire, cartridges? A. This is the same as yours.

"Q. This is the same style of box? A. As far as I know.

"Q. And this is the sort of cartridge you asked them for? A. I asked for 38-40 rifle shells.

"Q. And you got it? A. Yes.

"Q. And you took this home with you? A. Took it home.

"Q. You said before that you asked for .38; it is the same thing? A. It is the same thing, I got the same anyhow.

"Q. This is what you asked for, is it not? A. Yes, that is what I asked for.

"Q. Union Metallic Company's .38 Winchester? A. Yes.

"Q. They are guaranteed, these cartridges? A. Yes.

"Q. Guaranteed by the factory? A. Yes, sir.

"Q. You accepted that and took it with you? A. Yes.

"Q. And you did not open these cartridges when you purchased them? A. No, I did not.

"Q. The person who sold them did not open them? A. No.

"Q. He had no opportunity of seeing them, had he? A. No, no chance whatever, they were in a sealed box.

"Q. That is what you expected to receive, a sealed box? A. Yes, that is what I wanted.

"Q. And you did not examine them until you got home? A. No, I didn't examine them then." (Box of cartridges put in, marked exhibit 4.)

"Q. You know that this ammunition has, possibly, the best reputation, possibly is the best ammunition in the world? A. Never found any fault with it.

"Q. Manufactured by reliable people? A. The first box that I ever got from them that I ever had any trouble with.

"Q. And these shells are well known to huntsmen and the trade? A. Yes, I think they are.

"Q. There is no judgment used in selling to you this box of cartridges? Just sold to you? A. Just sold to me.

"Q. As a can of tomatoes, or peas, or beans? A. Yes.

"Q. You asked for a box of these cartridges, and they were handed to you? A. Yes. There is a difference from a can of peas, there is a guarantee on that box.

"Q. They are different from a can of peas because they have a guarantee on the box? A. Yes."

THE COURT: "You went to Rice Lewis and got this box, just before you went north? A. Just a few days before I went north.

"Q. What did you say when you went into the store? A. I asked them for a box of 38-40 shells, and that is the shells that I got.

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"Q. Gave you a box just like that, exhibit 4? A. Yes."

From the plaintiff's evidence, it appears to me clear that what he intended to purchase was a sealed box of cartridges.

He was familiar with the Union Metallic Company's 38-40 Winchester cartridges, and had been buying them in sealed boxes, and knew that each box was guaranteed by the maker.

He did not buy a certain number of cartridges as separate articles, but one sealed box, which he supposed to contain a certain number of 38-40 cartridges (these cartridges are described in some places as .38, and in other places as 38-40, but the plaintiff, in his evidence, states that the two terms mean the same thing; as he says in his evidence, "They were a sealed box."

"Q. That is what you expected to receive, a sealed box? A. Yes, that is what I wanted."

That being what he wanted, and what he asked for, that is what the salesman handed to him, and that is what he bought and what he obtained.

He had his own experience, experience as to the contents of such sealed boxes; and, when such a sealed box was handed to him, with his experience, he identified it as corresponding with his previous purchases, used his own judgment, and completed his purchase, running his own risk as to the contents, and not contemplating any responsibility on the part of the defendant company in respect of the quality of the contents of the box.

If a person goes into a shop, and recognises on the shelf goods with which he is familiar, say boxes known in the market as boxes of 38-40 Winchester cartridges, the goods of a particular manufacturer, and expresses a wish to buy one of those boxes of 38-40 Winchester cartridges, and it is then sold to him, he gets what he is buying, no matter what the contents of the box may be.

That is, in substance, what occurred here; the reference to .38 or 38-40 shells by the plaintiff, when in conversation with the salesman, was descriptive of the box, not of the contents.

The plaintiff did not rely upon the defendants as to the quality of the contents of the box; he was aware that, when in their possession, it was sealed; and he, doubtless, assumed, as the fact probably is, that it came into their hands from the manufacturer in a sealed condition, and that they had no more knowledge than he as to its actual contents. That he was buying on his own judgment, based on his experience of the goods in question, and not relying on any implied warranty on the defendant's part, is also made clear by the circumstance that he manifested no desire to have the box opened in order that he might inspect the contents. Doubtless, if he had so wished, he might have been afforded such an opportunity; and, if not, then he could have declined to purchase. The natural inference is, that the outside

appearance of the box identified it to his satisfaction as being the goods of the Union Metallic Company, which had, theretofore, proved entirely satisfactory to him; and thus he was content to rely on his own judgment as to the merits of the cartridges contained in the box in question.

That he was relying on the manufacturers, not on the defendants, also appears from his evidence where he explained that the purchase of the box of cartridges differed from the purchase of a can of peas, in that the box of cartridges bore on it the guarantee of the manufacturers, and it is significant that, in his examination, this reference to the manufacturers' guarantee originated with himself, and not with the examining counsel, shewing that when making the purchase the manufacturers' guarantee was present to his mind: thus he got the specific article which he bought.

As stated in Benjamin on Sale, 5th ed., p. 621: "It is a question for the jury whether the thing delivered be what was really intended by both parties as the subject-matter of the sale, although not very accurately described."

Thus, in *Mitchell* v. *Newhall* (1846), 15 M. & W. 308, the sale was of "fifty shares" in a company, and in fulfilment of a contract, the plaintiff, a stock-broker, tendered to the defendant a letter of allotment for fifty shares. The defendant contended that the letter of allotment was not the subject-matter of the contract; but, the jury having found that in fact no shares of the company had been issued by them, and that letters of allotment were annually bought and sold as shares in the company on the stock exchange, the defendant was held bound by the contract.

And in *Lamert* v. *Heath* (1846), 15 M. & W. 486, the defendant, a stock-broker, had bought for the plaintiff scrip certificates of shares in the Kentish Coast Railway Company, which were signed by the secretary, and issued from the company's office; and had for several months been the subject of sale and purchase in the market. At this stage the company repudiated the security as not genuine, urging that it was issued without authority. Thereupon the plaintiff sought to recover the purchase-money from the stock-broker, on the ground that the latter had not delivered the genuine scrip; but the Court held the buyer bound by his bargain, saying: "If this was the only Kentish Coast Railway scrip in the market . . . and one person chooses to sell, and the other to buy that, then the latter has got all that he contracted to buy."

If a purchaser buys a specific article, on his own judgment, and it turns out unfit for the purpose for which it was required, he cannot hold the vendor responsible. To do so, it must appear that he bought relying on the vendor's judgment, and made known to him the use to which the article was to be applied.

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Mere knowledge on the part of the seller as to the use for which the specific article is intended will not raise an implied warranty, if the buyer, not relying on the seller's skill or judgment, selects the article on his own judgment: per Erskine, J., in *Brown* v. *Edgington* (1841), 2 Man. & G. 279, 292.

The defendant company had no knowledge of the defective cartridge, and the plaintiff chose to buy the sealed box of cartridges, relying on his own judgment. This was the case in *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, 405. There the plaintiff gave to the defendant an order in the following words: "Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace." In giving judgment, Lord Abinger, C.B., says: "The case is that of an order for the purchase of a specific chattel, which the buyer himself describes, believing, indeed, that it will answer a particular purpose to which he means to put it; but if it does not, he is not the less on that account bound to pay for it. The seller does not know it will not suit his purpose, and the contract is complied with in its terms."

So in *Prideaux* v. *Bunnett* (1857), 1 C.B.N.S. 613, an action to recover the price of an article called "Prideaux's patent self-closing (or smoke-consuming) valve," in connection with which the plaintiff issued circulars with blanks intended to be filled by intending purchasers of the patent article, headed, "Particulars required for the application of Prideaux's Patent Valve for the Prevention of Smoke," the defendant, who had not seen the article, filled up one of the circulars and enclosed it in a note as follows: "Please prepare us a smoke-preventing valve," etc. The apparatus, as furnished, proved a failure; and, when the plaintiff brought the action for the price, the defendant asserted a breach of warranty: *Held*, that the representations in the circulars did not amount to a warranty, and that, this being the sale of a specific article, the plaintiff was entitled to recover the price.

In Benjamin on Sale, 5th ed., p. 625, in commenting on *Jones* v. *Just*, L.R. 3 Q.B. 197, the learned author says: "The principles above stated may be resolved into the proposition (also applicable to sales by sample) that a condition or warranty as to fitness or quality is implied only so far as a buyer does not buy on his own judgment. The buyer buys on his own judgment if he selects or defines the specific chattel or class of goods he requires, although he may state the purpose for which he is buying."

In *Robertson* v. *Amazon Tug and Lighterage Co.* (1881), 7 Q.B.D. 598 (C.A.), the plaintiff contracted with the defendants, for a lump sum to be paid to him by the defendants, to take a certain steam-tug with her own power, and towing six barges, from

Hull to the Brazils, the plaintiff to pay for crew and provisions. At the time of the contract, the engines of the tug were damaged and out of repair, but neither party was aware of the fact. In consequence of this defective condition of the tug, the voyage was delayed, and the plaintiff sustained loss of profits, and brought this action for damages for breach of an implied warranty that the tug was reasonably efficient for the purposes of the voyage. The plaintiff had failed, Brett, L.J., saying (p. 606): "When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made."

Mulock, C.J.

For the foregoing reasons, I am of opinion that the plaintiff, relying on his own judgment as to the quality of the cartridges put on the market by the Union Metallic Company, in sealed boxes like the one purchased, went to the defendant company's store for the purpose of purchasing one of such sealed boxes, and obtained the specific article that he desired, and that in making such purchase he did not rely on the sellers' judgment; and that, therefore, there was no implied warranty on the part of the defendants; and that this appeal should be dismissed with costs.

SUTHERLAND, J.:—I agree.

Sutherland, J.

CLUTE, J.:—I agree. I have only to add, after the very full reasons for judgment of the Chief Justice, that, in my opinion, the principle laid down in *The Moorcock*, 14 P.D. 64, at p. 68, approved by Lord Esher, M.R., in *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, at pp. 491 and 492 (C.A.), applies in this case, namely, that an implied warranty really is founded on the presumed intentions of the parties.

Clute, J.

What the law desires to effect by the implication is to give such business efficacy to the transaction as must be intended, at all events, by both parties. In the present case, having regard to the plaintiff's evidence, it seems impossible to reach the conclusion that either side contemplated inspection or intended that inspection should be made or supposed that the defendants were in any way responsible for the contents of the box.

Both knew that the packages were manufactured and sent out sealed up by a reputable firm, and upon this the plaintiff obviously relied when making the purchase. I can find no suggestion, from all that took place, that the plaintiff in any way relied

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upon any warranty as to the contents of the box of cartridges which were sold. It is not, I think, a case where, from the nature of the article and the conditions of purchase, the buyer looks to the seller for anything beyond the fact of receiving from his hand the sealed package called for—he gets what he asks for without any responsibility resting upon the seller that such package contains all that the buyer expects.

I do not follow the reasoning, as urged by Mr. McCullough, that the buyer did not get what he asked for. I think he did—in this sense that he relied upon the manufacturers and desired the sealed package of .38-40 cartridges as put up by them; this he received, and took his chances as to whether or not the manufacturers, who had always hitherto, so far as he was concerned, exercised due care, had done so in this case.

Riddell, J. (dissenting)

RIDDELL, J. (dissenting):—An appeal from the judgment of the County Court of the County of York; after a trial before a jury and answers found by them to questions submitted, the learned County Court Judge "nonsuited" the plaintiff—and this is the plaintiff's appeal.

While the result is called a nonsuit, of course it is a dismissal of the action. The reasons for judgment set out clearly, and with sufficient minuteness and accuracy, the facts of the case—but, as it seems to me that there was no little confusion of thought and consequently considerable misapplication of the cases during the argument before us, it would be well to set out briefly the grounds of the plaintiff's claim. He came to the defendants, who are dealers in ammunition, and asked for a box of U.M.C. 38-40 rifle shells. The defendants handed him a sealed box of what both he and they, without negligence, believed to be U.M.C. 38-40 rifle shells; he opened the box on reaching home, and, with a reasonable examination, found nothing wrong. Using his rifle with ordinary care, a cartridge from this box became wedged in the barrel because it was not a rifle cartridge at all, but a revolver cartridge, and caused a back-fire, injuring the plaintiff to an extent which, the jury find, should entitle him to $500 damages.

The question is not as to the quality of the rifle cartridges—but as to the kind of article sold.

There are some cases, which I do not intend to discuss, which indicate that there is or may be no implied warranty of quality in a sale of this kind—*Julien* v. *Laubenberger* (1896), 16 Misc. N.Y. 646, 38 N.Y. Supp. 1052, is one of them; and others are referred to in 35 Cyc. 412, n. 10. "There is," says the text, "no implied warranty as to latent defects of which in the nature of things the seller could not have knowledge."

But the present, in my view, is not such a case—the com-

plaint is not that the rifle cartridges sold were defective—but that some (or at least one) of the articles sold were (or was) not a rifle cartridge at all.

In every sale there is a condition precedent that the article sold shall answer the description, and this condition becomes a warranty when the goods have been dealt with as the purchaser's own: *Behn* v. *Burness*, 3 B. & S. 751 (Cam. Scacc.); *New Hamburg Manufacturing Co.* v. *Webb* (1911), 23 O.L.R. 44, and cases cited.

That this implied condition exists is perfectly clear. The Imperial Sales of Goods Act, 1893, sec. 13, is simply in affirmance of the common law: *Mody* v. *Gregson* (1868), L.R. 4 Ex. 49, at p. 56, and other cases cited in note to sec. 13 of the Act in Chalmers's Sales of Goods Act (1893), 7th ed., p. 40.

"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:" *Randall* v. *Newson* (1877), 2 Q.B.D. 102, at pp. 109, 110, *per* Brett, J.A.

"It is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind:" *Bowes* v. *Shand* (1877), 2 App. Cas. 455, at p. 480, *per* Lord Blackburn.

In the present case, a revolver cartridge is sold for a rifle cartridge, and it makes no difference whether the vendors knew the fact or not—they are, in my view, liable as for an implied warranty that it was a rifle cartridge.

The question of remoteness of damages has not been disposed of by the learned County Court Judge; it was not raised at the trial, and counsel for the defendants did not press us on the point, although invited by some members of the Court to argue it. Even if the damages proved should be too remote, I think that the plaintiff should have nominal damages with full costs here and below: *Village of Brighton* v. *Auston* (1892), 19 A.R. 305. I do not think, however, that the damages are too remote. At the time of the contract all parties contemplated that the plaintiff should use in his rifle the cartridges he bought—he did so, and, because one was not as warranted, an accident took place, precisely as was to have been expected.

I think that the appeal should be allowed with costs, and a judgment entered for the plaintiff for $500 and costs.

LEITCH, J.:—I agree.

Leitch, J.

Appeal dismissed; RIDDELL *and* LEITCH, JJ., *dissenting.*

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Re CLEARWATER ELECTION.

(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Scott, Simmons, and Walsh, JJ. June 18, 1913.

1. ELECTIONS (§ II C—72)—DISPUTED BALLOTS—DUTY OF WHOM TO COUNT.

Under the Alberta Election Act, 9 Edw. VII. ch. 3, it is the duty of the returning officer and not of a deputy returning officer or of a court of inquiry, to open envelopes containing disputed ballots allowed by such court, and count them. (*Per* Scott, Simmons, and Walsh, JJ.)

[*Re Clearwater Election*, 11 D.L.R. 355, affirmed in part.]

2. MANDAMUS (§ I F—54)—SUBJECT OF RELIEF—ELECTION—PERFORMANCE OF DUTY BY RETURNING OFFICER.

Mandamus will not lie, under sec. 235 of the Alberta Election Act, 9 Edw. VII. ch. 3, to compel a returning officer to open envelopes containing disputed ballots allowed by a court of enquiry, and add them to election returns, where he has properly added the votes cast, with the exception of the disputed ballots, as required by law; since his neglect to add the disputed ballots was not a wilful delay, neglect, or refusal to perform the duties imposed upon him by law; and adequate relief could be obtained on a recount before a District Court judge.

[*Re Clearwater Election*, 11 D.L.R. 355, reversed in part.]

3. ELECTIONS (§ II C—72)—DISPUTED BALLOTS—POWER OF DISTRICT COURT JUDGE TO COUNT IN FIRST INSTANCE.

A District Court judge, on a recount of an election by way of an appeal, has power to open envelopes containing disputed ballots and count those allowed by a court of enquiry.

Statement

APPEAL by H. W. McKenney, one of the candidates at an election, from an order of Mr. Justice Beck *Re Clearwater Election* (No. 1), 11 D.L.R. 353, made upon the application of A. Williamson Taylor and Joseph Clarke, the other candidates, directing the returning officer to count certain votes cast at the said election.

The appeal was allowed.

Frank Ford, K.C., and *Eager*, for H. W. McKinney.

C. C. McCaul, K.C., for A. W. Taylor.

Alex. Stuart, K.C., for J. H. Clarke.

The Returning Officer was not represented.

Harvey, C.J.

HARVEY, C.J.:—The election was held under the Alberta Election Act, ch. 3, of 1909. By sec. 100 of that Act any person whose name is not on the voters' list is entitled while the poll is open, upon taking the oath prescribed, to have his name added to the voters' list with the word "sworn" written after it.

By sec. 177, when this is done, if a candidate or his agent so requests, the deputy returning officer shall serve such person with a notice to appear at a time and place to be named in the notice and answer to a charge of having voted contrary to the provisions of the Act. When this is done the ballot is received

and placed in an envelope which is sealed and marked "disputed ballot." His name, residence and other particulars are also written in the envelope, and particulars of what has been done is also written in the poll book under the voter's name. On the count of the votes after the close of the poll the disputed ballots at the poll are placed in a separate envelope which is endorsed to indicate its contents (see 189).

Section 191 provides that everything but the disputed ballots and the poll book shall be placed in the large envelopes supplied for the purpose, sealed and placed in the ballot boxes. As by sec. 195 the deputy returning officer must, at the Court of enquiry, take out of the ballot box an envelope containing the poll book and the disputed ballots, though the Act is silent on the subject, it may be presumed that, before sealing the ballot box, he will place the poll book and disputed ballots in an envelope and place it in the box.

By sec. 195 the deputy returning officer and some justice of the peace selected by him or by the Lieutenant-Governor-in-council shall constitute a Court of inquiry whose duty, by sec. 203, is to determine "whether any statement sworn to under the provisions of this Act by the voters whose vote is the subject of the inquiry is false in whole or in part, and, if false in part, in what respect it is so false." If the statement is false in whole or in part the vote is disallowed; if it is wholly true it is allowed. Sec. 200 authorizes the withdrawal of an objection to a vote, in which event,

> the inquiry shall cease forthwith . . . and such vote shall be allowed.

Sec. 205 provides that the Court, after concluding its labours, shall "make a return in duplicate of the decision reached by it on the qualifications of the several voters whose right to vote is the subject of dispute; and, if any vote has been disallowed, it shall specify on what ground it has been disallowed."

The deputy returning officer is to place one duplicate return and all evidence and exhibits, together with the poll book in an envelope or envelopes and seal them and return them to the ballot box.

The section is silent as to what is to become of the disputed ballots again, but by sec. 210 we find them taken out of the ballot box once more in the "large envelopes containing the poll books and the disputed ballots and returns in respect thereof," this time by the returning officer for the purpose of making his declaration of election. Sec. 210 which prescribes the duty of the returning officer is as follows:—

> 210. The returning officer at the place, day and hour appointed by his proclamation, and after having all the ballot boxes shall open them and shall first open the large envelopes containing the poll books and the dis-

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puted ballots and returns in respect thereof, if any, and render his decision regarding any ballot upon which the Courts of inquiry respectively have failed to agree, having regard only to the evidence taken by the Court of inquiry that examined into the same, he shall then open the sealed envelopes containing the statements of the polls and shall, in the presence of the election clerk and of the candidates or their representatives, if present, add up the votes given for each candidate from the statements of the polls and the returns of the Courts of inquiry respectively, and shall add thereto any votes allowed by him as to which any Court of inquiry has failed to agree as hereinbefore provided, and shall forthwith declare to be elected the candidate having the largest number of votes.

Other sections which are important are 218, 224, 235, and 285, which are as follows:—

218. If, within eight days after that on which the returning officer has made addition of the votes for the purpose of declaring any candidate elected upon the application of a candidate or a voter, it is made to appear by affidavit to the Judge that deputy returning officer has in counting the votes:—

(*a*) Improperly counted any ballot paper; or,

(*b*) Improperly rejected any ballot paper; or,

(*c*) Made any incorrect statement of the number of ballots cast for any candidate; or,

(*d*) That the returning officer has improperly added up the votes; or,

(*e*) That the Court of inquiry or the returning officer has improperly allowed or rejected any disputed ballots, and if the applicant deposits within the said time with the clerk of the Court the sum of $100 in legal tender or in the bills of any chartered bank doing business in Canada as security for the costs,

the Judge may, in writing, appoint a time and place to hear and determine any appeal from the Court of inquiry or the returning officer, and where same is asked to recount or finally add up the votes cast at the election:—

Provided that, where the application is limited to an appeal or appeals from the Court of inquiry or returning officer and does not involve a recount, the security for costs hereinbefore provided shall be $10.

224. At the time and place appointed, and in the presence of the said persons, the Judge shall (*a*) hear and determine appeals from the Court of inquiry or returning officer in respect to disputed ballots.

(*b*) Make a final addition from the statements contained in the ballot boxes returned by the deputy returning officers or recount all the votes or ballot papers returned by the several deputy returning officers as the case may be, and shall, in the case of a recount, open all the sealed envelopes containing—

(*a*) The used ballot papers which have been counted;

(*b*) The rejected ballot papers;

(*c*) The cancelled ballot papers;

(*d*) The declined ballot papers;

(*e*) The unused ballot papers.

235. If a returning officer wilfully delays, neglects or refuses—

(*a*) To add up the votes; or

(*b*) To declare to be elected the candidate or where two or more can-

didates are required to be elected from any electoral division the candidates to the required number having the largest number of votes; or,

(c) To give his casting vote where he is by law required to do so; or,

(d) To make the return as required by this Act of the candidate having the largest number of votes;

the person aggrieved or any voter who voted at the election may apply to a Judge of the Supreme Court for a mandamus commanding the returning officer to perform the duty which he is shewn to have omitted.

(2) The notice shall be served upon the returning officer and upon any person who was a candidate at the election.

(3) In other respects the provisions of the Judicature Ordinance and the rules made thereunder shall apply to such application.

(4) Nothing in this section contained shall affect or impair any other right or remedy of the person aggrieved.

285. Every officer engaged in the election who is guilty of a wilful act or omission in contravention of this Act shall in addition to any other penalty or liability to which he may be subject forfeit to any person aggrieved thereby a sum not exceeding $400.

In this election a Court of inquiry allowed five disputed ballots, but did not open the envelopes containing the ballots, and the return made consequently did not disclose for whom the ballots were cast.

At another poll there were two disputed ballots, objections to which were withdrawn in consequence of which no Court of inquiry was held and no return therefore made in respect thereof. The returning officer on the day appointed for making his count and declaration under sec. 210, finding nothing directing him to open the envelopes and count the ballots did not count these seven ballots, and made his declaration in disregard of them.

After he had made his declaration, proceedings were taken under sec. 235, under which the order of mandamus was made at the instance of A. Williamson Taylor, one of the candidates in respect of the five votes passed in by the Court of inquiry, and at the instance of Joseph Clarke, another candidate in respect of the two votes which had not been dealt with by a Court of inquiry, and H. W. McKenney, the candidate who had been declared elected, was ordered to pay the costs. If, as seems reasonable, the disputed ballots which are allowed are to be counted before the returning officer makes his declaration it seems clear that they must be counted, either by the Court of inquiry which allows them, or by the deputy returning officer or by the returning officer. Inasmuch as the returning officer is to use only the return of the Court of inquiry, it would seem reasonably clear that the deputy returning officer, other than as a part of the Court of inquiry, could not count them. The learned Judge who made the order, apparently concluded that the duty of the Court

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of inquiry having been set out in terms, what was prescribed comprised its whole duty and that left no one but the returning officer to count them. But it is apparent that such a rule might as well be applied to the ascertainment of the duty of the returning officer which would free him from the duty of counting them and they would therefore be left uncounted as was done here.

I confess myself unable to see this duty imposed upon the returning officer as clearly as the learned Judge below did. Indeed, there are many provisions which lead me to doubt whether it is his duty.

These ballots may be properly marked or they may not, but no power is given by the Act to reject ballots which are not properly marked, except to the deputy returning officer under sec. 187, and the Judge in a recount under sec. 226. If these ballots are to be treated in counting as other ballots, then the deputy returning officer, as a part of the Court of inquiry in a count by it, might, perhaps, be deemed to have the power given by sec. 187, while there is no provision giving any such power to the returning officer.

Then sec. 186, which deals with the count of the ballots by the deputy returning officer after the close of the poll provides that "he shall not *then* count the disputed ballots, but shall deal with them as hereinafter provided." The use of the word "then," suggests that at a later stage he is to count them. Another reason for thinking that the returning officer is not to open the envelopes is that he is required to make an oath in form 52 in which he states, "I have not opened or permitted to be opened any of the envelopes containing the ballot papers." Undoubtedly if he opens the envelopes containing the disputed ballots he cannot make the prescribed oath, and to add an exception when none is authorized clearly makes it a substantially different oath.

It is clear, however, from sec. 210 that in case of a disagreement between the members of the Court of inquiry, he must allow or disallow the vote, and in case he allows it, he must count it, which he can only do by opening the envelope and ascertaining for whom it is marked.

This weakens, considerably, the argument founded on the form of the oath, though it does not destroy it entirely, for the case in which he might have to count a ballot paper allowed by himself might not occur in a hundred elections, and might, therefore, have been overlooked in the form of the oath, but the common case of votes allowed by Courts of inquiry would occur in nearly all cases, and, therefore, could hardly be considered as having been overlooked. The strongest argument, to my mind, in favour of the view that the votes are to be counted before

they reach the returning officer, is the provisions of sec. 210, requiring him to ascertain the number of votes for each candidate by adding the statements of votes for each candidate made out by the deputy returning officers to the returns of the Courts of inquiry. Now, it is quite apparent that there would be no possibility of doing this if the returns were not of the same character as the statements, *i.e.*, expressed in votes for each candidate. There is no form of return of the Court of inquiry and it is apparent that a return stating that the Court had allowed such and such votes of which so many were cast for one candidate and so many for another would be a return which would be in no way in conflict with the provisions respecting the Court of inquiry and would be a return which could be added to the statement and the only kind that could be so added. If the section had said that he shall ascertain the number from the statements and the returns then it might well be said that the returns coupled with his opening the envelopes and counting the votes allowed would be sufficient with the statements to enable him to ascertain exactly the number of votes cast for each candidate. There is, however, not a word in the section requiring him to count any ballots, but he is directed to add and to add only. There appears, therefore, to be strong reasons for doubting the correctness of the conclusion that it is the duty of the returning officer and not that of the Court of inquiry to count the disputed ballots. I do not, however, consider that it is necessary to decide definitely where the duty lies, as I think this appeal can be determined on other grounds and I would not have considered the arguments at this length, but for the purpose of shewing reasons for doubting the correctness of the conclusion on that ground of the decision appealed from.

In my opinion sec. 235 was not intended to have any application to such a case as the present.

The section is preceded by the heading, "Failure to make return." This heading applies only to this section, the next section being preceded by the heading, "Publication of returns." Now the heading is as much a part of the Act as the section itself.

Maxwell on Statutes, 5th ed., 82, says:—

> The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections.

and on p. 69:—

> The preamble of a statute has been said to be a good means to find out its meaning, and, as it were, a key to the understanding of it; and as it usually states, or professes to state, the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted for the purpose of solving any ambiguity, or of fixing the meaning of words which may have more than one, or of keeping the effect of the Act within

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its real scope, whenever the enacting part is in any of these respects open to doubt.

and again on p. 82:—

The functions of the preamble is to explain what is ambiguous in the enactment and it may either restrain or extend it as best suits the intention.

(*b*), (*c*), and (*d*) of the section clearly apply to cases where the returning officer refrains from doing his clear duty; why then should (*a*) be construed as meaning more than it says for the purpose of subjecting the returning officer not merely to a mandamus but also to the money penalty of sec. 285? It is not contended that the returning officer has refrained from doing what he considered to be his duty or that he has done what he has done other than honestly and as he believed in the proper discharge of his duty. Moreover it appears to me to be a play in words to say he has not added up the votes. He has added up all the votes that he conceived it his duty to add up. Presumably, there are ballots in the envelopes marked, "disputed ballots" but whether there are and whether they are marked in such a way as to make them capable of being counted cannot be ascertained until they are examined and one disputed ballot would support the argument as well as a dozen.

He has made his declaration and swears that he is ready to make his return as soon as the proper time comes. If, therefore, this section is as to the heading indicates and as I conclude it to be for the purpose of preventing a returning officer from rendering an election abortive then, especially as the proceeding is the extraordinary one of mandamus, it should not be extended beyond its purpose and it should have no application to the present case.

I feel the readier to come to this conclusion because it appears to me that the Act provides other means of reaching the desired end of having these disputed votes properly dealt with, viz., before a District Court Judge in a recount under sec. 218.

I see no reason why if it can be said that the votes have not been added up in the words of sec. 235, when some have been omitted it cannot as well be expressed by saying they have been improperly added up in the words of sec. 218. It is true that a mistake in the addition would be an improper addition, but who that has gone through his school days and later in adding has not inadvertently omitted a figure and consequently arrived at an improper result? Of such a case, can it be said that the term, "not proper" is "improper" addition is an incorrect designation? In my opinion it cannot. Then it is clear that under sec. 224 the District Judge is not directed to unseal the envelopes containing the disputed ballots and for that reason it seems to me clear that it is intended by the Act that they will be unsealed

and counted before they come to him but if that has not been done, he has power to do it for if the application is for a recount he is to

recount all the votes or ballot papers returned by the several deputy returning officers.

It will at once be said that if these had not been counted they cannot be recounted and that is perfectly true if the word "recount" is to be kept to its strict meaning, but everyone who has any knowledge of recounts knows that the word is not so used for it is the recognized duty of the Judge to examine the rejected ballots which have not been counted (or in so far as they have been counted, have been counted in the same manner as the disputed ballots) and if he considers any of the rejected ballots good, he counts them for the first time even though it is designated a recount. I think therefore that as the machinery of a recount furnishes the fullest protection against an injustice there is no need to extend section 235 beyond its apparent purpose and even if the section appeared to be wide enough to cover the case, mandamus is always discretionary and it is laid down that resort should not be had to it if there is other adequate and convenient remedy (see Encyclopædia Laws of England, 2nd ed., vol. 8, at 529.

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At the opening of the case, objection was taken that the appellant had no standing since the order was against the returning officer. We were all however of opinion that as by sec. 235 the appellant was one of the persons who had to be served and as an order has been made againt him as to count and he has been given a right to appeal he is properly before the Court as appellant. For the reasons above stated I would allow the appeal with costs against the respondents and discharge the order appealed from with costs of the application against the applicants.

SCOTT, J.:—I am of opinion that it was the duty of the returning officer to count the disputed ballots in question.

Scott, J.

By sec. 29 of the Act it was the duty of the deputy returning officer to produce the envelope containing the disputed ballot before the Court of inquiry, to open the envelope and retain the custody of the ballots during the sittings of the Court. Under sec. 203 and 205 the jurisdiction of the Court appears to be confined to passing upon the question of the qualification of the voters who cast the disputed ballots. It is no part of their duty to ascertain how a voter casting a disputed ballot has voted, nor are such ballots to be opened by the Court. After the Court has made its return to the deputy returning officer his only duty as appears by secs. 205 and 206 is to place a duplicate of the return, the evidence and exhibits and poll book in the ballot box

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and return it to the returning officer. I cannot find anything in the Act which expressly or even indirectly authorized him to open the disputed ballots or count them.

Under sec. 210 it is the duty of the returning officer to add up the votes given for each candidate from the statements of the polls and the returns of the Court of inquiry respectively and to add thereto any votes allowed by him as to which that Court has failed to agree.

Under this provision it surely must be his duty to open and count the disputed ballots in respect of which the Court of inquiry has agreed. He cannot add up those votes from the returns of the Court of inquiry as those returns must relate solely to the question of the qualification of the voters who cast them and that Court could not ascertain how they had voted or whether their ballots were marked in the manner prescribed by the Act. It is expressly stated that he must count the disputed ballots in respect of which the Court of inquiry has failed to agree upon the question of the qualification of the voters who cast them and I think it would be unreasonable to assume that he should count them and not those in respect of which the Court of inquiry has agreed.

The affidavit form 52 in the schedule to the Act which the returning officer is required to make is referred to by counsel for the appellant as indicating a contrary intention. In it he is required to state that he has not ascertained and has not attempted to ascertain from the ballot papers or other contents of any of the packets how any person has voted. In cases where the Court of inquiry has failed to agree upon the question of the qualification of a voter casting a disputed ballot he must, under sec. 210 decide that question, and, if his decision is in favour of the qualification of the voters, he must open the ballot and allow or disallow the vote and, in doing so, he must necessarily ascertain how the voter has voted. In such case he is expressly authorized and directed to ascertain how a voter has voted and the affidavit in the form as prescribed could not be made by him. The form of affidavit would, therefore have to be altered to suit the circumstances and I see no reason why it should not also be altered in such manner as to make it applicable to cases where the Court of inquiry has agreed upon the qualification of the voters casting disputed ballots, which I have already held it was his duty to open and, if allowed by him, count them.

Notwithstanding what I have stated, I am of opinion that the appeal should be allowed with costs on the ground that, for the reasons stated by the Chief Justice in which I concur, a mandamus should not have been directed to issue.

I am also of opinion that, in the event of a recount, it will be the duty of the District Court Judge to take the disputed

ballots and account irrespective of whether they had been previously opened and counted.

SIMMONS, J., concurred with the Chief Justice.

WALSH, J.:—The intention of the Legislature undoubtedly was that each envelope containing a disputed ballot paper should be opened and the vote represented by it counted if the right of the person who cast it to vote should be established. There is nothing in the Act which says in express terms upon whom this duty devolves, but of necessity it must be either (*a*) the deputy returning officer; (*b*) the Court of inquiry, (*c*) the returning officer; (*d*) a District Court Judge or (*e*) a Supreme Court Judge, for no person other than these has either the opportunity or the right given to him by the Act to handle any of these ballots or any duty whatever imposed upon him with respect to them.

If either the deputy returning officer of the Court of inquiry of which he is a member is to do it he or it could only do so after the vote has been allowed, for I think it is not open to question that until then at any rate the ballot must remain sealed up in the envelope in which it was enclosed on polling day. Under sec. 195 the functions of the Court of inquiry are to hear and dispose of any objections to disputed ballots, and the deputy returning officer is to retain the custody of them during the sittings of the Court. Under sec. 205 the Court shall forthwith after concluding its labours, which consist simply in discharging the above-described functions, make a return in duplicate of the decisions reached by it on the qualifications of the several voters whose right to vote is the subject of dispute and the deputy returning officer shall then place one of such duplicates in the ballot box and under sec. 206 shall then immediately lock and seal the box and forthwith personally deliver it to the returning officer. There is not throughout the secs. 195 to 211, which are grouped under the heading, "Court of inquiry" even a hint that either the deputy or the Court is to open these envelopes and count the ballots contained in them. Not only that, but there is no interval or opportunity allowed for a reference back to the deputy to enable him to do it or for the Court to do it for everything which follows the discharge of the only duty imposed upon the Court, namely the deciding upon the qualifications of these voters, is to be done either "immediately" or "forthwith" upon the conclusion of its labours which labours are described with detail in the Act. The return which it makes is quite sufficient to enable any one else into whose hands the ballot box may come to count such of the disputed ballots as have been allowed just as effectually as either the deputy or the Court could, for it shews the conclusion reached by the Court

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with respect to each ballot in dispute and it is accompanied in the ballot box by the disputed ballots each enclosed in an envelope bearing the name of the voter whose ballot it is. The oath which the deputy has to take under sec. 207 (form 48 B) shews that he must "immediately upon the close of the enquiry and while the Court was still sitting" replace in the ballot box "the envelopes containing the aforesaid disputed ballot papers." I do not think that the reference to the envelopes is of importance, for it does not say whether they were when so replaced opened or unopened and it seems to me that even if it was the duty of the deputy or the Court to open them it would be necessary to replace the ballots in them so that in the event of an appeal their identity would remain. The other words which I have quoted simply serve to accentuate what I have already said as to there being no interval of time afforded or any opportunity given for the doing of this work, either by the deputy or the Court. At the end of sec. 186 which prescribed some of the duties of the deputy after the close of the poll it is directed that "he shall not then count the disputed ballots" which would lead one to look elsewhere for instructions to him to count them at a later period. In the absence however of any such instructions either in express language or by necessary implication I do not think that any argument in support of the view that it is the deputy's duty to count these ballots can be based simply upon the use of the word "then" especially when sec. 186 ends by instructing him to "deal with them as hereinafter provided." Section 195 makes it the duty of the deputy at the Court of inquiry to take from the ballot box "the envelope containing the disputed ballots and the poll book" and then directs that "the envelope containing the disputed ballots and the poll book" shall be opened by the deputy. The question naturally arises why, if the Court or the deputy is not to count the disputed ballots should the deputy be thus instructed. The language of the section seems to indicate that the disputed ballots (enclosed in their individual envelopes) and the poll book are to be enclosed in one envelope, although I can find no other provision to that end. The Court would certainly require some record of the disputed votes which it could procure only from the poll-book or the endorsement on the envelopes containing them, and this is the only explanation that I can give of this requirement. I can find nothing in the Act which imposes the duty in question upon either the deputy returning officer or the Court of inquiry.

The election papers get to the returning officer from the deputy. His duties are defined by sec. 210, and so far as the present application is concerned they are to "add up the votes given for each candidate from the statements of the polls and the returns of the Courts of inquiry respectively." The statements

of the polls are those referred to in sec. 190 (form 46), which give amongst other things the number of votes, other than disputed votes, which were cast for each candidate according to the count of the deputy. There is no form provided by the Act for the return which the Court of inquiry is to make. Sec. 205 requires it however to make a return "of the decisions reached by it on the qualifications of the several voters whose right to vote is the subject of dispute." A return in strict conformity with this requirement would simply say that the votes of such and such persons have been allowed and of such and such others have been disallowed. The Court is not required to shew in this return for which candidate any of these persons voted. It is obvious, therefore, that from the statements of the polls and the returns of the Court of inquiry containing nothing more than sec. 205 says they shall contain it would be absolutely impossible for the returning officer to "add up the votes given for each candidate." He would know that so many votes had been counted for each candidate by each deputy at the close of the poll and that the right of certain other persons to vote had been allowed or disallowed as the case might be but that is all that he would know. His duty, however, is to add up the votes given for each candidate and this he can only do by knowing for which candidate each disputed ballot which is allowed is marked which information he can get only by an examination of the disputed ballots. In examining them he is not disregarding the directions of the section for it is "from the returns of the Courts of inquiry" that he is enabled to say which of the disputed ballots are to be added to the total of the undisputed votes for each candidate. It is more in harmony with the spirit of the Act which seeks to preserve the secrecy of the ballot to place this duty on the returning officer rather than on the Court of inquiry. There must, of necessity, be a disclosure of the manner in which each voter who cast a disputed ballot which has been allowed exercised his franchise. The examination of the ballot by the Court of inquiry must reveal to two men how each of these voters voted, and disclosure of that fact must be made in a written return to the returning officer. Upon an examination by the returning officer he alone need know this and he is under no necessity to perpetuate it in a report. For these reasons I am of the opinion that this act which must manifestly be done by some one must be performed by the returning officer.

There is nothing in the Act suggestive of any original duty in this respect on the District or a Supreme Court Judge. The District Court Judge comes into it only on an application for a recount or by way of appeal and then only if such application is made within eight days after that on which the returning officer has made his addition. If there is no application for a

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recount his count stands, which fact of course disposes of the idea of original jurisdiction in the District Court Judge as well as in a Supreme Court Judge who only acts on appeal from the District Court Judge.

With a great deal of doubt, however, I concur in the opinion of the Chief Justice that mandamus is not the proper remedy for the wrongs of which the applicants complain. I was very much impressed with Mr. McCaul's argument that the returning officer has wilfully refused (giving to the word "wilfully" the meaning attributed to it by Lord Russell of Killowen in *Regina* v. *Senior*, [1899] 1 Q.B. 283, at 290) "to add up the votes" because he has refused to add up all of the votes and that he is therefore within sec. 235 of the Act. He certainly has refused to add up all of the votes for he has deliberately left out of the count the disputed ballots which he should have added to the votes of the respective candidates for whom they are marked. But the other considerations referred to by the Chief Justice outweigh this argument in my opinion. There can be no question but that on a recount before the District Court Judge it will be his duty to take the disputed ballots into account and to count them if they are otherwise not open to objection, for I think "that the returning officer has improperly added up the votes" by reason of his failure to include these ballots in his count, and that is one of the cases provided for by sec. 218.

I therefore concur in the disposition of the matter made by the Chief Justice.

Appeal allowed.

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Re GARDNER.

Nova Scotia Supreme Court, Graham, E.J. April 7, 1913.

1. ALIENS (§ I—3)—DEPORTATION — LACK OF FUNDS — SUFFICIENCY OF ORDER.

A deportation order made by an immigration officer which states the reason of deportation as "lack of funds, required to have $25; but only had $21.50," is insufficient in form to shew jurisdiction on its face, and the immigrant will be released on *habeas corpus*.

Statement

APPLICATION for the discharge under *habeas corpus* of John Gardner, a British subject, held under a deportation order made by an immigration officer.

An order was made for his discharge.

H. Mellish, K.C., in support of application.

W. A. Henry, K.C., *contra*.

Graham, E.J.

GRAHAM, E.J.:—This man had in cash $36 absolutely his own. When he was asked as to this subject, he produced but

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$21, apparently not knowing the amount required, but he also told the officer that he had more money, and if they would wait a few minutes, he could find it. He says they paid no attention. He later found, and produced *bonâ fide* three gold sovereigns from his waistcoat. There is no question about this.

He has a written contract with a Toronto firm to pay him $22.50 a week as a steel plate engraver, or process worker, and was on his way there when he was detained by the immigration officer at Halifax. The order purports to have been made March 27, 1913. Probably it has been made more recently, at least the one returned with the writ has that appearance. However, this one is defective in form in my opinion and does not shew jurisdiction on the face of it.

This one states that the applicant has been examined by the Board of Inquiry (or officer in charge) at this port. It also states that he has been rejected for the following reasons: "Lack of funds, required to have $25, but only had $21.50." This, in my opinion is not a statement sufficient in law to enable the keeper to hold the applicant, and does not shew jurisdiction in Mr. Barnstead (the immigration officer).

It would be a strange thing to send this man back to the mother country to return with this same money which would entitle him at once to land. On principles stated by me in *Re Walsh*, the applicant will be discharged.

Applicant discharged.

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RAINY RIVER NAVIGATION CO. v. ONTARIO AND MINNESOTA POWER CO., and the MINNESOTA AND ONTARIO POWER CO.

Ontario Supreme Court. Trial before Britton, J. July 16, 1913.

1. WATERS (§ II C—84)—INTERFERENCE WITH FLOW—DAM OWNED BY FOREIGN AND DOMESTIC COMPANIES—LOWERING LEVEL OF RIVER.

Where two companies were formed, one in Canada and the other in the United States, under the same management and control, to build a dam across an international stream, both are answerable when sued in the courts of Canada, for a diminution of the natural flow of the river so as to interfere with navigation below the dam.

2. WATERS (§ I C 5—52)—NAVIGATION—OBSTRUCTIONS — DIMINUTION OF FLOW OF RIVER—LIABILITY.

Where a dam obstructs the natural flow of the waters of a navigible stream to such an extent as to interfere with the usual operation below the dam of the plaintiff's line of boats the owner of the dam is answerable therefor.

3. DAMAGES (§ III E—143)—MARINE TORTS—OBSTRUCTING NAVIGATION — DISCREDIT TO BOAT LINE—INABILITY TO MAKE TRIPS—REMOTENESS.

Damages for discredit to the reputation of a boat line because of interference with the regular operation of boats, is too remote to be considered in an action for damages resulting from the diminution of the natural flow of the waters of a stream as the result of the building of a dam.

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RAINY RIVER NAVIGATION CO. v. ONTARIO AND MINNESOTA POWER CO.

Britton, J.

4. DAMAGES (§ III E—143)—MARINE TORTS—OBSTRUCTION OF NAVIGATION—INJURY TO FUTURE PROSPECTS—REMOTENESS.

Damages for injury to the future prospects of a navigation business by reason of the diminution of the natural flow of a stream by the defendants by their operation of the gates and sluices of a dam, are too remote.

ACTION for damages due to the plaintiff's inability to operate steamboats on a river as the result of a diminution of the flow of a navigable river by the building of a dam by the defendants.

Judgment was given for the plaintiff.

I. F. Hellmuth, K.C., and *A. R. Bartlett*, for the plaintiff.

Glyn Osler, for the defendants.

BRITTON, J.:—The plaintiff company was the owner of steamboats used in navigating Rainy River and the Lake of the Woods. The head-office was at Kenora, and the company had made arrangements for the season of 1911 for the transportation of freight and passengers between the towns of Kenora and Fort Frances and intermediate ports. The two defendant companies—the Ontario and Minnesota Power Company and the Minnesota and Ontario Power Company—had constructed a dam across Rainy River, above the International Falls, and used it for the production of power by means of sluices and gates in the dam. The plaintiff company complained that during the season of 1911, the defendants, by their dam and by the operation of gates and sluices therein, so obstructed the water that navigation in Rainy River was impossible for a considerable portion of the season, and that the plaintiff company was unable to ply its boats between Fort Frances and Rainy River and intermediate ports.—The two defendant companies were under the same management and control. The Minnesota and Ontario Power Company, however, was incorporated in the State of Minnesota, while the other was an Ontario corporation. The Minnesota company entered a conditional appearance and disputed the jurisdiction of the Court. The learned Judge said that the two companies together and for a common purpose constructed the dam in question. The Ontario company did the work necessary on the Canadian side of the boundary-line, and the Minnesota company did the work on the other side. The dam was a continuous, connected work, extending completely across Rainy River. If the dam as a whole so interfered with the flow of water as to cause damage to a person using the Canadian side of the river, the Minnesota company was equally responsible with the Ontario company; and, therefore, the Court had jurisdiction to entertain the action as against the Minnesota company, as well as against the Ontario company. The plaintiff company had two steamers, the

"Kenora" and the "Agwinde." The learned Judge was of opinion that the evidence did not establish that there had been any such interference by the defendants with the flow of the water as to cause damage to the plaintiff company in the running of the steamer "Kenora." As to the "Agwinde" he came to the conclusion, with some hesitation, that the defendants did so interfere with the natural flow of the water from above the International Falls into Rainy River as to cause damage to the plaintiff company by preventing the running of the "Agwinde" during part of the season of 1911. As to the damages for which the defendants were liable, the learned Judge said that comparatively little of the plaintiff company's loss during the season of 1911 was properly attributable to the defendants. The "Agwinde" lost twelve trips during the season. The plaintiff company was not entitled to recover for alleged loss by reason of the route being discredited, nor for damage to future prospects of navigation business; such damages were too remote. The damages were assessed at $540, for which amount judgment was given for the plaintiff company with costs.

Judgment for plaintiff.

CURRY v. E. M. F. CO. OF CANADA Limited.

Ontario Supreme Court, Clute, J. March 31, 1913.

1. DAMAGES (§ III A 1—51)—BREACH OF CONTRACT — EXCLUSIVE SALES AGENCY—MEASURE.

Nominal damages only can be recovered for the breach of an agreement for the exclusive sale of automobiles within a county, which did not entitle the agent to commissions on sales made by his principal, where the former in no way promoted the sales made by the principal; and it was not shewn that the agent would have made such sales if the defendant had not done so.

[*Roberts* v. *Minneapolis Threshing Machine Co.* (1896), 8 South Dakota 579, followed.]

Statement

THIS action was brought by William G. Curry and Clyde W. Curry, a co-partnership doing business under the name of Clyde Curry & Co., against the E. M. F. Company of Canada Limited and the Studebaker Corporation of Canada Limited.

The statement of claim was as follows:—

1. The plaintiffs are a partnership carrying on business in the city of Windsor as garage owners and agents for the sale of automobiles, parts thereof, and accessories, and the defendant companies are manufacturers thereof and carry on business in the town of Walkerville.

2. On the 14th December, 1911, the plaintiffs, who had been its agents theretofore, entered into a written contract with the first-named defendant company, by which they were to be continued

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as sole agents within the county of Essex for the sale therein of automobiles, parts, and accessories of the said company.

3. Subject to the making of the said contract, the second above-named defendant company entered into some working arrangement with its co-defendant, and thereafter, and prior to the times hereinafter mentioned, took charge of its factories and business and dealt with the plaintiffs as principals, together with its co-defendant.

4. Under and by virtue of the said contract, the defendants were obliged to deliver to the plaintiffs certain automobiles and equipment therein specified, and for a time discharged their obligations in this respect; but, in the latter part of June last year, in breach of the said contract, refused to deliver any more, whereby the plaintiffs lost the discount or commission thereon under the contract.

5. The defendants, in further breach of the said contract, themselves sold a considerable number of automobiles and equipment within the county aforesaid, the number and value thereof being wholly within the knowledge of the defendants, and thereby deprived the plaintiffs of their said discount or commission thereon.

6. The defendants, in further breach of the said contract, sold parts and accessories of automobiles within the said county, the quality and value whereof is also wholly within the knowledge of the defendants, and thereby deprived the plaintiffs of their said discount or commission thereon.

7. The plaintiffs, on their part, performed the said contract; but, by reason of the breaches aforesaid, and in the loss of the discount or commission aforesaid, they were deprived of the benefits of time and money expended in and about the said performance.

The plaintiffs, therefore, claim from the defendants:—

1. Damages for breach of the contract aforesaid.

2. Damages for failure to deliver cars to them as demanded.

3. Damages for loss of profits from the time of the refusal to deliver until the said contract was determined.

4. An accounting with respect to the automobiles, equipment, parts, and accessories sold by the defendants, as claimed under paragraphs 5 and 6 thereof.

5. Such further and other judgment as may seem meet upon the evidence adduced.

6. Costs.

The statement of defence of the defendant the Studebaker Corporation of Canada Limited was as follows:—

1. Except as herein expressly admitted, this defendant denies the allegations contained in the plaintiffs' statement of claim.

2. This defendant and the E. M. F. Company of Canada Limited are one and the same corporation, the name of the latter

having been changed by the Lieutenant-Governor to that of this defendant by order bearing date the 7th May, 1912.

3. This defendant, under the name of "the E. M. F. Company of Canada Limited," entered into a certain agreement in writing with the plaintiffs, bearing date the 14th December, 1911, to which agreement this defendant craves leave to refer.

4. In and by the said agreement, the plaintiffs ordered and agreed to pay for twenty automobiles as therein specified. The plaintiffs further agreed to deposit with the defendants the sum of $300, and to maintain such deposit throughout the period of the said contract. The plaintiffs further agreed to maintain at all times the defendant's list-price for automobiles and parts, and not by rebate, allowances, donations, or any other means, to evade the spirit of the said agreement. The plaintiffs further agreed to represent and advertise such automobiles, make all reasonable efforts to promote and increase the sales thereof, to keep in stock at least one of each model made by the defendant, for the sole purpose of demonstrating and exhibiting the same to prospective purchasers, and to maintain the same in good order and repair. The plaintiffs further agreed to respond promptly to all inquiries respecting the purchase of the said automobiles, keep the defendant fully informed as to the number of inquiries for and sale of automobiles, and any other matters affecting the interests of the defendant in connection with the agreement. The plaintiffs further agreed to appoint a sub-dealer or establish a branch for the sale and repair of E.M.F. 30 and Flanders 20 cars in every city or town within his territory that might at any time be designated by the defendant, in order that the defendant should have adequate representation therein.

5. The plaintiffs failed to observe or perform each and every of their agreements mentioned or referred to in the next preceding paragraph hereof, and by reason thereof the defendant was relieved of the said contract.

6. By reason of the failure of the plaintiffs to observe and perform the terms of the contract, the said contract was cancelled by the defendant, and written notice thereof given to the plaintiffs on the 22nd February, 1912.

7. The defendant submits that this action should be dismissed with costs.

The plaintiffs' reply was as follows:—

1. The plaintiffs join issue with the defendants upon the statement of defence delivered herein.

2. Referring to paragraph 4, the plaintiffs say that they are ready and willing to accept and pay for the number of automobiles agreed to be purchased, but the defendants refuse to deliver the same as demanded by the plaintiffs.

3. The plaintiffs further say, in answer to the said paragraph,

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that the said deposit of $300 was duly made, but the maintenance thereof was not required by the defendants; in lieu thereof payment was accepted on the purchase of parts and other merchandise at the end of each month, upon statements rendered.

4. The plaintiffs further say, in answer thereto, that they have maintained the list-price for automobiles and parts, and have done all in their power to advertise the products of the company and promote sales thereof, and have maintained a car for demonstration purposes on exhibition and in use, and always in good order and repair.

5. The plaintiffs further say that the defendants at no time designated any city or town within the territory in which a sub-dealer was to be appointed and a branch established; but, in any event, the plaintiffs have made all reasonable efforts to advance the interests of the defendants in this respect, even without the said designation.

6. The plaintiffs further say that they have otherwise performed and observed all the conditions and requirements of the contract referred to.

The action came on for trial before LATCHFORD, J., who, by consent of the parties, referred it for trial to MCHUGH, Junior Judge of the County Court of the County of Essex.

The Referee, after hearing evidence and argument, found in favour of the plaintiffs for the recovery of $745. The Referee's reasons for his judgment were as follows:—

The plaintiffs seek to recover certain commissions or profits which they allege became payable to them under the provisions of an agreement between the parties entered into on the 14th December, 1911, for the sale of automobiles. I held at the hearing that the plaintiffs were entitled to recover compensation in respect to three vehicles which they offered to buy and pay for, but which the defendants refused to deliver to them. I also held that the plaintiffs were not entitled to recover any commission or profits in respect to automobiles sold by the defendants to sub-dealers, for the reason that the plaintiffs, through their own neglect and default, had failed to appoint sub-dealers as provided for by the contract. The plaintiffs seek to distinguish the position of the agent Foster from that of the other sub-dealers appointed by the defendants, on the ground that Foster and the defendants were brought together by the plaintiffs. It is true that negotiations between the plaintiffs and Foster relative to his appointment as a sub-dealer were opened, prior to his appointment by the defendants, but these negotiations failed by reason of the plaintiffs' refusal to allow Foster the commission or compensation he or any other sub-dealer would be entitled to under the terms of the contract. On the plaintiffs' neglect or refusal to appoint Foster, the defendants, in my opinion, were at liberty to treat with him without reference to the plaintiffs.

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The vehicles sold by the defendants to Foster were purchased by him for the sole purpose of enabling him to carry out his contract with the defendants.

The contract does not, in express words, give the plaintiffs the exclusive right to sell the defendants' automobiles within the county of Essex, although, in my opinion, that is the true intent and meaning of the contract. It provides that it shall expire by its own limitations on the 1st August, 1912, or it may be cancelled by either party, upon fifteen days' written notice being given to the other party, by registered letter. A formal notice in conformity with the provision of the contract was given by the defendants to the plaintiffs on the 3rd July, 1912. Apart from sales made by the defendants to sub-dealers, they also sold eight second-hand cars and three new ones (one of which is described as of special construction), during the year 1911, and prior to the cancellation of the contract, in or adjacent to the city of Windsor.

The contract expressly provides that it does not grant selling rights for vehicles of special design or construction or second-hand vehicles. The plaintiffs failed to observe some of the obligations imposed upon them by the contract. They did not order or take the number of vehicles they agreed to take and pay for; they did not keep on deposit with the defendants, as agreed, $300, as a guaranty for the repair accounts they contracted from time to time; and, as already stated, they did not appoint a sub-dealer in any of the localities designated by the defendants. The defendants notified the plaintiffs verbally that, unless the provisions of the contract were complied with, the field would no longer be reserved for their exclusive benefit; and, in pursuance of this intimation, they sold the cars referred to. These sales were made without the authority or consent of the plaintiffs, and, in my opinion, in violation of the terms of the contract.

The plaintiffs should be compensated for their services upon a *quantum meruit*. By their efforts they found persons willing to purchase three vehicles, but were prevented by the defendants from earning commission or profits which they would have been entitled to under the terms of the contract. It does not appear that the plaintiffs had opened negotiations with any of the persons who became purchasers from the defendants. They advertised the defendants' vehicles and introduced them to the public, and in that way may have assisted the defendants in making sales; but I am unable to say that the plaintiffs are entitled to recover more than nominal damages in respect to the sales made by the defendants in Windsor and Walkerville.

The plaintiffs might have made a profit of $745 on the three vehicles which the defendants refused to deliver to them; and,

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in my opinion, substantial justice will be done by awarding the plaintiffs this sum with costs.

The plaintiffs appealed and the defendants cross-appealed from the finding and report of the Referee.

March 27. The appeal and cross-appeal were heard by CLUTE, J., in the Weekly Court at Toronto.

J. H. Rodd, for the plaintiffs.

J. H. Coburn, for the defendants.

Clute, J.

March 31. CLUTE, J.:—There was an appeal by the plaintiffs to increase the amount allowed to the plaintiffs, and a cross-appeal by the defendants to reduce that amount. All the questions raised on the appeal were disposed of except one, in which the plaintiffs claimed commission upon the cars sold to Amberley, Lindsay, and LaFont. The point is reduced to a narrow one.

It is admitted that during the existence of the agency of the plaintiffs and within the territory assigned to them, the defendants made sale of three of their machines without reference to the plaintiffs. It is not contended on the part of the plaintiffs that these persons to whom the sales were made, or any of them, were brought to the knowledge of the defendants through the plaintiffs' agency as persons likely to buy, but simply that, under the contract between the parties, the defendants had no right to sell machines of the kind they did sell within the territory assigned to the plaintiffs while the agency continued.

The Referee finds, as a fact, that the defendants did sell three new cars (one of which is described as of special construction) during the year 1911, and prior to the cancellation of the contract, in or adjacent to the city of Windsor, that is, within the district to which the defendants had appointed the plaintiffs exclusive agents.

The Referee also finds that the plaintiffs are entitled to recover nominal damages only in respect of these sales made by the defendants.

I was referred by Mr. Rodd to Evans on Principal and Agent, 2nd ed., pp. 402, 405, 407; *Simpson* v. *Lamb* (1856), 17 C.B. 603; *Prickett* v. *Badger* (1856), 1 C.B.N.S. 296; *Green* v. *Bartlett* (1863), 32 L.J.C.P. 261; *Green* v. *Reed* (1862), 3 F. & F. 226. But these cases do not cover the point here involved, nor have I been able to find any English or Canadian authority applicable to the present case. It seemed to be conceded that the contract between the parties gave the exclusive right to the plaintiffs as sales-agents within the county of Essex. There is nothing in the contract which entitles them to a commission on sales within the territory by the defendants. That being so, damages for breach would have to be proven as in any other case.

It is not pretended here that the plaintiffs introduced to the defendants the persons to whom the sales were made, or in any way promoted the sales, or, owing to their method of procuring purchasers, were likely to have effected a sale to any of these three persons; so that there is no evidence upon which the Court could justly say what, if any, damage, the plaintiffs have suffered by reason of the breach.

There is an American case where a somewhat similar point arose, *Roberts* v. *Minneapolis Threshing Machine Co.* (1896), 8 S. Dak. 579, where it was held that "an agent who has an exclusive contract for the sale of machinery in a given territory, cannot recover his commission from his principal for a sale made by another in such territory till he has shewn that he himself would have made the sale, or that he performed, in connection therewith, the requirements imposed upon him by the contract." Fuller, J., who gave the judgment of the Court, said (p. 584): "Without anything before the jury as a basis for the computation of compensatory damages, and in the entire absence of evidence tending to shew that in any event appellant would have made either of the sales complained of, or that he performed any act with reference thereto, more proof of the violation of the contract would entitle appellant to no more than nominal damages."

A number of American cases are there referred to: see also *Brush-Swan Electric Light Co. of New England* v. *Brush Electric Co.* (1892), 49 Fed. Repr. 5.

In the present case there is no evidence to shew that the plaintiffs earned, or would have earned, any commission on sales to any of these persons, if the sales had not been made by the defendants, nor is there any evidence that they promoted in any way the sales which were made by the defendants.

There is a breach of the contract, but only nominal damages could, upon the evidence, be allowed. In this respect, I agree with the Referee.

As both parties have failed in their appeals, there will be no costs.

Both appeals dismissed.

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June 18.

MONTREAL STREET R. CO. v. MARINS.

Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll, and Gervais, JJ. June 18, 1913.

1. CARRIERS (§ II K 1—212)—INJURY TO STREET CAR PASSENGER—ALLOWING TIME TO ALIGHT—SUDDEN STARTING OF CAR.

A passenger may recover damages for being thrown from a street car by its sudden starting as he was about to alight in compliance with the conductor's request that all passengers should disembark as the car was going no further.

Statement

ACTION for $1,999 damages for injuries suffered by respondent on one of the cars of the company, appellant.

The trial Judge found that when the St. Denis car was nearing Belanger street he called out that the car was not going further and that passengers should disembark; that most of the passengers got up and went to the platform, and some even on to the first step, holding on to the bar, when the car started off so suddenly that he was thrown off. It was also proven that the conductor had left the platform and run ahead to get his switcher. The trial Judge, therefore, found in favour of the plaintiff, and rendered judgment for $1,125.

R. Taschereau, K.C., for appellant.

V. Cusson, K.C., for respondent.

Gervais, J.

GERVAIS, J., for the Court stated, that, as the case was one of fact, the Court would not interfere with the findings of the trial Judge, which appeared well founded.

Cross, J.

CROSS, J., dissented.

Action sustained, CROSS, J., *dissenting*.

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July 3.

BREED v. ROGERS.

Ontario Supreme Court, Falconbridge, C.J.K.B. July 3, 1913.

1. INJUNCTION (§ II—130)—INTERIM — GRANTING — BALANCE OF CONVENIENCE—COMPENSATORY DAMAGES.

An interim injunction will not be granted where the preponderance of convenience, both public and private, does not require it, and a proper inference can be drawn from the undisputed facts only on the trial; and the damages, if any, which are not irreparable, may be compensated in money.

Statement

MOTION by the plaintiff for an interim injunction restraining the defendants from committing a nuisance by erecting a coal-handling plant and carrying on a coal business on lands south of the Belt Line Railway and north of Lawton avenue, in the city of Toronto.

S. H. Bradford, K.C., and *T. A. Silverthorne*, for the plaintiff.

G. F. Shepley, K.C., and *G. W. Mason*, for the defendants.

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FALCONBRIDGE, C.J.:—It does not appear to me that the plaintiff has made out a sufficiently strong case to justify the Court in interfering by way of interlocutory injunction.

While there is no great dispute about the actual facts, the plaintiff asks me to draw one inference and the defendants another; and, in my opinion, the proper inference can be drawn only by the eliminative process of a trial.

The damage, if any, cannot be irreparable—it can be easily estimated in dollars by a Judge or Master.

The affidavit of Alfred Rogers shews that the preponderance of convenience—public as well as private—is wholly against the propriety of granting an interlocutory injunction.

The injunction will not now be granted, but the motion will stand over until the trial. The parties may deliver pleadings in vacation, and the defendants are to speed the trial. Costs of the motion to be costs in the cause unless the Judge at the trial shall otherwise order.

The authorities on which I base this judgment are as follows: Halsbury's Laws of England, vol. 17, pp. 217-8; vol. 21, pp. 531, 534; Kerr on Injunctions, 3rd ed., p. 174; *Lord Cowley* v. *Byers* (1877), 5 Ch.D. 944; *Earl of Ripon* v. *Hobart* (1834), 3 My. & K. 169; *Magee* v. *London and Port Stanley R. Co.* (1857), 6 Gr. 170; *Pope* v. *Peate* (1904), 7 O.L.R. 207; and see *Rushmer* v. *Polsue*, [1906] 1 Ch. 234, as to increase of noise in an already noisy neighbourhood.

Injunction refused.

KEDDY v. DAUREY.

(Decision No. 2.)

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Drysdale, and Ritchie, JJ. April 28, 1913.

1. CONTRACTS (§ I D 2—51)—MEETING OF MINDS—VARIANCE — EVIDENCE TO SHEW.

Relief from a contract will not be granted on the ground that the written agreement did not contain the terms of the bargain as made unless the variance is shewn by clear and satisfactory proof.

[*Keddy* v. *Daurey*, 7 D.L.R. 118, reversed.]

Statement

THIS was an action by plaintiff, a lumberman, residing at Mahone Bay, in the county of Lunenburg, claiming damages for violation of an agreement in writing entered into between plaintiff and defendant whereby defendant agreed to sell to plaintiff all the soft wood timber standing and growing on the property of defendant in size down to five inches on the stump and upwards, plaintiff to have three years from the 1st day of January, 1909, in which to cut said timber.

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It was alleged that, after the making of said agreement, defendant in breach thereof, sold or pretended to sell, the timber on said land to one Aulenbach, who, with the defendant, unlawfully cut down and converted the same to their own use. The principle defence to the action was that the defendant did not execute the agreement as alleged, in support of which evidence was given to shew that defendant was an illiterate person who signed as a marksman, and did not know what he was signing, and executed the agreement supposing that certain changes which he required to be made, had, in fact, been made.

The cause was tried before Russell, J., who gave judgment dismissing plaintiff's claim, *Keddy* v. *Daurey*, 7 D.L.R. 118.

Plaintiff appealed, and the appeal was allowed, judgment being given for the plaintiff.

V. J. Paton, K.C., for appellant.

S. A. Chesley, K.C., for respondent.

The judgment of the Court was delivered by

Drysdale, J.

DRYSDALE, J.:—In this action the defendant seeks to avoid an agreement between himself and plaintiff in reference to the sale of timber on certain lands of defendant.

No doubt an agreement as to this timber was settled between plaintiff and defendant, and it was agreed between them that such agreement should be reduced to writing, and a county magistrate was selected to draw up the document. The magistrate was in due course instructed, and prepared the document, which was executed by both plaintiff and defendant; the latter made his mark instead of his signature, and the clerk to the magistrate testifies that it was first read over to the defendant.

The defendant has the burden of establishing, by clear and satisfactory proof, that the document relied upon is not his agreement, and this I conclude he has failed to do. It seems to me he has failed to state even his own view of any concluded bargain at variance with the terms of the agreement in question. A bargain was admittedly made, and it seems reasonably certain the document, as reduced to writing, was read over to defendant, and by him, in due course, executed. The magistrate is dead, his clerk is a disinterested person, who testifies to the due execution by defendant, and I think, before such an agreement should be set aside, or held not binding on defendant, more satisfactory evidence, as to mistake by, or imposition upon the defendant should be forthcoming, than has been produced in this case.

The plaintiff states, in clear terms, the agreement made that was to be reduced to writing, and that the writing is in all respects in accordance with the concluded arrangement between

plaintiff and defendant, it was reduced to writing by a magistrate (now dead), his clerk testifies to the execution by defendant after being read to him, and as against this I find nothing in the case that leads one to conclude the agreement between the parties was other, or different, than the writing in question.

With all proper deference to the learned trial Judge, I think the defendant has failed in the burden cast upon him in maintaining his defence herein.

I am of opinion the appeal ought to be allowed with costs, and judgment entered for the plaintiff herein for $100, the amount of damages proved with costs.

Appeal allowed.

SMITH v. TOWNSHIP OF BERTIE.

Ontario Supreme Court. Trial before Middleton, J. March 8, 1913.

1. MUNICIPAL CORPORATIONS (§ I A—5)—INCORPORATION—POLICE VILLAGE—POWERS OF COUNTY COUNCIL—ULTRA VIRES.

A county council is without jurisdiction to enact, in creating a police village, that it is erected into an incorporated village apart from, and that its inhabitants shall be a body corporate separate from, the township in which it is situated.

2. HIGHWAYS (§ IV A 6—155)—DEFECT IN SIDEWALK IN POLICE VILLAGE—LIABILITY OF TOWNSHIP FOR.

A township is liable, under sec. 606 of the Municipal Act, R.S.O. 1897, ch. 223, for injuries sustained on a defective sidewalk, notwithstanding it was within the limits of a police village; as the fact that by sec. 741 of such Act, as amended, power to build and repair sidewalks is conferred on the trustees of such village, does not affect the primary liability of the township for the condition of all sidewalks within the village limits.

Statement

ACTION against a township for injuries resulting from a defective sidewalk within the limits of a police village. The defendant township denied liability on the ground that it was not answerable for the condition of sidewalks within such villages.

An issue of law set down for hearing and determination upon the pleadings and admissions of the parties was determined in favour of the plaintiff.

H. S. White, for the plaintiff.

G. H. Pettit, for the defendant township corporation.

Middleton, J

March 8. MIDDLETON, J.:—The action is to recover damages resulting from an accident arising, it is said, from lack of repair of a sidewalk in the police village of Crystal Beach. The defendant corporation contends that it is not liable for an accident of this kind within the limits of the police village. Neither counsel was able to refer me to any case in which this question has been discussed; and I have been unable to find any discussion

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of the exact nature of a police village and the effect of its incorporation upon the liability of the parent municipality.

Under the Municipal Act, R.S.O. 1897, ch. 223, sec. 714: "On the petition of any of the inhabitants of an unincorporated village, the council or councils of the county or counties within which the village is situate may, by by-law, erect the same into a police village, and assign thereto such limits as may seem expedient."

In supposed pursuance of this statute, on the 7th December, 1898, the County Council of the County of Welland passed a by-law enacting that the village of Crystal Beach and its neighbourhood—defined by metes and bounds— "be erected into an incorporated police village, apart from the township of Bertie, in which the same are situated, by the name of Crystal Beach."

The by-law then proceeds: "and the inhabitants of such village of Crystal Beach shall be and become a body corporate free from such township; and, as such, shall have perpetual succession, with such powers and privileges as are conferred on and held by incorporated police villages within this Province, and the powers of such corporation shall be exercised by and through and in the name of the Corporation of the Village of Crystal Beach."

There was absolutely no power on the part of the county council to enact this latter clause. It is entirely *ultra vires* and void. The position of a police village must be found in the Municipal Act as it stood at that date; and plainly the "erection" of a limited territory into a police village falls far short of incorporation.

The sections 715 to 735 of the Municipal Act provide that every police village shall have three trustees, to be elected by the voters qualified to vote at municipal elections for the township. Provisions are made for the holding of the election, and that the trustees elected shall hold office until their successors are appointed. In case of a vacancy by death or otherwise, the remaining trustees are to fill the vacancy. The election is to take place annually on the last Monday in December.

Sections 736 to 750 deal with the duties and powers of the trustees. They may estimate the sum required to cover the expenditure in respect of matters over which they have jurisdiction. This amount is to stand in lieu of the levy for like purposes by the township generally, not to exceed one per cent. on the assessed value of the property. The amount required is to be levied by the township and to be expended on the order of the trustees. The trustees are given power by sec. 741 to build sidewalks and culverts, put in drains, and improve streets, within the village limits.

By secs. 744 and 745, by-laws may be passed by the township with the assent of the ratepayers of the village, upon the applica-

tion of the trustees, for the purpose of purchasing fire-engines or supplying water or light and heat to the inhabitants of the village. The trustees have charge of the execution of the work, and the township pays upon the order of the trustees.

By sec. 746, similar power is given to establish parks in the village.

By sec. 747, the trustees are required to enforce certain regulations for protection against fire and for the prevention of nuisances; and, by secs. 748 to 750, penalties are provided for the infraction of police regulations.

From all this, I think, it is abundantly plain that under this statute a police village does not become a separate incorporation, but that the scheme is really one by which a limited territory is set apart, and the trustees are empowered to raise indirectly, through the township, by way of local assessment, sums required for certain local improvements.

In 1903, this legislation was supplemented by the addition to the Municipal Act of sections found as secs. 751 to 757 in the Consolidated Municipal Act of 1903. By sec. 751, when the census returns of a police village shew that it contains over 500 inhabitants, then, upon petition, the council of the county may declare the trustees of the police village a corporation; and after the passing of such a by-law certain additional powers are given to the incorporated board. It may construct works as local improvements under secs. 664 *et seq.* of the Municipal Act; and, after incorporation, the Board becomes responsible for the maintenance and repair of all works, improvements, and services undertaken by it; the Board is made responsible for all damages sustained by reason of any default; and the provisions of sec. 606 of the Act are made to apply to the incorporated Board.

This amendment goes to fortify the view I have expressed of the true position of trustees of a police village under the earlier Act.

It follows from this that the defendant municipality is responsible for the condition of all roads within its limits, under sec. 606; and that the fact that the trustees of the incorporated village have authority to construct sidewalks and to repair them, within the limits of the village, does not absolve the township from its primary liability. The lack of repair resulting in an accident imposes liability upon the entire municipality; and, while this is in one sense unfair, it is no more unfair than the situation which arises when any work constructed as a local improvement falls into disrepair. There the municipality as a whole is liable for the lack of repair in a work constructed as a local improvement. If the trustees of the police village fail to renew a decayed sidewalk, the township is not justified in leaving it as a source of danger, and may remove it altogether.

In *Faulkner* v. *City of Ottawa* (1906), 8 O.W.R. 126, the city

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was held liable for damage occasioned by the inadequacy of sewers constructed under a local improvement plan, although the ratepayers by petition had prevented the construction of an enlarged sewer; and, although the case was reversed upon appeal (1907), 10 O.W.R. 807, the judgment did not turn upon this question.

I, therefore, determine the question in favour of the plaintiff, and direct that the costs be paid by the defendant corporation in any event of the litigation.

If the defendant corporation desires to take the opinion of an appellate Court, I suggest to the parties the wisdom of allowing the remaining issues to be determined before an appeal is taken, so that the whole matter may be reviewed upon one appeal. This may readily be accomplished by an order extending the time for appealing this decision until the issues of fact are determined.

Judgment accordingly.

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REX v. BOGH SINGH.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. April 21, 1913.

1. INTERPRETER (§ I—5)—CRIMINAL TRIAL — IMMATERIAL OMISSIONS — EFFECT.

It is sufficient that an interpreter fairly and faithfully gives the substance of the testimony, omitting any irrelevant details.

2. PERJURY (§ II C—60)—EVIDENCE THROUGH INTERPRETER—SUBSTANCE OF ANSWERS TRANSCRIBED.

On a charge of perjury against a witness speaking in a foreign tongue, it is not essential that the prosecution should prove that every word uttered by the witness in the witness-box had been translated by the interpreter and repeated by him in English so as to be placed upon the official stenographer's notes; it is enough that the court is satisfied on the interpreter's testimony in the perjury trial that he repeated in English all that was material of what the accused had said in a foreign language.

3. EVIDENCE (§ VIII—674)—CONFESSIONS OR ADMISSIONS—PROOF THAT VOLUNTARY.

Before the Crown introduces statements made by a prisoner while in custody as evidence of an admission or confession, the onus is on the Crown to shew that there has been no inducement given to make those statements.

[*R.* v. *Bruce*, 12 Can. Cr. Cas. 275, 13 B.C.R. 1, followed.]

Statement

MOTION by the accused for leave to appeal and for direction for a stated case to bring up questions as to (*a*) the regularity in taking evidence at the trial through an interpreter, (*b*) the propriety of trial Judge's instructions to the jury, (*c*) the admissibility of an alleged confession made by the accused. The charge was one of perjury.

The motion was dismissed.

J. McDonald Mowat, for prisoner.

J. R. Grant, for Crown.

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MACDONALD, C.J.A.:—We need not call upon you regarding the second question, Mr. Grant. The question is unintelligible as it appears on this notice of motion, but after hearing the argument I think I understand what Mr. Mowat is attempting to get the Court to direct the trial Judge upon.

Macdonald, C.J.A.

As I understand it now his proposition is this: that it is not sufficient that the stenographer take down the evidence interpreted by the interpreter—and to go into Court and swear that what he has taken down is a true report—that that is not sufficient proof of what took place at the trial, particularly as the interpreter says there were some things he did not give to the stenographer—things that had no relevancy to the matter at all; for instance he uses the expression here, "And you in giving your interpretation do not give all the rigmarole they give? A. I had to check them several times you will remember, Mr. Russell." But he then added, "I gave the substance of it fairly and faithfully."

If that is not sufficient to prove what took place at the trial in the absence of satisfactory and clear evidence that something material has been left out or wrongly put in, then I do not know how the record at the trial can be proven. Mr. Mowat admits he is not trying to shew that anything material has been left out or anything has been wrongly put in. Under these circumstances, I would refuse the motion so far as the second question is concerned.

Irving, J.A.

IRVING, J.A.:—A written report by the stenographer of what the interpreter said was the testimony of the witness must, in the absence of evidence to the contrary, govern. We should refuse this second application.

Martin, J.A.

MARTIN, J.A.:—I agree, and in no event would I be a party to sending that back to the learned trial Judge. It is unintelligible on its face as it now stands, and even after the long explanation we have had it is none too luminous. Apart from that I think it amounts to, if the contention as put before us is to prevail, the administration of justice would collapse.

Galliher, J.A.

GALLIHER, J.A.:—I refuse to send this question back.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I do not think we ought to send this back to the learned trial Judge to state the first question. There are some things in his charge which might be interpreted to mean that the jury were entitled to look at that evidence, in ascertaining whether the accused misled the Court or not; but in view of the fact that he specifically told the jury that they were to eliminate from their consideration the evidence of Jawallah Singh, I think that is sufficient under the circumstances of this

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case. Each case, of course, stands upon its merits. The motion is therefore dismissed.

IRVING, MARTIN, and GALLIHER, JJ.A., agreed.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think we will have to refuse the relief asked for and dismiss the appeal. Had it not been for this confession I should have come to the opposite conclusion, but I think the confession is admissible in the first place, and in the second place, it concludes the matter against the prisoner.

Martin, J.A.

MARTIN, J.A.:—I agree.

Irving, J.A.

IRVING, J.A.:—I agree. The case of *Rex* v. *Bruce*, 13 B.C.R. 1, 12 Can. Cr. Cas. 275, settles the principle of the admission of the confession.

Galliher, J.A.

GALLIHER, J.A.:—I take a different view. Shortly, I don't think that confession, such as it is, is sufficient to turn the scale. Before bringing home perjury to a man, you must bring home practically the words uttered by the prisoner in giving evidence, at all events as far as they are relative to the issue, and, apart from the confession, there is no question in my mind that they have not done so. I do not think the confession, reading it as a whole, is sufficient, as I said before, to fill up that gap.

Motion dismissed.

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McGOVERN v. MONTREAL STREET R. CO.

Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll, and Gervais, JJ. June 18, 1913.

1. TRIAL (§ V C 1—286)—VERDICT — SPECIAL FINDING — VAGUENESS.

A verdict finding the defendant street railway company negligent in the words "carelessness in handling the car" is too vague upon which to give a judgment in an action by a passenger for injuries sustained by the door of the car closing upon the passenger's hand; a more specific finding is necessary to establish liability on the basis of the car having been run at too high a speed and so jolted as to cause the door to close suddenly.

Statement

APPEAL from a judgment dismissing an action for $1,999.99 damages notwithstanding the jury's verdict which awarded the plaintiff $333.33.

The appeal was allowed.

T. E. Walsh, K.C., for appellant.

C. H. Heward, for respondent.

The judgment of the Court was rendered by

Carroll, J.

CARROLL, J.:—The plaintiff was aboard a Guy and Beaver Hall car and alleges that owing to the negligence of the company's

employees she met with an accident, which resulted in the amputation of part of her left thumb. The special fault alleged is that the car took the switch when leaving the St. James street line, at too great a speed, and this speed caused the plaintiff to fall in the car and the door of the car to close on her hand, injuring the same. The jury answered there was common fault in that the plaintiff, after embarking, had been too slow in proceeding to her seat, and in that the defendant had shewn carelessness in handling its car.

The jury also declared, although no question of the kind had been put to them, that the accident did not occur at the spot indicated in the declaration and as a matter of fact the evidence shews that the accident occurred about 20 yards from the switch at a spot where the line curves. The trial Judge dismissed the action on the following grounds:—

Considering that the only fault charged against the defendant is in taking the switch, when the Beaver Hall line leaves St. James street line, at a very rapid rate of speed;

Considering that a judgment cannot be rendered upon the finding of a jury in a case such as the present, where the fault or negligence found is not a fault alleged by the plaintiff in the declaration or statement of claim;

Considering that it is impossible to connect the fault or negligence found by the jury with the fault found by the plaintiff in her declaration.

The reason for the judgment is clearly given, the plaintiff specified one spot as that at which the accident occurred, and that is not the spot where it did occur; the evidence does not sustain the allegation.

The accident occurred on the day mentioned, on the car mentioned, but instead of at the switch, occurred twenty yards farther. The object of pleadings is to set out the respective contentions of the parties so that neither the one nor the other may be taken by surprise. We are of opinion that where a substantial allegation does not concur with the proof made then it is correct to hold that judgment should be rendered *secundum allegata et probata*, but the rule cannot apply where the fact in question is not material and where the evidence is not of a nature to take the other by surprise. Now in this case what it was important to establish was the accident, the car on which it occurred, and on what line, on what day and how it happened. Whether it occurred at the switch or twenty yards farther or twenty yards before was immaterial to the decision of the case. As this is the sole ground of judgment we find the same erroneous, and that a new trial should be held. The respondent has drawn attention to the vagueness of the jury's statement concerning the company's negligence: "Carelessness in handling the car." I confess the answer is vague, and the jury will have to specify more fully what this means. Doubtless, had the trial Judge been of

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another opinion as to the reason given for his judgment, he would have called the jury's attention to this and invited them to specify this fault.

Appeal allowed with costs; costs of the Superior Court to abide result of new jury trial.

Appeal allowed.

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TOWN OF ARNPRIOR v. UNITED STATES FIDELITY AND GUARANTY CO.

Ontario Supreme Court. Trial before Britton, J. June 11, 1913.

1. BONDS (§ II C 1—25)—PUBLIC OFFICER—GUARANTY COMPANY BOND—RENEWALS—NEW BOND.

A new bond replacing an expiring bond of fidelity insurance in the same company and in favour of the same employer upon the same risk is a "renewal" of the original insurance as to make material thereto the accuracy of the answers made on behalf of the employer on the issue of the first bond, where the bond was issued upon an expressed condition that the answers were to be taken as the basis of the bond or any renewal or continuation thereof or of any substituted bond.

2. BONDS (§ II C 1—37)—PUBLIC OFFICER—GUARANTY COMPANY BOND — DEFENCE—INCREASING DUTIES OF OFFICER.

An appointment as municipal sanitary inspector conferred upon a town police officer does not add to his duties so as to nullify a bond of fidelity insurance executed by a guaranty company for the faithful performance of his duties as chief of police where the work as sanitary inspector was something fairly within police duties.

3. EVIDENCE (§ II—95)—BURDEN OF PROOF—ACTION ON GUARANTY COMPANY BOND—DEFENCE—FALSE STATEMENTS ACCOMPANYING APPLICATION FOR BOND.

The onus rests on the defendant in an action on a bond of indemnity executed by a guaranty insurance company, to shew the falsity of statements and answers to questions in a writing made by the mayor of a town accompanying the application of a tax collector for a fidelity bond. (Dictum *per* Britton, J.)

Statement

ACTION to recover $5,000 upon a fidelity bond executed by the defendants, dated the 30th May, 1905, by which the defendants agreed, subject to certain conditions and stipulations in the bond, to make good and reimburse to the plaintiffs all and any pecuniary loss sustained by the plaintiffs, of money, securities, or other personal property in the possession of one John Mattson, Chief of Police and Tax Collector of the plaintiffs, by any act of fraud or dishonesty on his part in the discharge of his duties in these two capacities.

Judgment was given for the plaintiffs.

W. M. Douglas, K.C., and *J. E. Thompson*, for the plaintiffs.
G. H. Watson, K.C., and *T. F. Slattery*, for the defendants.

Britton, J.

BRITTON, J.:—The bond contains a great many conditions, and the breach of these is put forward by the defendants in their statement of defence as relieving them from any liability under their bond.

On or about the 19th May, 1904, Mattson made an application in writing to the defendants for a bond as an officer of the plaintiff corporation. The then Mayor of Arnprior, at the request of the defendants, sent to them a statement dated the 10th June, 1904, agreeing to be bound by the statements and answers to questions therein, and agreed that the answers to the questions submitted in that statement were to be taken as conditions precedent and as the basis of the bond applied for or any renewal or continuation thereof or any other bond substituted in place thereof.

A bond was issued by the defendants in favour of the plaintiffs dated the 16th June, 1904, for $5,000.

On the 30th May, 1905, a new bond for the same amount was made by the defendants in favour of the plaintiffs; and the defendants contend that all the statements which were the foundation of the first bond continued as the foundation and basis of the bond last-mentioned. There was no application in writing, by either Mattson or the plaintiffs, for the new bond; no representations of any kind by them. If any were made by Mattson, they were made without the knowledge and consent of the plaintiffs. No continuation notice was sent by the defendants to the plaintiffs at or about the time of expiry of the first bond.

The liability on the last bond—the one sued upon—was from the 10th June, 1905, to the 10th June, 1906, subject to continuance or renewal. It was continued by certificate on the 28th May, 1906, to the 10th June, 1907, and by certificate of the 11th July, 1907, to the 1st June, 1908. (This was a mere clerical error, "1st" instead of "10th.") It was further continued on the 10th June, 1908, to the 10th June, 1909, and by certificate of the 4th June, 1909, to the 10th June, 1910, and by certificate of the 14th June, 1910, to the 10th June, 1911.

During the currency of the bond and between the 10th June, 1910, and the 10th June, 1911, suspicion was directed towards Mattson that he was not acting honestly as Collector. A special audit was ordered, and investigation followed, with the result that Mattson was found to have fraudulently appropriated to his own use money of the plaintiffs. He embezzled in 1908 and 1909, $11,246.55.

The plaintiffs deny the right of the defendants to set up as any defence in this action the written statement mentioned. It was made for the purpose of getting a bond in 1904. It served its purpose. The bond was issued. There was liability under it for a year. At the end of the year liability was not continued, but was terminated by the defendants.

On the 30th May, 1905, the defendants, upon being paid the premium for another year, executed and issued the new bond

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above-mentioned. This bond, by continuation certificates, was kept in force until the 10th June, 1911.

In each year after 1905, except one, the defendants made inquiry of the plaintiffs and received a satisfactory report of Mattson's conduct.

With a good deal of hesitation, I come to the conclusion that the written statement of the 10th June, 1904, upon which the bond of the 16th June, 1904, was issued, can be invoked as part of the contract represented by the bond of the 30th May, 1905.

The statement itself contains the following: "It is agreed that the above answers are to be taken as conditions precedent and as the basis of the above bond applied for, or any renewal or continuation of the same that may be issued by the United States Fidelity and Guaranty Company to the undersigned, upon the person above-named."

My conclusion is, that the present bond is a renewal of the original insurance. There is much to be said against that view. The bond itself, in express terms, makes the new bond a new contract.

It was argued that the statement was only part and parcel of the contract, which expired in one year, and which was not renewed within the meaning of the contract; as to which "renewal" or "continuation" has a definite meaning; but it expired; and as to the new bond the company did not ask for a new statement or report of any kind.

It is somewhat anomalous that the company can allow the bond to expire, and keep a statement on foot as the basis of a new bond. I come to the conclusion that the defendants can do this only because of the want of care on the plaintiffs' part in not making inquiry as to the written statement mentioned in the bond.

The plaintiffs are not bound by any alleged warranty of the truth of the statement. The plaintiffs did not execute the bond; the employee did.

Such a statement as the defendants invoke might be true when made and untrue at the expiration of the first year, so that a new statement in the same words could not be given. The defendants are getting the benefit of the falsity of a statement, if it was false, made in 1904, by making that statement do the double duty of being the foundation of a bond in that year and of another one in substitution in 1905, without the plaintiffs asking for such substituted bond.

In the case of *Youlden* v. *London Guarantee & Accident Company*, 12 D.L.R. 433, 4 O.W.N. 782, it was held that a renewal receipt, even after the lapse of a policy, was not a new unconditional insurance, but that it carried on the old contract

in its entirety. That differs from the present case in this respect: the old bond was not carried on, the new bond alone is recognized both by plaintiffs and defendants.

In *Liverpool London & Globe Ins. Co.* v. *Agricultural Savings and Loan Co.*, 32 O.R. 369, it was held that a renewal was not a new contract of insurance. That is the converse of the present case.

I am of opinion that the old statement for the former bond can be read into the new contract and as the foundation of the bond sued upon.

Counsel for the plaintiffs submitted that, under R.S.O. 1897 ch. 203, sec. 144, sub-sec. 2, the defendants could not rely upon the falsity of any statement in the writing mentioned; as the bond did not, in providing for the voiding of it, limit the untrue statements to those that are material to the risk.

In so far as the defendants rely upon any misstatement in the application, that objection is supported by *Village of London West* v. *London Guarantee and Accident Co.*, 26 O.R. 520; but the main reliance of the defendants is upon the misstatements in the writing itself, not the application. This is set out in the body of the bond. Having regard to *Jordan* v. *Provincial Provident Institution*, 28 Can. S.C.R. 554, and to *Venner* v. *Sun Life Insurance Co.*, 17 Can. S.C.R. 394, I do not decide nor do I give effect to the plaintiffs' contention in this action upon that point.

In the case of *McDonald* v. *London Guarantee and Accident Co.*, 2 O.W.N. 1455, the recited statement in writing delivered by the employer expressly stipulated that the statements therein were to be limited to such statements as were material.

The case of *Hay* v. *Employers' Liability Assurance Corporation*, 6 O.W.R. 459, decides, upon the authority of *Venner* v. *Sun Life Insurance Co.*, 17 Can. S.C.R. 394, and *Jordan* v. *Provincial Provident Institution*, 28 Can. S.C.R. 554, that, as the question of materiality in the answers contained in the statement in writing, is for the Judge or jury, it is unnecessary to set out in full the misstatements relied upon or to allege their materiality. I am bound by this.

Also see *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.*, 11 O.L.R. 330.

The defendants apparently rely most strongly upon the statement of the Mayor in the writing referred to, as it appears in the answers to questions 11 and 12 on that paper: "Q. 11. To whom and how frequently will he account for the handling of funds and securities? A. He accounts to Treasurer daily, or when he has collected funds."

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The answer was merely a statement of the Collector's duty. That was true until the Collector failed to do his duty, and appropriated money he ought to have paid to the Treasurer. It was to prevent loss in case the Collector failed to do his duty that the guaranty bond was secured.

"Q. What means will you use to (a) ascertain whether his accounts are correct? (b) How frequently will they be examined? A. (a) Auditors examine rolls and his vouchers from Treasurer yearly. (b) Yearly."

I am of opinion that these answers do not mean more, and that they were not intended to mean more, than that the Municipal Act requires a yearly audit, and that there would be such an audit; the Act would be complied with.

Section 295 of the Consolidated Municipal Act, 1903, provides for the appointment of a collector or collectors; and subsec. 3 of that section provides that the council may prescribe regulations for governing them in the performance of their duty. There is no regulation governing them prescribed by statute, and the matter is left to the fair and reasonable discretion of the council.

The plaintiffs' council, on the 4th October, 1893, passed a by-law requiring all municipal taxes to be paid on or before the 14th December in each year. This by-law was amended, in a manner not material in this action, by a by-law dated the 6th October, 1899.

Under the by-law of 1893, five per cent. had to be added to these unpaid taxes. To have that done, and to enable the Treasurer to make the return required of him, the Collector was obliged to make a return to the Treasurer of all persons who had paid taxes on or before the 14th December, and at the same time he was required to pay to the Treasurer the amount of taxes so paid.

Section 292 provides that the Treasurer shall, after the 14th December and on or before the 20th December, prepare and transmit to the Clerk of the municipality a list of all persons who have not paid their taxes on or before the 14th December. This necessitates the examination of the Collector's roll for each year, down to the 14th December; and apparently no statutory duty is put upon the Treasurer to examine the Collector's rolls other than to that date.

Section 299 provides for the appointment of two auditors by the council of each municipality. Section 304 defines the duties the council of each municipality.

Section 304 defines the duties of these auditors.

The Treasurer of the Village of Arnprior was a salaried officer, who also gave security to the plaintiffs, by a bond of these defendants, for the due performance of the duties of his

office. Section 290 prescribes the duties of the Treasurer, and sec. 291 states what books the Treasurer is to keep. He should enter the date of payment of any tax money to him by the Collector.

After the roll gets back to the Collector, with the percentage added for collection, there is no statutory provision for any inspection of it.

Mattson saw his opportunity, and began to appropriate the money received by him from the taxes unpaid on the 15th December, 1908, and unpaid on the roll on the 15th December, 1909.

In interpreting the answer of the Mayor, it should be remembered that the plaintiffs are a municipal corporation. Their work is done as prescribed by statute, as to which the defendants know as much as the plaintiffs. They are presumed to know the law. The answers were given in perfect good faith.

I am unable to find upon the evidence that there was fraud or concealment of any kind, nor was there any wilful misstatement on the part of the Mayor, Treasurer, or Clerk, or any officer of the plaintiff corporation, in obtaining the bond in question. I am of opinion that the answers of the Mayor—the statements in writing—are true in the way the Mayor understood the questions and in the way he wished the defendants to understand them, and in the way the defendants did understand them.

It is alleged by the defendants that Mattson was in debt to the plaintiffs in June, 1904, and that the plaintiffs were aware of it, or should have been aware of it, and that Mattson was in debt to the plaintiff corporation every year during the continuation of the bond, and that the plaintiff corporation had knowledge of that condition of affairs.

There is no proof of any such indebtedness for the year 1907 or any year prior to that; and the plaintiff corporation had no knowledge of any such indebtedness, if any existed, in or prior to the year 1907.

I find against the defendants upon the eleventh, twelfth, and thirteenth paragraphs of the statement of defence. These have reference to the notice by the plaintiffs to the defendants of Mattson's default; and to the want of compliance by the plaintiffs with the conditions as to proof of loss. These conditions were reasonably complied with.

The defendants say that the statement made in the application by Mattson for the issue of the bond, and the answer to the questions of the defendants by the plaintiffs therein, and the statements by the plaintiffs to the defendants mentioned before, were all untrue. I am of opinion that many of the

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statements were immaterial, and that all of them were substantially true.

Going back to the statement of 10th June, there are seventeen questions, exclusive of some sub-divisions. In what I have said, I have dealt with questions 11 and 12. No argument can successfully be made in favour of the defendants upon the answers to 1, 2, 3, 4, 5, 8, 9, 10, and 17. This leaves 6, 7, 13, 14, 15, and 16 to be considered. Question 6 (*a*)—What will be the title of applicant's position? (*b*)—Explain fully his duties in connection therewith. Answer (*a*)—Chief of Police and collector of taxes. (*b*) To collect all taxes.

The answers are perfectly true; but the defendants say that additional duties placed upon the collector voids the bond. The alleged additional duties were the collection of license fees and water rates and fines and acting as sanitary inspector.

There is no evidence of Mattson's collection of any fine or license fee, nor of his being authorised by the plaintiffs to make such collections. If he did, he acted without authority from the plaintiffs, at the instance of the person liable.

"Sanitary Inspector" is not a distinct office. It was something fairly within the duty of Mattson as Chief of Police, to look after on his rounds.

There is no evidence that he acted as collector of water rates; and, if he did so act, there was no shortage in his water account. Although Mattson was called, he said nothing about making up shortages, if any, on water rates by payment out of tax money.

"Q. 7 (a). If the duties embrace the custody of cash, state largest amount likely to be in his custody at any one time. (b) And the average amount of daily handlings. A. (a) $2,000; (b) $100 to $500.

It was stated by Mattson that on occasions when the heaviest taxes were paid, and paid by cheque, there was as much at one times as $8,000—including cheques—in his hands. Even if Mattson did have $8,000 in cash and cheques in his possession at one time, it was an exceptional thing—a thing not in the ordinary course likely to occur. The Mayor was only speaking of what was likely. Mattson stated in his signed application of the 19th May, 1904—which the defendants put in as evidence—that the total amount handled by him during the year would be $18,000 or $19,000, and the largest amount apt to be under his control at any time would be $1,000. Taking the largest amount for the whole year at $19,000, and allowing say a hundred days for collection, the average would be only $190 a day; much less than the maximum amount mentioned in the statement of the Mayor.

I find that the answers to question 7 are substantially true.

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It was not shewn that the answers to questions 13, 14, 15, and 16 were not true. The onus was upon the defendants to shew the falsity if the answers were false.

No evidence was given to shew that there was any default or indebtedness prior to that of 1909.

I find that the defendants were duly notified in writing of Mattson's default, and that the defendants were furnished with proofs of their loss.

I further find that the defendants requested that Mattson be prosecuted for his theft or embezzlement, and that he was prosecuted and found guilty.

There will be judgment for the plaintiffs for $5,000 with interest thereon from the 20th June, 1911, at five per cent. per annum, with costs.

Judgment for plaintiffs.

IRVIN v. VICTORIA HOME CONSTRUCTION AND INVESTMENT CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. MECHANICS' LIEN (§ VI—46)—RIGHT TO LIEN—SUB-CONTRACTOR FURNISHING LABOUR AND MATERIALS — STATUTORY NOTICE OF LIEN CLAIM FOR MATERIALS.

A sub-contractor who furnishes both labour and materials for the construction of a building for a lump sum is entitled to a lien therefor without giving the notice required of a mere materialman by sec. 6 of the B.C. Mechanics' Lien Act, R.S.B.C. 1911, ch. 154.

[To same effect see *Fitzgerald* v. *Williamson*, 12 D.L.R. 691; for Annotation on parties entitled to the benefit of Mechanics' Lien statutes, see 9 D.L.R. 105.]

Statement

APPEAL by the defendant from a judgment giving a sub-contractor a mechanics' lien for labour and materials furnished for the construction of a building.

The appeal was dismissed.

Aikman, for appellant, defendant.

F. C. Elliott, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff was a sub-contractor for the tiling of the building which was being erected under contract by the defendant companies for the owners, the individual defendants, the plaintiffs supplying the material as well as the labour for a lump sum of $5,050. No notice was given by the plaintiff under sec. 6 of the Mechanics' Lien Act to the owners of the material supplied. But for that section it seems clear that the plaintiff would have a sub-contractor's right to a lien which, though less beneficial, under certain circumstances than that of persons supplying material who have given the required notice, yet is clearly recognized by the Lien Act.

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The appellants contend, and this is the only question raised in this appeal, that the plaintiff is a person who places or furnishes material, and not having given the notice, is precluded by said section from asserting a claim of lien as a sub-contractor for the materials included in his contract. Originally, the Mechanics' Lien Act gave labourers, contractors and sub-contractors, only, lien rights; then the Act was amended so as to give liens to persons placing or furnishing materials. A person merely furnishing materials to be used in a building must give notice. By doing so he not only obtains a right to lien, but one which, by virtue of sec. 15, may be much more advantageous than that given to a sub-contractor. If the appellant's contention be right, then a sub-contractor's status has been changed by the rights granted to suppliers of materials. The sub-contractor who supplies his own material must, perforce, if that contention be right, segregate materials from labour, and notify the owner of the value of the materials and claim for it as materials furnished to be used in the building, and for the balance of his contract as a sub-contractor, and if he fail to do this his right to a lien for the value of his materials is gone.

Having regard to the history of the Act, the language of the section itself, and the form of notice prescribed in the schedule, I think the appeal fails.

Irving, J.A.

IRVING, J.A.:—I would dismiss the appeal and hold that the plaintiff, being a sub-contractor undertaking to supply material and work the same into the building, is not required to give a notice of his intention to claim a lien. The provisions of sec. 6 requiring a notice to be given, apply to a materialman pure and simple. The failure of the contractor to keep a pay-roll as required by sec. 15, prevents anyone bringing an action against the owner for payment. The section does not prevent a sub-contractor from filing a lien. The section was designed to afford some measure of protection to the owner.

Martin, J.A.

MARTIN, J.A.:—The plaintiff is a sub-contractor under an entire contract for $5,050 with the Victoria Home Construction and Investment Company, Ltd., to supply marble and tiles, and do all the work connected therewith according to plans and specifications, under a contract which the said company had with the owners for the erection of a certain building. The plaintiff gave no sufficient written notice under the proviso in sec. 6 of the Mechanics' Lien Act; and it is submitted that he has no lien for the material which he supplied and actually "placed" in the building. But the exact point is decided in his favour by us to-day in *Fitzgerald* v. *Williamson*, 12 D.L.R.

691, viz., that said proviso only applies to a bare materialman, and, therefore, plaintiff is entitled to a lien for the full amount of his claim. B. C. C. A. 1913

GALLIHER, J.A., concurred. Galliher, J.A.

Appeal dismissed.

THE KING v. KNOWLES. ALTA.

Alberta Supreme Court, Beck, J. August 4, 1913. S. C. 1913

1. DISORDERLY HOUSES (§ I—1)—INMATE OF—MAN AS.

A man cannot be convicted, under secs. 225, 228 and 238 of the Criminal Code, of being an inmate of a bawdy house, since such sections apply to female inmates only.

APPLICATION to quash a conviction of a man for being an inmate of a bawdy house. Statement

The application was granted, and the conviction quashed.

Selwood for the Crown.

Cameron, for the application.

BECK, J.:—The defendant, a man, was convicted of being an inmate of a bawdy house. Beck, J.

One of the questions raised before me on this application, one for a writ of *habeas corpus*, is whether a man can be convicted of being an inmate. The Criminal Code, R.S.C. 1906, ch. 146, sec. 225, defines a common bawdy house as a "house, room, set of rooms or place of any kind kept for purposes of prostitution or occupied or resorted to by one or more persons for such purposes." By sec. 228, the keeping of such a house is made an indictable offence and any one who appears, acts or behaves as master or mistress or as the person having the care, government or management is to be deemed to be the keeper. By sec. 238, a common prostitute or night walker who does not give a satisfactory account of herself (clause (*i*)), a keeper or inmate of such a house or house for the resort of prostitutes (clause (*j*)), a frequenter of such a house not giving a satisfactory account of himself or herself (clause (*k*)), and a person who having no peaceable profession or calling to maintain himself by for the most part supports himself by the avails of prostitution (clause (*l*)), are liable, under sec. 239, to summary conviction.

I have referred to these provisions because, omitting the word inmate from clause (*j*), they appear to me to furnish quite sufficient grounds upon which to convict a man who is an inmate of a bawdy house on any finding of facts upon which it may fairly be supposed parliament intended he should be con-

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victed. He may be convicted of being a keeper—and the definition of this is very wide—of being a frequenter or of living on the avails of prostitution. But if the bald fact of being an inmate, *i.e.*, a mere dweller in the house, is sufficient to justify conviction, then a person who is nothing more than a servant, such as a cook or general-purpose men, or who is merely a poor dependent, provided for out of charity, would be liable to conviction.

In a statute creating a criminal offence such an intention, if it is the intention, must be made clear beyond question, and I think this has not been done. I think, looking at all the associated provisions of the Code, the meaning to be attached to the word inmate is an inmate for the purposes of prostitution and therefore a female. Cases of unnatural offences are dealt with elsewhere in the Code.

I have been referred to no decisions upon the point in Canada or elsewhere, and as far as I can discover in a casual search, there is no corresponding provision in England or in the United States of America. I am, therefore, left to form unaided the best judgment I can upon the point.

In view of the opinion I have formed, I quash the conviction.

Conviction quashed.

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HARRIS v. WESTHOLME.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. January 7, 1913.

1. CONTRACTS (§ IV C I—345)—PART PERFORMANCE — ENTIRE CONTRACT —RECOVERY.

In the absence of acts amounting to acquiescence or acceptance, a contractor cannot recover on a contract to be executed in a specified manner and not to be paid for until completion, if the work as done is different from that stipulated in the contract.

[*Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, referred to; see also *Elford* v. *Thompson*, 1 D.L.R. 1, and Annotation on failure of a contractor to complete the work, 1 D.L.R. 9.]

Statement

APPEAL by defendants from judgment of Morrison, J.

The appeal was allowed.

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

Hart-McHarg, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal and dismiss the action. To my mind the evidence is conclusive that the elevator in question was not completed in accordance with the contract. That being so, the contract price never became due and owing by the defendants, and this action is, therefore, not sustainable.

IRVING, J.A.:—The contract was an entire contract. Mr. McHarg argued that the judgment should be upheld as there has been a substantial performance of the contract. The general law is well settled. In the absence of acts amounting to acquiescence or acceptance, the contractor cannot recover on a contract to be executed in a specified manner, and to be paid for upon completion, if the work is done in a manner different, or so defectively as to call for an allowance for the defects.

Unless the owner consents to the variations, or is willing to accept the work, or has done something which amounts to a fresh contract, or has prevented the contractor doing his work, then the contractor must do exactly what he agreed to do, and unless he does, he cannot recover. In *Cutler* v. *Close* (1832),, 5 C. & P. 337, and *Lucas* v. *Godwin* (1837), 3 Bing. N.C. 737, Tindal, C.J., makes use of some language which assists Mr. McHarg, but in *Cutler* v. *Close*, 5 C. & P. 337, there had been acceptance and acquiescence to a certain extent. After the installation of the stove, the pipes were moved at the suggestion of the defendants, and in the correspondence the apparatus was spoken of as not being satisfactory, but not as a complete failure.

In *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, 17 L.J.Q. B. 545, where the contractor having agreed to build two houses, abandoned his contract, a decision by the Court of Appeal, Smith, L.J., said:—

> The law is that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered. Therefore the plaintiff could not recover on the original contract. It is suggested, however, that the plaintiff was entitled to recover for the work he did on a *quantum meruit*. But, in order that that may be so, there must be evidence of a fresh contract to pay for the work already done.

Collins, L.J., said:—

> If the plaintiff had merely broken his contract in some way so as not to give the defendant the right to treat him as having abandoned the contract, the plaintiff might perhaps have been entitled to sue on a *quantum meruit* on the ground that the defendant had taken the benefit of the work done. But that is not the present case. There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a *quantum meruit* from the defendants having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only where the circumstances are such as to give that option that there is any evidence on which to ground the inference of a new contract.

In the pleadings before Mr. Justice Morrison there was no claim on a *quantum meruit* basis, and this Court is now asked to amend the pleadings by inserting such a claim.

I do not think we could allow such an amendment except on

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terms, and if we did I think a new trial would be necessary, but notwithstanding the hardship to the plaintiff, it is, in my opinion, our duty to refuse an amendment—the application is too late—the work done was not of the character and finish contracted for. Moreover, in my opinion the judgment below was wrong on the facts—facts established by photographs and other documentary evidence. On the whole I do not think the amendment should be allowed.

In *Ellis* v. *Hamlen* (1810), 3 Taunt. 52, where the action was brought on a special contract, with a count for work, labour, etc., upon a *quantum valebant*, Lord Mansfield said:—

> To be sure it is hard that he should build houses and not be paid for them, but the difficulty is to know where to draw the line, for if the defendant is obliged to pay where there is one deviation from his contract he may equally be obliged to pay for anything how far soever distant from what the contract stipulated for.

I would allow the appeal.

Martin, J.A.

MARTIN, J.A., concurred in allowing appeal.

Galliher, J.A.

GALLIHER, J.A.:—I would allow the appeal. There can be no question on the evidence that the work was not done in accordance with the contract. I find no proof of acceptance or waiver on the part of the appellants, and no evidence of a fresh contract to pay for the work done. The doctrine is summed up very concisely in the case of *Sherlock* v. *Powell*, 26 A.R. (Ont.) 407, at 409 and 410.

Appeal allowed.

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MOFFATT v. CROW'S NEST PASS COAL CO., Ltd.

(Decision No. 1.)

British Columbia Supreme Court, Murphy, J. May 8, 1913.

1. MASTER AND SERVANT (§ II A 2—43)—LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF INJURY—RIGHT OF DEPENDANTS UNDER NOTICE BY SERVANT.

A notice of injury given by a workman is sufficient to entitle his dependants after his death to the benefits of the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, without any other or further notice.

[For affirmance of this case, see the case following on page 643.]

Statement

CASE submitted by Judge Thompson, arbitrator under the Workmen's Compensation Act (B.C.), as to whether the demand for compensation for and on behalf of the deceased James Roby while living was a sufficient demand for compensation for his dependents after his death.

The date of the injury was August 9, 1910, and he died on August 29, 1910, but meanwhile a notice of claim had been given

under the Workmen's Compensation Act in the following form:—

The Workmen's Compensation Act, 1902.

Notice of Claim.

The Crow's Nest Pass Coal Company, Ltd.,
Fernie, B.C.

Gentlemen,—Take notice that a claim is made under the provisions of the above Act for compensation on behalf of Mr. James Roby, occupation, Rope rider, Check No. 2502, who was injured at your Mine No. 2, located at Coal Creek, on August 9th, 1910.

Signed this 16th day of August, 1910.

DAVID REES,
Agent.

Statement

The questions submitted were:—

(1) Was there evidence upon which I could find that the deceased James Roby was the husband of Mary Roby mentioned in the pleadings?

(2) Was there evidence upon which I could find the dependency of Mary Roby mentioned in the pleadings upon James Roby deceased?

(3) Was I right in over-ruling the objection of Mr. Herchmer, counsel for the respondents, and in allowing counsel for the applicant to prove notice of injury and demand for compensation after closing his case at the trial?

(4) Was the demand for compensation for and on behalf of the deceased James Roby while living, a sufficient demand for compensation for his dependents after his death?

W. A. Macdonald, K.C., for appellant.

E. V. Bodwell, K.C., for respondent.

MURPHY, J.:—The only question argued before me was No. 4. In my opinion it should be answered in the affirmative. The giving of the notice under the Act seems to be for the protection of the employer and so that he may not be made to suffer by stale claims. Having received such notice from the injured person I see no reason why such persons (dependants) after his death should be called upon to give another notice.

Murphy, J.

Direction accordingly.

MOFFATT v. CROW'S NEST PASS COAL CO. Ltd.

(Decision No. 2.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, JJ.A. July 22, 1913.

1. MASTER AND SERVANT (§ II A 1—43)—LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF INJURY — DEATH OF SERVANT—RIGHT OF "DEPENDANTS" UNDER NOTICE GIVEN BY SERVANT.

A notice of injury given by a workman is sufficient to entitle those dependant upon him after his death to the benefits of the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, without any other or further notice.

[*Moffatt v. Crow's Nest Pass Coal Co.*, 12 D.L.R. 642, affirmed.]

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MOFFATT v. CROW'S NEST PASS COAL CO. LTD. (No. 2.)

Macdonald, C.J.O.

APPEAL from the judgment of Murphy, J., *Moffatt* v. *Crow's Nest Pass Coal Co.*, 12 D.L.R. 642.

The appeal was dismissed.

Bodwell, K.C., for defendants, appellants.

Maclean, K.C., for plaintiff, respondent.

MACDONALD, C.J.A.:—James Roby was, on August 9, 1910, injured while employed in the appellants' mines at Fernie. Notice of injury was given and claim for compensation under the Workmen's Compensation Act was made on his behalf, and served on the appellants on the 16th of the same month. Roby died on the 25th of the same month, before any further proceedings had been taken.

Subsequently, proceedings were taken on behalf of his wife and children, the respondents in this appeal. Appellants contend that because a new claim, under the said Act, was not made by the respondents, they had lost their right to compensation. The arbitrator and the learned Judge appealed from, each held that the first claim was sufficient. As has been stated by the arbitrator, a liberal construction in favour of beneficiaries ought to be given to the Act so as to carry out the manifest intention to provide for the injured and his dependants without undue regard to mere technicalities.

I would dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—James Roby, who was injured on August 9, 1910, put in his claim on August 16, 1910, and died on August 29, 1910.

In August, 1912, the plaintiff, the legal personal representative of James Roby, applied for an arbitration in the interest of the widow of James Roby, a dependant.

It is objected, that as no claim was made on behalf of the widow, within six months of the death, the dependant's claim is gone.

In considering that question—or any other question on the construction of this Act—we must be guided solely by the language of the statute, without the addition of anything that is not necessarily implied.

When we examine the Act we find that as soon as the accident happens, the owner is liable to "make compensation." The measure of liability may vary according to the facts of the particular case, but the liability of the defendants to make compensation is fixed by the accident. That being so, a demand by the workman himself or by his agent in the workman's lifetime is the only claim necessary to support the proceedings under sec. 7 of the Act, R.S.B.C. 1911, ch. 244.

The section says:—

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Proceedings for the recovery under this Act of compensation shall not be maintained unless notice of the accident shall have been given . . . and unless the claim for compensation with respect to such accident has been made within, etc.

The section does not say "the claim for compensation *of the workman*, or of the dependant," but speaks of the claim for compensation with respect to such accident.

The form of the notice served on the defendants shews that the claim was made by or on behalf of the workman, but the insertion of the name of the applicant does not, in my opinion, prevent it from being a claim for compensation with respect to such accident.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—In my opinion the statute is satisfied if "the claim for compensation with respect to such accident" is duly made by any one at the time lawfully qualified to make it. Here that was done by the deceased, and I agree with the learned Judge below that it was not necessary for a "dependant" to give a second notice. It appears from the highest authority that the object of the notice is to give the employer an opportunity of settling the claim, or defending it—or as Lord Atkinson puts it in *Thompson* v. *Goold*, [1910] A.C. 409, at 413:—

> to protect the employer from stale demands, to warn him that a claim is about to be made against him, and thus put him upon his guard,

and that warning was given herein by the only person entitled to give it at the time, and I see no good reason for requiring a second one.

The appeal should be dismissed.

Appeal dismissed.

PRATT v. CONNECTICUT FIRE INSURANCE CO.

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British Columbia Supreme Court. Trial before Clement, J. June 18, 1913.

1. INSURANCE (§ III E 1—75)—STATUTORY CONDITIONS—VARIATION—DESTRUCTION OF PROPERTY BY FOREST FIRES—REASONABLENESS.

A condition that an insurance company should not be answerable for loss occurring through forest fires, is a reasonable variation of the statutory conditions pertaining to fire insurance under R.S.B.C. 1911, ch. 114.

2. INSURANCE (§ III E 1—87)—FIRE—VARIANCE FROM STATUTORY CONDITIONS—VACANCY—REASONABLENESS.

That an insurance company shall not be answerable if insured premises should become vacant or unoccupied is reasonable and valid, although a variation of the statutory conditions under R.S.B.C. 1911, ch. 114.

Statement

TRIAL of action to recover upon a fire insurance policy.

The action was dismissed.

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Clement, J.

J. Arthur Clark, for plaintiff.
E. C. Mayers, for defendant.

CLEMENT, J.:—At the conclusion of the trial I gave judgment in the plaintiff's favour on the issue as to the cancellation of the policy sued on; but reserved judgment upon the two other questions remaining for determination, namely, as to the operation and effect of two conditions contained in the policy in variation of the statutory condition as set out in the Uniform Conditions Act, R.S.B.C. 1911, ch. 114.

It was not disputed that the facts in evidence brought the case within the conditions; but Mr. Clark urged that they were unjust and unreasonable conditions to be enacted by the company. At the hearing, no evidence was adduced by the plaintiffs directed specially to the question of the reasonableness of the conditions, and it was contended that all variations from the statutory conditions are *primâ facie* unjust and unreasonable and that consequently the burden should be upon the company in that regard. I reserved judgment to consider the point more carefully, intimating that if I should continue of opinion that the burden—except in the case of a variation manifestly unjust and unreasonable upon its very face—is upon the plaintiff in a case of this kind, I should allow the plaintiff to adduce evidence along that line. In *Eckhardt* v. *Lancashire*, 31 Can. S.C.R. 72, at 74, the Supreme Court unqualifiedly approved of the judgment of Meredith, C.J., at the trial, *Eckhardt* v. *Lancashire*, 29 Ont. R. 699, and, as I read that judgment, the question is one to be determined on the circumstances of and surrounding the particular contract and there is no such presumption as is here contended for. Having so concluded, the case was again called, but no further testimony was adduced. It was, however, admitted that the property insured formed part of a group of structures situate around the mouth of the Silver King Mine upon the wooded mountain side some miles away from any neighbours; and the "survey" was put in shewing the position of the various structures.

The facts then, as they are before the Court, are that at the date of the contract, the mine was being operated, the different buildings insured were insured as buildings occupied by various members of the operating staff, and that the *locus* was as above set out.

The conditions set up are that the company should not be answerable first, for loss occurring through forest fires, and secondly, for loss if the premises insured should become vacant or unoccupied; and, as already intimated, the facts bring the case within these conditions. The fire which destroyed the buildings was a forest fire, and at the time the mine was not being worked, and the various buildings were unoccupied.

After careful consideration, I am unable to say that it was unjust and unreasonable for the company, at the date of the contract, to stipulate for immunity under the circumstances indicated. I am free to say, that, in view of the fact that the company's refusal to recognize liability, was at first (and, indeed, until an amended defence was filed in this action) based solely upon the contention that the policy had been cancelled, their reliance now upon these variations hardly calls for commendation; but legally they are entitled to stand upon their contract unless I can find affirmatively that these variations are unjust and unreasonable. I have tried in vain to propound some good reason for so holding and must therefore dismiss the action. I do so, however, without costs as the company failed in the issue upon which most of the time of the trial was taken up.

Action dismissed.

PETERSON v. THE GARTH CO.

Quebec Court of King's Bench (Appeal Side), Trenholme, Lavergne, Cross, Carroll, and Gervais, JJ. June 18, 1913.

1. APPEAL (§ VII M 8—659)—MEASURE OF DAMAGES—WORKMEN'S COMPENSATION ACT—INCREASING THE AMOUNT ON APPEAL.

The appellate court may modify the judgment below by increasing the damages on the plaintiff's appeal, if the court below has underestimated the percentage of loss of earning power which the evidence shews to have resulted to the workman in an action under the Workmen's Compensation Act (Que.).

Statement

APPEAL by the plaintiff who sued under the Workmen's Compensation Act (Que.) for $1,523 damages, resulting from injuries received while in the employ of the respondent. Appellant, an expert mechanic, on July 25, 1912, was engaged in punching holes with a large chisel in the cement floor of the new C.P.R. station for the placing of a mail shute, in the elevator shaft. He had to lean over the shaft holding the chisel whilst another workman hammered on the head thereof over his shoulder. Whilst punching a hole an elevator from above descended without warning, struck the chisel into his left hand cutting off part of the middle finger, and injuring the third and fourth fingers.

The trial Judge found a permanent and partial incapacity of eight per cent. on an earning power of $800 a year, which entitled plaintiff to an annual rent of $26; but finding also that working with full knowledge of the danger to which he was exposed without demur the plaintiff was guilty of inexcusable fault, the judgment was reduced to $20 a year.

Lawrence Macfarlane, for appellant.

H. V. P. Aylmer, for respondent.

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PETERSON v. THE GARTH CO.

The judgment of the Court was delivered by

TRENHOLME, J.:—There was no proof of inexcusable fault in the facts of record, and the Court is of opinion that the appellant's incapacity represented at least 15 per cent. of his earning power. Hence the appellant should have an annual rent of $52.

The judgment will be modified accordingly, with costs against respondent.

Judgment varied.

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July 15.

REX v. HUTCHINS.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Johnstone, and Brown, JJ. July 15, 1913.

1. EVIDENCE (§ IV C—401)—MARRIAGE LICENSE ISSUED IN UNITED STATES —AUTHENTICATION.

A copy of a marriage license and of a return shewing the performance of a ceremony thereunder, is admissible in evidence without further proof, under sec. 23 of the Canada Evidence Act, when certified under the seal of a Court of record of a state of the United States.

2. EVIDENCE (§ XII F—952)—BIGAMY—PROOF OF SECOND MARRIAGE—SUFFICIENCY.

A conviction of bigamy cannot be sustained where the sole proof of the second marriage is an admission of the accused that he and the woman "went through a form of marriage."

Statement

APPEAL on a case reserved by the trial Judge for the opinion of the Court on a trial for bigamy resulting in the conviction of the accused.

The conviction was quashed and the respondent discharged.

T. A. Colclough, for the Crown.

No one for accused.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—The accused, William J. Hutchins, was tried before the learned District Court Judge for the judicial district of Cannington on April 10, 1912, on a charge "that he, the said William J. Hutchins, at or near Estevan, in the province of Saskatchewan, being already married to one Irene Hutchins, did go through a form of marriage with another woman, Anna L. Seyfert, and to her the said Anna L. Seyfert was then and there married, his the said William J. Hutchins' first wife being still alive, contrary to sec. 308 of the Criminal Code of Canada, and was found guilty and sentenced to one year's imprisonment in Regina gaol. The evidence against the accused was, as shewn by the Judge's notes, shortly as follows:—

Irene Hutchins, the first wife, identified the accused as her husband, and testified to her marriage to him in Minneapolis, Minnesota, U.S., in February, 1911. Her testimony, stated briefly, is, that she and the accused went to the office of the clerk

for marriage licenses in Minneapolis on February 8, 1911, and secured a marriage license and afterwards were married by the Reverend Mr. Klinger, a minister of the United Brethren Church at her home in Minneapolis, after which they lived together until July, 1912. Owing to quarrels she left the accused and began divorce proceedings against him, which were subsequently dropped. The following document put in on behalf of the prosecution was admitted in evidence against the accused:—

(*Exhibit "C"*)

State of Minnesota,
District Court,
For the County of Hennepin.

To any person lawfully authorized to solemnize marriages within said State:

Know ye that license is hereby granted to join together as husband and wife, William J. Hutchins, of the County of Hennepin, and State of Minnesota, and Irene Wilkerson, of the County of Hennepin, and State of Minnesota, being satisfied by the oath of said William J. Hutchins that there is no legal impediment thereto.

Therefore, this shall be your sufficient authority for solemnizing the marriage of the said parties, and making return thereof, as provided by law.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Minneapolis in said County, this 8th day of February, A.D. 1911.

(Sgd.) A. E. Allen,
Clerk of District Court.
By (Sgd.) R. S. Wiggin,
Deputy.

Seal of District Court,
Hennepin Co., Minn.

State of Minnesota,
County of Hennepin.

I hereby certify that on the 19th day of February, in the year of our Lord one thousand nine hundred and eleven, at Minneapolis, Minn., in said County, the undersigned, a Minister of the Gospel, did join in the holy bonds of matrimony, according to the laws of this State, William J. Hutchins, of the County of Hennepin and State of Minnesota, and Irene Wilkerson, of the County of Hennepin and State of Minnesota.

In presence of
(Sgd.) Harry Riley.
Florence Riley.

(Sgd.) H. M. Klinger,
United Brethren,
628 Fillmore St.,
N.E. Minneapolis.

Returned and filed March 14th, 1911.

A copy of my credentials of ordination is recorded in the office of the Clerk of the District Court for the County of Hennepin, State of Minnesota.

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REX
v.
HUTCHINS.

Haultain, C.J.

State of Minnesota, }
County of Hennepin. }

I, P. S. Neilson, Clerk of the District Court, Fourth Judicial District, in and for the County of Hennepin, State of Minnesota, the same being a Court of record, do hereby certify that I have compared the paper writing upon which this certificate is endorsed with the original license and certificate of marriage of William J. Hutchins and Irene Wilkerson on file in the said clerk's office, at the Court House in said Hennepin County, Minnesota, and find the same to be true and correct copies thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of the said District Court, at the City of Minneapolis, in said County, this 22nd day of Jan., A.D. 1913.

(Sgd.) R. S. Neilson,
Clerk of District Court.
(Sgd.) C. F. Williams,
Deputy.

Seal of the District Court,
Hennepin Co., Minn.

There was also put in on behalf of the prosecution the "statement of the accused" made and signed by him in due statutory form on the preliminary inquiry before the magistrate who committed him for trial on this charge. The statement made by the accused is as follows: "I supposed that after 30 days from the date of the papers served upon me, divorce would be granted and that I would be free to marry again. I admit I married Irene in Minneapolis, and I admit I went through a form of marriage with Anna L. Seyfert." The learned trial Judge submits for our opinion the following questions:—

1. Was I right in admitting the documentary evidence, exhibit C?

2. Was I right in finding that there was sufficient proof of the first marriage?

3. Was I right in finding that there was sufficient proof of the second marriage?

As to question 1:—

Sec. 23 of the Canada Evidence Act provides that evidence of any proceeding or record whatsoever of in or before any Court of record of any State of the United States of America may be made in any action or proceeding by a certified copy thereof purporting to be under the seal of such Court without any proof of the authenticity of such seal or other proof whatever.

In view of that provision, the document, in my opinion, was properly admitted.

As to question 2:—

The evidence of Irene Hutchins and the admission of the accused, together with the documentary evidence already dealt

with, in my opinion constitute ample evidence of the first marriage.

As to question 3:—

The only evidence of the second ceremony is the statement of the accused that he "went through a form of marriage with Anna L. Seyfert." The first marriage to Irene Hutchins having been proved, it is further necessary, to support the conviction, to prove that the accused afterwards went through a valid form of marriage with Anna L. Seyfert. A valid form of marriage for this purpose is

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> a form of marriage known to, and recognized by the law as capable of producing a valid marriage independently of the bigamous character of the marriage: *R.* v. *Allen*, 41 L.J.M.C. 97, 101, 12 Cox C.C. 193.

It will not be necessary, in my opinion, for the determination of this question to consider the numerous and conflicting cases on the effect of admissions of "marriage" by the accused in bigamy cases. The accused admits that he went through a form of marriage, but there is nothing in that admission to connect the form of marriage with the time or place mentioned in the charge before the committing magistrate, and there is, of course, nothing to indicate what the "form of marriage" was. In my opinion there was no evidence to support that part of the charge, and the conviction should therefore be reversed, and the prisoner discharged.

I think I may say, as was said by Walton, J., in *Rex* v. *Lindsay*, 66 J.P. 505, under very similar circumstances, that

> there has been a great miscarriage of justice in this case, and the prisoner has got off scot-free because the evidence was incomplete.

The alleged bigamous marriage in this case took place at Estevan on December 11, 1912, four months to a day before the accused was brought to trial. Surely there should have been no difficulty in procuring the necessary evidence to prove the second marriage.

Newlands, J.

NEWLANDS, J.:—I agree with the answer to question 3 and that the conviction should be quashed. I have not, therefore, considered questions 1 and 2.

Johnstone, J.
Brown, J.

JOHNSTONE, and BROWN, JJ., concurred.

Conviction quashed.

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July 12.

DOUGLASS v. BULLEN.

Ontario Supreme Court, Britton, J. July 12, 1913.

1. INJUNCTION (§ I E—40)—TRESPASS TO REAL PROPERTY—ADEQUACY OF LEGAL REMEDY.

An injunction will not be granted to prevent the erection of a building alleged to encroach on the plaintiff's land, if his remedy by an action for damages is adequate.

[*Douglass* v. *Bullen*, 3 D.L.R. 898, 3 O.W.N. 1619, and *Neal* v. *Rogers*, 22 O.L.R. 588, referred to.]

2. DAMAGES (§ III M—290)—INJUNCTION — WRONGFUL ISSUANCE—SCOPE OF.

On an injunction undertaking damages will not be awarded in relation to matters not within the scope of the injunction order, *i.e.*, loss of time incident to the litigation generally, and not specially to the injunction.

3. DAMAGES (§ III M—292)—INJUNCTION UNDERTAKING—WRONGFUL ISSUANCE—TRIVIALITY—REMOTENESS.

An inquiry as to damages sustained by the wrongful issuance of an injunction will not be granted where the injuries claimed are trivial or remote, and not such as could have been within the contemplation of the parties when the writ was issued.

[*Smith* v. *Day*, 21 Ch.D. 421, and *Gault* v. *Murray*, 21 O.R. 458, referred to.]

Statement

ACTION to establish the boundary-line between the land of the plaintiff and that of the defendant on the east side of Surrey Place, in the city of Toronto, and for an injunction restraining the defendant from encroaching. The plaintiff Douglass was the owner and the plaintiff Woods the tenant of land which lay to the north of the defendant's land.

A. McLean Macdonell, K.C., and *O. H. King*, for the plaintiffs.

Shirley Denison, K.C., and *F. C. Snider*, for the defendants.

Britton, J.

July 12. BRITTON, J.:—The plaintiff Douglass purchased in 1886, and the conveyance to him describes the land by metes and bounds. Since his purchase, the plaintiff Douglass has been in undisputed possession. In the early part of 1912, the defendant purchased the property lying to the south of the plaintiffs', for the express and avowed purpose of erecting thereon a large and expensive apartment house. The plaintiffs were quite opposed to such a building close to their southern boundary, and they were on the alert to prevent the defendant trespassing to the slightest extent in prosecuting his building operations.

The plaintiffs allege that, immediately before the commencement of this action, viz., on the 10th June, 1912, a surveyor of the defendant entered upon the plaintiffs' land and planted a post, which, the surveyor alleged, marked the north-east

boundary of the defendant's land. The plaintiffs allege that the surveyor assumed to determine, for the defendant, the southern boundary-line of the plaintiffs' property, that being the northern boundary line of the defendant's property. The plaintiffs allege that this post was at least three inches upon the land of the plaintiffs, and that the so-called boundary-line encroached upon the plaintiffs' land distances varying from one and three-quarter inches to nine and one-half inches. Because of this action of the surveyor, the plaintiffs, on the 10th June, applied for and obtained an interim injunction order. The usual undertaking as to damages was given, and the plaintiffs were allowed to file and use further material on motion to continue the injunction. The motion to continue was argued on the 16th July, 1912, and continuance was refused: *Douglass v. Bullen*, 3 D.L.R. 898, 3 O.W.N. 1619.

By that order, the costs of and incidental to both motions were reserved to be disposed of at the trial or other final disposition of this action. The defendant then proceeded with the building, and, with the exception of that part of the northern foundation wall, called the footings, erected it wholly upon his own land. There is now no claim for an injunction.

At the opening of the trial before me, counsel for the plaintiffs stated that the action was to fix the boundary between these properties of the plaintiffs and defendant, and the plaintiffs asked for a declaration as to the true boundary-line.

During the trial, counsel for the plaintiffs frankly stated that, although the encroachment by the footings is something to complain of, that is a comparatively trifling matter, and the action was not brought in reference to these. As to these footings the defendant also alleges that the matter was of trifling character, and he has paid into Court $25, alleging that sum to be sufficient compensation to the plaintiffs, if they are entitled to anything.

The defendant claims large damages consequent upon the injunction, and asks for a reference as to these.

I am of the opinion that the plaintiffs were not entitled to proceed by injunction. They acted hastily because they did not want an apartment house close to their southern boundary. They thought that the defendant intended to act in a high-handed and arbitrary manner, and they looked with alarm upon every movement the defendant made. The plaintiffs had the right, of course, to watch and protect even an inch of their territory, but, in a matter of boundary, pending negotiations, proceeding by injunction was not the authorised way.

The evidence satisfies me that the defendant did not intend to take or use or injure any part of the plaintiffs' land. There was no question of removing the plaintiffs' fence further than was necessary to enable the defendant to work to the line.

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The defendant did speak of claiming the land to the post mentioned by Wilson, and did speak of the projecting eave or cornice of the stable; but, apart from a suggestion as to his right, he had done nothing up to the time of issuing the writ beyond what seemed reasonable under the circumstances. The acts complained of, even if done, were not likely to do any irreparable damage to the plaintiffs. If the defendant had actually commenced to build any part of his wall upon the plaintiffs' lands, he would have done so at his own risk and loss, and would be obliged to pay damages, if any, to the plaintiffs, and money in payment of damages would be an adequate remedy. Then the matter was in fact comparatively trifling to the plaintiffs. And an injunction might do the defendant great damage; and, if it did not in fact injure, it cannot be held to excuse the plaintiffs. This seems to me a case where from first to last there was no intention to injure the plaintiffs; and, had the plaintiffs attempted in a reasonable way to meet the defendant, a settlement of all the small matters in dispute could have been arrived at. My inference from the evidence is, that the defendant did not at first intend to claim or encroach upon any land in possession of the plaintiffs. After relations had become strained, the defendant apparently thought that, if his conveyance called for it, and if the surveyor was right in giving him an extra few inches, he would take it, but he did not intend to fight for it, nor did he in fact take it, and has not in this action claimed it. The plaintiffs point to the defendant's examination for discovery as shewing his real intention before the injunction order issued. The defendant's answers upon that examination go no further than to challenge or doubt the plaintiffs' paper title to as much land as they had in possession. The defendant did not set up any claim beyond what I have above stated.

The plaintiffs' claim for an injunction fails. They had a cheaper, a more just and convenient remedy for all the alleged wrongs done by the defendant: *Neal* v. *Rogers*, 22 O.L.R. 588.

The defendant says that, owing to the injunction, he was unable from the 10th June to the 16th July to proceed with the erection of the apartment house, and thereby sustained heavy damages. These he claims under the plaintiffs' undertaking, and asks for a reference.

The order is, that the defendant "be restrained from wrongfully entering upon the plaintiffs' lands, from pulling down the plaintiffs' fences, from wrongfully taking away the support of the plaintiffs' lands, from encroaching on the boundary of the plaintiffs' lands, with excavation for a building, or in any other way trespassing upon the lands of the plaintiffs, as set out in the writ of summons."

There seems nothing in that order to prevent the defendant from doing all that he says he desires to do, or all that he afterwards did, viz., erecting the apartment house upon his own land, unless the description by metes and bounds in the plaintiffs' writ was erroneous and so misled the defendant.

The plaintiffs are responsible, at least to the extent of costs, for wrongfully proceeding by injunction. The plaintiffs put the law in motion, put the defendant upon his defence; but the plaintiffs are not responsible in damages which, if sustained, resulted from an erroneous interpretation by the defendant of the injunction order.

The defendant has, in answer to the plaintiffs' demand, furnished particulars of alleged damages. These particulars fill six pages and a half, and the damages are of a very varied character, amounting to very many thousands of dollars.

The Court is not bound to grant an inquiry as to damages, even where the defendant has sustained some damage by the granting of the injunction, but it has a discretion and may refuse any inquiry if the damage is trivial or remote. See *Smith* v. *Day*, 21 Ch.D. 421.

A considerable amount of the defendant's claim is for alleged loss of rent. The damages ought to be confined to the immediate natural consequences of the injunction, under the circumstances, which were within the knowledge of the party obtaining the injunction. The damages claimed are, in my opinion, too remote. The defendant gave notice to the plaintiffs that he was liable to suffer damage by reason of the injunction, and that he would hold the plaintiffs responsible; but, as to such damages as are claimed, the plaintiffs could have no knowledge, and they could not have been within their reasonable contemplation when the order was asked for. Damages should be confined to circumstances of which the plaintiffs had notice. See Kerr on Injunctions, 4th ed., 592.

No doubt, the defendant has suffered some damage, but I cannot sort out damage by reason of the injunction distinct from loss of time and trouble and detriment arising from litigation; so no inquiry should be directed. See *Gault* v. *Murray*, 21 O.R. 458.

There will be judgment declaring a line as now agreed upon between the parties to be the true boundary-line between the properties of the plaintiffs and defendant. This line may be described, if the parties agree, by Mr. Van Nostrand, surveyor. If they do not agree, I will set out the line in the judgment, upon the minutes being spoken to.

The plaintiffs will be entitled to the $25 paid into Court as full compensation for the lapping or extension of footings of

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the defendant's wall upon the southern part of the plaintiffs' land.

In so far as the action was for an injunction, it will be dismissed with costs payable by the plaintiffs to the defendant.

There will be no damages to the defendant, and no inquiry will be directed. In so far as the defendant has made such damages a matter of counterclaim, the counterclaim will be dismissed without costs.

Judgment accordingly.

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July 9.

REX v. QUONG WING.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Brown, JJ. July 9, 1913.

1. CONSTITUTIONAL LAW (§ II B—325)—REGULATIONS OF BUSINESS—PROHIBITING WHITE FEMALES FREQUENTING OR BEING EMPLOYED IN PLACES KEPT OR MANAGED BY ORIENTALS.

Ch. 17 of the Sask. Statutes of 1912, prohibiting any white woman or girl residing, lodging or working in, or frequenting any restaurant, laundry or other place of business or amusement, kept, owned or managed by a Chinaman, Japanese or other Oriental person, is not *ultra vires*.

[*Hodge* v. *The Queen*, 9 A.C. 117, 132, and *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, specially referred to; *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, distinguished.]

Statement

APPEAL by each of the defendants Quong Wing and Quong Sing by way of stated case from convictions for violation of ch. 17 of the Sask. Statutes, 1912, prohibiting any white woman or girl residing, lodging or working in, or frequenting, any laundry, restaurant or place of business or amusement, kept, owned or managed by a Chinaman, Japanese or other Oriental person. The constitutionality of the Act was questioned.

The appeal was dismissed.

W. B. Willoughby, for appellant.

J. N. Fish, for respondent.

Haultain, C.J. (dissenting)

HAULTAIN, C.J. (dissenting):—This is a case stated by the police magistrate for the city of Moose Jaw for the opinion of the Court under sec. 761 of the Criminal Code. The appellant Quong Sing is a Chinaman by birth and a naturalized Canadian subject of the King. The charge laid against him, and upon which he was convicted by the police magistrate, is that he being a Chinaman and the owner and keeper of a place of business in the city of Moose Jaw known as the Royal Rooming House, did employ in the said rooming house one Annie Hartman, a white woman, contrary to the provisions of "An Act to prevent the Employment of Female Labour in Certain Capacities," being ch. 17 of the statutes of Saskatchewan, 1912. The following are the provisions of the Act in question:—

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1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Japanese, Chinaman or other Oriental person.

2. Any employer guilty of any contravention or violation of this Act shall upon summary conviction be liable to a penalty not exceeding $100 and in default of payment to imprisonment for a term not exceeding two months.

Since these proceedings were begun the Act has been amended, and now applies only to Chinamen.

By consent of counsel on both sides, the only question left for our consideration is whether the enactments of sec. 1 are within the competency of the Saskatchewan legislature. The determination of this question depends upon the construction of sees. 91 and 92 of the British North America Act, 1867.

Before discussing this question, it will be desirable to consider the scope and effect of the legislation now under review. Sec. 1 is badly drawn. The words, "No person shall employ in any capacity any white woman or girl" have no grammatical connection with any of the rest of the section. The intended meaning would probably be given by inserting the word "in" after the word "girl" in order to connect the phrase with the words "any restaurant, laundry, etc." The effect of this section, so far as alien or naturalized Chinamen are concerned, is to prohibit them from employing "white" female labour in any capacity, except in a private house. It also imposes upon Chinese owners and keepers of hotel, restaurant and other business property special disabilities and restrictions, not only with regard to the labour they employ but also with regard to the public they serve. It also puts a practical prohibition on the employment of any Chinaman as the manager of any business in which female employees are required. A Chinaman who wishes to invest in business property must do so with the full knowledge that his only possible tenant will be persons who are willing to carry on a business which can only employ coloured female labour, and, in the case—say—of a hotel, can only accommodate coloured female guests.

The question then is whether these restrictions and disabilities which apply exclusively to Chinamen constitute an invasion by the provincial legislature of the exclusive jurisdiction of the Parliament of Canada in respect of the regulation of "trade and commerce" or "naturalization and aliens" conferred upon it by sub-sees. 2 and 25 of sec. 91 of the British North America Act, 1867. If this Provincial Act prohibited the employment of white female labour by any person in certain specified busi-

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nesses, it might well be considered within the powers of the provincial legislature under the decisions in *Hodge* v. *Regina*, 9 A.C. 117, 53 L.J.P.C. 1; and *Citizens' Insurance Company of Canada* v. *Parsons*, 7 A.C. 96, 51 L.J.P.C. 11. But it is aimed exclusively at Chinamen, and imposes unequal conditions upon them. The argument on this point was not pressed very strongly upon us, and Mr. Willoughby relied almost altogether on the other ground, that the Act is *ultra vires* of the provincial legislature as conflicting with the exclusive jurisdiction of the Dominion in the matter of naturalization and aliens. On this point the appellant relies on *Union Colliery Co. of B.C.* v. *Bryden*, [1899] A.C. 580, 68 L.J.P.C. 118; while the respondent cites the decision in *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, reported in 72 L.J.P.C. 23, as *Vancouver City Collector of Voters, etc.* v. *Tomey Homma*. In the first of these cases the legislature of British Columbia had passed an Act which enacted that "No Chinaman shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground." Lord Watson, in delivering the judgment of their Lordships of the Judicial Committee of the Privy Council, said in part as follows:—

> There can be no doubt that, if sec. 92, of the Act of 1867 had stood alone and had not been qualified by the provisions of the clause which precedes it, the provincial legislature of British Columbia would have had ample jurisdiction to enact sec. 4 of the Coal Mines Regulation Act, R.S.B.C. 1911, ch. 160. The subject-matter of that enactment would clearly have been included in sec. 92, sub-sec. 10, which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in sec. 92, sub-sec. 13, which embraces "Property and Civil Rights in the Province."
>
> But sec. 91, sub-sec. 25, extends the exclusive legislative authority of the Parliament of Canada to "naturalization and aliens." Sec. 91 concluded with a proviso to the effect that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."
>
> Sec. 4 of the Provincial Act prohibits Chinamen who are of full age from employment in underground coal workings. Every alien when naturalized in Canada becomes, *ipso facto*, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada; but sec. 91, sub-sec. 25, might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject of naturalization seemed *primâ facie* to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in

Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear, as it occurs in sec. 91, sub-sec. 25. But it seems clear that the expression "aliens" occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalized; and the words "no Chinaman," as they are used in sec. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized. . . .

The provisions of which the validity has thus been affirmed by the Courts below are capable of being viewed in two different aspects, according to one of which they appear to fall within the subjects assigned to the provincial parliament by sec. 92 of the British North America Act, 1867, whilst, according to the other, they clearly belong to the class of subjects exclusively assigned to the legislature of the Dominion by sec. 91, sub-sec. 25. They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of sec. 92, sub-sec. 10, or sec. 92, sub-sec. 13. But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia.

Their Lordships see no reason to doubt that, by virtue of sec. 91, sub-sec. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of the opinion that the whole pith and substance of the enactments of sec. 4 of the Coal Mines Regulation Act, R.S.B.C. 1911, ch. 160, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trenches upon the exclusive authority of the Parliament of Canada.

The second case referred to, *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, dealt with a provision of the British Columbia Elections Act which enacted

that no Chinaman, Japanese or Indian shall have his name placed on the register of voters for any electoral district or be entitled to vote at any election.

The British Columbia Courts, following the decision in *Union Collieries* v. *Bryden*, [1899] A.C. 580, declared the enactment to be *ultra vires* of the provincial legislature. But the Judicial Committee held that decision to be inapplicable to the facts of the case then before them and held that the Act was not *ultra vires*.

In delivering the judgment of the Board, Lord Halsbury, L.C., said:—

The first observation which arises is that the enactment supposed to *ultra vires* and to be impeached upon the ground of its dealing with alien-

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age and naturalization, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver city is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. The extent to which naturalization will confer privileges has varied both in this country and elsewhere. From the time of William III. down to Queen Victoria no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council. . . . The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

This, indeed, seems to have been the opinion of the learned Judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Collieries Co.* v. *Bryden*, [1899] A.C. 580. That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.

At first sight, the reasoning in the first part of the foregoing passage was equally applicable to the *Union Collieries* v. *Bryden* case. A child of Chinese parentage born in Vancouver city is a natural-born subject of the King, and would be equally excluded from the right to earn his living by working in the mines. But, as it was pointed out by Lord Halsbury, the right to the franchise was not a right which invariably or necessarily accompanied or followed upon naturalization, and it was not an ordinary right of the inhabitants of British Columbia such as the right to work or engage in business.

Both the reasoning and the decision in *Union Collieries* v. *Bryden*, [1899] A.C. 580, in my opinion apply to the enactment now under consideration. The regulations which are here impeached are not really aimed at the regulation of restaurants, laundries, and other places of business and amusement or of the employment of female labour, but were devised to deprive the Chinese, whether naturalized or not, of the ordinary rights of the inhabitants of Saskatchewan. The right to employ, the right to be employed, the right to own property and to own, manage or conduct any business without being subjected to unequal and discriminatory restrictions, are just as truly ordinary rights of the inhabitants of Saskatchewan as the right to work.

For these reasons, the provisions of the Act in question are,

in my opinion, *ultra vires* of the Legislature of Saskatchewan, and the conviction made by the police magistrate ought therefore to be reversed.

LAMONT, J.:—This matter comes before us by way of a case stated by the magistrate at Moose Jaw. On May 21, 1912, an information was laid under oath before the magistrate for that he the said Quong Wing, on May 20, 1912, at the city of Moose Jaw, in the province of Saskatchewan, being a Chinaman, and the owner and keeper of a place of business known as the C.P.R. restaurant, in the city of Moose Jaw, did employ in said restaurant as waitresses two women, to wit, one Mabel Hopham and one Nellie Lane, contrary to the Act respecting the Employment of White Female Labour in Certain Capacities, being ch. 17 of the statutes of Saskatchewan, 1912.

On the hearing before the magistrate he found the following:—

(1) That the accused Quong Wing was born in China and of Chinese parents.

(2) That the said accused was on the date of the alleged offence a naturalized British subject.

(3) That on May 20, 1912, the said accused was the keeper of a restaurant known as the C.P.R. restaurant in the city of Moose Jaw, in the Province of Saskatchewan.

(4) That on the said 20th day of May, 1912, the said accused had in his employ as waitresses in the said restaurant one Mabel Hopham and one Nellie Lane, and that the said Mabel Hopham and Nellie Lane are white women.

On these facts the magistrate convicted the accused.

Counsel for the accused, desiring to test the validity of the conviction, upon the ground—among others—that the Legislature of Saskatchewan had no authority to enact said ch. 17, applied to the magistrate to state a case for the Court *en banc*. This the magistrate did; and among others, the following question, which was the only one argued before us, was stated:—Whether the said Act under which the information was laid was *ultra vires*.

The Act in question is entitled, An Act to prevent the Employment of Female Labour in Certain Capacities. It contains the following provisions:—

1. No person shall employ in any capacity any white woman or girl, or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Japanese, Chinese, or other Oriental person.

2. Any employer guilty of any contravention or violation of this Act shall upon summary conviction be liable to a penalty not exceeding $100, and in default of payment to imprisonment for a term not exceeding two months.

By sec. 5 of the Saskatchewan Act (4 & 5 Edw. VII. ch. 42),

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the provisions of the British North America Act, 1867 to 1886, except in so far as varied by the Saskatchewan Act, are made to apply to the Province of Saskatchewan. Under the British North America Act the legislative power is distributed between the Parliament of Canada and the provincial legislatures. By section 92 exclusive legislative jurisdiction is given to the provincial legislatures over the classes of subjects therein set out; and by sec. 91 legislative authority in respect of all matters not coming within the classes of subjects exclusively assigned to the provincial legislatures is vested in the Parliament of Canada, and for greater certainty a list of subjects is set out in this section over which the Parliament of Canada has exclusive legislative authority. Within the sphere of their respective legislative jurisdictions these legislative bodies are supreme. In *Hodge* v. *The Queen*, 9 A.C. 117, at 132, the Privy Council held that a provincial legislature, within its territorial limits and in reference to the classes of subjects exclusively assigned to it by the British North America Act, possesses as plenary powers as the Imperial Parliament had at the passing of that Act. Being possessed of sovereign power within the sphere of its jurisdiction, the discretion of the Provincial Legislature in the exercise of that power is not open to question. All argument, therefore, as to the wisdom or unwisdom, the justice or injustice, of provincial legislation, or the fact that it discriminates against one person or set of persons and in favour of another person or set of persons is excluded from our consideration. The only matter for inquiry is as to the legislative competence of the Provincial Legislature to pass the Act impeached. Does the subject-matter of that Act fall within one of the classes of subjects exclusively assigned by sec. 92 to the provincial legislatures? If it does not, then it can have no validity. If it does, then *primâ facie* it is within the legislative competence of the Provincial Legislature. But *primâ facie* only. A further inquiry is necessary to determine whether or not it does not also fall within one of the classes of subjects enumerated in sec. 91 over which the Parliament of Canada has exclusive jurisdiction.

Legislative enactments which for one purpose and in one aspect fall within one of the classes of subjects exclusively assigned to the provincial legislatures may, for another purpose and in another aspect, fall within one of the classes of subjects exclusively assigned to the Parliament of Canada. When such is the case, it is necessary to ascertain the true nature and character of the legislation impeached irrespective of what is its ostensible object, so as to determine which purpose or aspect is the predominating one, to which effect should be given.

The right to employ white women in the conduct of the busi-

nesses referred to in the Act is a civil right, and legislation affecting that right comes within the class of subjects enumerated in sub-sec. 13 of sec. 92, namely, property and civil rights in the province. As the Act places certain restrictions upon the conduct of the businesses carried on in the province, the subject-matter of the Act impeached would also be included within sub-sec. 10 of sec. 92 which extends to "local works and undertakings." The legislation impeached may also be viewed as having for its object simply the protection of white women, and as such it would fall within what are known as police regulations under sub-sec. 16 as being matters of a merely local or private nature in the province. That it came within these classes was not disputed on the argument before us. It was, however, contended that it was also legislation on the subject of "Naturalization and Aliens," exclusively assigned by sub-sec. 25 of sec. 91 to the Parliament of Canada, and that the legislative jurisdiction of the Provincial Legislature was thereby overborne. The authority upon which such contention is made is the decision of the Privy Council in *Union Colliery* v. *Bryden*, [1899] A.C. 580. In that case the legislation impeached was an Act of the legislature of British Columbia which enacted that

> no boy under the age of twelve years, and no woman or girl of any age, and no Chinaman, shall be employed in any mine to which this Act applies underground.

The defendant company employed certain Chinamen in their mine contrary to the above provision; and an action was brought for an injunction restraining the company from so doing. The Privy Council held the Act to be *ultra vires* on the ground that, although ostensibly only a coal mining regulation, it was in reality devised to prohibit the continued residence of the Chinese in British Columbia by making it impossible for them to earn a living. As this was found to be the leading feature of the Act, it was held to trench upon the subject of "Naturalization and Aliens." Referring to this decision, the same Court, in a later case, that of *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, reported in 72 L.J.P.C. 23, as *Vancouver City Collector of Voters, etc.* v. *Tomey Homma*, said:—

> This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and in effect to prohibit their continued residence in that province, since it prohibited their earning their living in the province.

In this latter case the Court discussed the question as to the scope of the term "Naturalization and Aliens" referred to in

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sec. 91, sub-sec. 25. The Lord Chancellor, in giving the judgment of the Court, said:—

> The truth is, that the language of that section does not purport to be deal with the consequences of either alienage or naturalization, but it undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion; that is to say, it is for the Dominion to determine what shall constitute either the one or the other; and the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization, but the privileges attached to it where these depend upon residence are quite independent of nationality.

As the *Cunningham* case is the last pronouncement of our highest Court of Appeal, I take it that the subject of "Naturalization and Aliens" gives to the Parliament of Canada the exclusive legislative right of saying what shall constitute alienage and what shall be the conditions upon which an alien may become a naturalized British subject, but it does not include the consequences flowing from either alienage or naturalization. The rights and liabilities, duties and obligations flowing from the status either of alienage or of naturalization in respect of any particular subject-matter are to be determined by the legislature having sovereign authority over that particular subject. In order, therefore, to bring the legislation of the provincial legislature within the subject of "Naturalization and Aliens," such legislation must in its true meaning and character relate to what constitutes alienage or to the terms and conditions upon which naturalization may be acquired, or it must affect aliens in such a manner as to make it difficult if not impossible for them to become naturalized subjects. Once an alien becomes naturalized he passes from under the legislative jurisdiction of the Parliament of Canada, in so far as it can legislate on the subject of naturalization and aliens, for these subject-matters are no longer applicable to him. An alien, once naturalized, stands in precisely the same position as a natural-born British subject. He has the same rights, and is subject to the same obligations. But the rights which any subject acquires, and the obligations to which he is subject, whether individually or as a member of the community, in respect of any subject-matter, are neither more nor less than the rights given to him and the liabilities and restrictions imposed upon him by the will of the legislature having sovereign jurisdiction over that particular subject. In this case the Act impeached does not deal with what constitutes alienage or the terms upon which an alien may become naturalized.

Does it affect the ability of a Chinaman to fulfil the terms and conditions upon which he may become a naturalized British subject under the legislation of the Parliament of Canada? It is con-

tended that it does because it imposes restrictions on the conduct of any business carried on by him. This, it is alleged, makes it more difficult for him to carry on business, and may have the effect of driving him out of the country by making it impossible for him to successfully conduct his business here. Does such a result necessarily follow? Does it follow that the restrictions imposed by the Act are necessarily so detrimental to the carrying on by a Chinaman of his business that the Court is justified in holding that the legislature intended by these restrictions to exclude the Chinaman from this province? This, to my mind, is the distance we must go before it can be said that the impeached legislation, which is *primâ facie* within the jurisdiction of the provincial legislature, is in its true meaning and character legislation upon the subject of "Naturalization and Aliens." That the legislation has imposed restrictions is not sufficient. The legislature has the right to impose restrictions upon the conduct of any business carried on within the province, provided the imposing of those restrictions does not carry it into the field of legislation assigned to the Parliament of Canada.

The Act prohibits the employment of white women or girls in any restaurant, laundry or other place of business or amusement owned, kept, or managed by Chinamen. It also provides that no white woman or girl shall be permitted to reside in or lodge in or, save as a *bonâ fide* customer in a public apartment thereof, frequent any such place; and that anyone so employing them or permitting them to so reside shall be liable to a penalty. It will be observed that the Act does not in any way prohibit the employment of Chinamen. Indirectly, however, it does affect a number of them. It affects those who own or keep any places of business or amusement. It places a restriction upon the conduct of their business. It does not prohibit Chinamen from carrying on such business, but it enacts that in carrying on such business the Chinamen must get along without the assistance of white women. To that extent, but to that extent only, does it interfere with the conduct of any business owned or kept by Chinamen. The Act also prohibits the employment of white women by every person carrying on business who employs a Chinaman as his manager. A person conducting such place of business must take his choice between employing a Chinaman as manager or employing white women; and to the extent that the employment of white women is necessary or more profitable to the conduct of the business, the prohibition contained in the Act may militate against the employment of a Chinaman in the capacity of manager.

If the legislation were to be viewed in this aspect alone, it is arguable that the restrictions imposed may in some cases affect

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the ability of a Chinaman to obtain from his business or his labour the same rewards as if the Act had not been passed. But while that is so can it be said that on account of these restrictions he is unable to successfully carry on business and is thereby prevented from continuing his residence here? That such would be the result can not, in my opinion, be conclusively presumed in the absence of evidence that the employment of white women is necessary to the successful conduct of any business referred to in the Act. The onus is on those who assert that legislation *primâ facie* within the legislative competence of the provincial legislature comes also within one of the class of subjects enumerated in sec. 91: *L'Union de St. Jacques* v. *Belisle*, L.R. 6 P.C. 31. On the other hand it will be observed that the whole restriction imposed by the Act is, that white women and girls shall not be employed in or permitted to reside or lodge in or frequent places of business or amusement where by such employment or residence they will be placed in a position in which they will be subject to the authority and influence of a Chinaman occupying the position of owner, keeper or manager over them. There is no restriction on their going to these places and being in a public apartment thereof in a legitimate way for *bonâ fide* purposes of business or amusement. As such they are not under the influence or subject to the authority of a Chinaman.

The legislature has not set out the consideration which inspired the legislation beyond what is to be inferred from the language of the Act; but when we consider on the one hand that the sole restriction imposed by the Act is that white women and girls shall not be placed in a position whereby they will be subject to the authority and influence of a Chinaman, nor shall they frequent places where Chinamen are in authority except as customers in public apartments thereof, and on the other hand, consider that it imposes no bar to the employment of the Chinaman or the conduct of his business beyond what is necessary to secure to white women freedom from the influence and authority of a Chinaman, the proper inference to be drawn, in my opinion, is that the Act was passed in the interests of morality and for the protection of white women, and not for the exclusion of the Chinese or preventing those who are still aliens from becoming naturalized subjects. The predominating aspect of the legislation, therefore, is the protection of white women, and not the exclusion of the Chinese. Effect should be given to this aspect. In this aspect the legislation impeached amounts to no more than police regulations and as such is within the legislative competence of the provincial legislature. It cannot, therefore, be said to be legislation upon the subject of "Naturalization and Aliens."

This being the only respect in which the Act was impeached, I am of opinion that the legislation is *intra vires* of the provincial legislature. The conviction should, therefore, be affirmed.

BROWN, J.:—The statute in question, ch. 17, Saskatchewan Statutes, 1912, on these appeals enacts, in effect, that no person shall employ any white woman or girl in, or permit any white woman or girl to reside or lodge or work in, or (save as a *bonâ fide* customer) to frequent, any restaurant or laundry or other place of business or of amusement if the same is owned or kept or managed by a Chinaman. Obviously, the sum and object of this legislation is to prevent white women from coming, through employment, residence, lodging, work, or otherwise, under the control or influence of any Chinaman. This object is revealed by the legislation itself, although the reasons for attaining the object can only be understood by one familiar with the actual conditions. For the purposes of the appeal it seems to me sufficient to say that the interests and protection of white women and girls were the primal considerations in the mind of the legislators. While this is the aim and object, the result of the legislation is such that Chinamen in general are put in a disadvantageous position as compared with their fellow-citizens in the enjoyment of the right to employ and be employed, and in the use of their property. It is clear that as a result of the legislation a Chinaman as such, whether naturalized or not, is prevented from employing white female labour in any place of business or amusement owned, kept, or managed by him; is prevented from entertaining as lodgers or guests any white woman in any place of business or amusement if the same be owned, kept or managed by himself, even though such white woman may, for example, be accompanied by her husband; is prevented from being employed as manager of any place of business or amusement where any white woman happens to be employed or happens to lodge; or, in other words, is prevented from managing any places of business in the province except to a very limited number; is prevented from using property owned by him except in the most circumscribed manner, because most places of business and amusement in this province employ or entertain white women or girls in some way or another. In brief, the legislation prevents a Chinaman as such from being employed in many positions of trust and responsibility, it handicaps him in carrying on legitimate business, and it greatly limits the uses to which he may put his property. It is contended on behalf of the appellants that because of these obvious results the legislation is *ultra vires* of the province, as being an infringement of "Naturalization and Aliens," subjects exclusively within the

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jurisdiction of the Parliament of Canada, under sub-sec. 25 of sec. 91 of the British North America Act.

The mere fact that a provincial legislature may appear from one point of view to infringe on subjects exclusively reserved for the Dominion does not necessarily make the legislation *ultra vires*. It has on several occasions been laid down by the Privy Council (see *Hodge* v. *The Queen*, 9 A.C. 117; and *The Union Colliery Company* v. *Bryden*, [1899] A.C. 580) that subjects which in one aspect and for one purpose fall within sec. 91 of the British North America Act may in another aspect and for another purpose fall within sec. 92, and *vice versa*. This case is, in my judgment, clearly distinguishable from the case of *Union Collieries* v. *Bryden* (*supra*). In that case the legislation could not be supported because the sole aim and object of the legislation, or, to use the words of Lord Watson in delivering the judgment of the Privy Council, "the whole pith and substance of the enactments" consisted in establishing a statutory prohibition against Chinamen as such, and did not from any point of view or for any purpose seriously deal with any subject over which the legislature had jurisdiction. Had the legislation in that case constituted a regulation for the better working of underground coal mines it would, I infer from the judgment, have been upheld, notwithstanding its serious effect on Chinamen as a class and on Chinamen only. In referring to the *Union Collieries* case, Lord Halsbury, in delivering the judgment of the Privy Council in the case of *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, is reported as saying:—

> This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia.

It is distinctly laid down in the *Tomey Homma* case that, while the subjects of "Naturalization and Aliens" are exclusively reserved for the Dominion by sub-sec. 25 of sec. 91, that sub-section does not purport to deal with the consequences of either naturalization or alienage; that it is for the Dominion to determine what shall constitute either the one or the other, but that the consequences which shall follow from either are not touched. In this respect the judgment seems in conflict with what was laid down by Lord Watson in the *Union Collieries* case, but I take it that the later pronouncement of the Privy Council must be accepted as the correct view. It is surely competent for the province to legislate for the protection of any class of its citizens—in this case white women and girls—such legislation being in the nature of police regulations and if

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in so doing the ordinary rights of another class—in this case Chinamen—are affected, even seriously affected, that will not, in my judgment, in view of what has been laid down by the Privy Council, make the legislation *ultra vires* of the province. We, of course, have nothing to do with the policy or impolicy of the legislation; that is a matter entirely for the legislature.

The appeal in each case should, therefore, be dismissed, with costs.

Brown, J.

NEWLANDS, J., concurred.

Newlands, J.

Appeal dismissed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. MECHANICS' LIENS (§ IV—15)—FOR CONVEYING MATERIAL TO STRUCTURE.

A lien for conveying building materials to the land where they are to be used cannot be acquired under sec. 6 of the B.C. Mechanics' Lien Act, R.S.B.C. 1911, ch. 154.

[*Webster* v. *Real Estate Imp. Co.*, (Mass.) 6 N.E.R. 71, followed.]

2. MECHANICS' LIENS (§ IV—15)—FOR CONSTRUCTING STREETS IN UNDEDICATED PLAT.

Labour performed in making streets, which have not been dedicated as public highways, in a tract of land being sub-divided for the owner's profit, is not work done on public highways for which a lien is denied by sec. 3 of the B.C. Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, but is lienable under sec. 6 of the Act.

3. MECHANICS' LIENS (§ IV—15)—FOR HIRE OF TEAMS AND DRIVERS.

One who furnishes a contractor with horses, waggons and drivers for the use on premises he is improving, is, under sec. 6 of the B.C. Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, entitled to a lien for their hire.

Statement

APPEAL by the claimants from a judgment denying a mechanics' lien for labour.

The appeal was allowed in part.

Maclean, K.C., *Higgins* and *Bass*, for appellants, claimants.

Bodwell, K.C., and *Moore*, for respondents, defendants.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The Anderson Construction Company had a contract from the Uplands Limited to make streets, boulevards and sewers in a tract of land of several hundred acres which was being sub-divided for residential purposes, and was known as the Uplands Farm, of which William Hicks Gardner was the registered owner, the Uplands Limited being the registered holder of an agreement of sale from the said registered owner. The appellant Vannatta was under contract with the Anderson Construction Company to haul cement from the Grand Trunk Pacific wharves to the Uplands, and deliver same in

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stock piles where needed for the prosecution of the said work, and for the hauling of certain iron pipes from Rithet's wharf to the same place to be distributed where directed by the Anderson Company. Two questions arise in his claim, one going to the whole, and the other to part of it. As to the first, the learned trial Judge held that he was not within sec. 6 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, as being a person who has done work or service *upon* the premises.

The fact that the cement and pipes were hauled from a point outside the Uplands to that property, does not, in my opinion, exclude the said appellant from the class of persons mentioned in the said section. If a hod-carrier were required by his employment to carry bricks or mortar from an adjoining lot not included in the premises being built upon, and deliver them to the bricklayers upon such building, I do not think we could say the hod-carrier was outside the protection of said section, and if that be so the hauling of material from a greater distance is distinguishable only in degree. The work being performed by said appellant was an essential part of the contractor's work. It was work upon that undertaking, and hence while not all physically performed upon Uplands farm, was in contemplation of the act performed there. This is not like the case of a common carrier delivering goods at its freight depots. Here, the appellant was required to do part of the work on the premises and part of the hauling was over the Uplands farm, and the unloading and distribution was done there, and was an integral part of the work in progress.

With regard to the other point, it was argued that as to the items of $384.10 and $12.00, his lien was filed too late. I think this is so. The contract, under which the deliveries were made, expired on 1st October, and the lien was not filed within 31 days of that date. As to the other items amounting to $294.10, defendant is entitled to succeed.

As to the other lien claimants, McLeod, Gillespie, Cameron & Calwell and Dilley, whose claims are of an appealable amount, their work was all done on the Uplands farm, and hence, the question I have just dealt with in Vannatta's case does not arise in their cases. I therefore hold that all these claimants, including Vannatta, are within said section 6, and as it has not been made an issue in this appeal that there is no money due by the owner to the contractor, it is unnecessary to distinguish between labourers and sub-contractors.

The principal contest in this appeal was as to whether the work which the Anderson Construction Company had contracted to do for the respondents was work in public highways, and if so, whether section 3 of the Act did not preclude lien claims.

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I think the several streets which are designated "Lot X" on the plan of the Uplands are not to be regarded as public roads. Schedule C. of the Oak Bay Municipality Act, ch. 72, B.C. Acts, 1910, to my mind settles that question in favour of the appellants, hence all the appellants whom I have found entitled to succeed are, I think, entitled to liens upon the Uplands farm, including said "Lot X," subject, of course, to any paramount interest.

I would allow the appeal of the appellants Vannatta to the extent already mentioned, and of McLeod, Gillespie, Cameron & Calwell and Dilley in whole.

Macdonald, C.J.A.

IRVING, J.A.:—I see no objection in allowing the lien on the ground that this claim is for filling in and making up roads. I am of opinion that these are not public highways within the meaning of the Act—certainly they were not dedicated until made and completed.

Irving, J.A.

As to Vannatta, I think he had 31 days from completion of the services to file his claim for lien. The latter is spoken of as one contract, and the verbal agreement to continue is spoken of as another contract, but really and truly he claims in respect of services. I would therefore hold that he was in time, but, in my opinion, the Act does not contemplate a lien being allowed for work done upon land to a person who delivers goods to be used in the construction and improvement of a place, although the place of delivery is in or upon the land. The Act speaks of a lien for a person placing and furnishing material, and in the schedule, they speak of the delivery by the person who places and furnishes the material. The Supreme Court of Massachusetts in *Webster* v. *Real Estate Improvement Co.*, 6 N.E.R. 71, has held that the hauling of raw material to the premises was too remote to entitle the carter to a lien. This case is cited in Phillips on Liens, and I think in 1891, when I was in practice and acted in many mechanics' lien cases for the Victoria Lumber and Manufacturing Co., and other mill owners, a decision was given that, although the mill-owner could have a lien for his lumber, he could not include the cost of hauling. I have tried to find a report of that decision, but no report can now be found one way or the other. Therefore I would strike out Vannatta's claim.

As to the other four claimants, in my opinion they caused work to be done. They supplied teams and men. I would allow their claims.

MARTIN, J.A.:—The first objection to all the liens is raised on section 3 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, but I shall content myself by saying that, after a care-

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ful consideration of the point, I have come to the conclusion that the roads in question are not "public streets or highways" within that section, and therefore it presents no obstacle.

Vannatta's claim is for hauling material (sand, gravel, cement, pipe, etc.), from town out to the property in question at so much per yard or ton, under a written contract with the contractors, which contract was, I find, renewed so as to form one continuous contract amounting to $690.20. This includes also some materials which he hauled from the property into town, that had to be returned or changed. No notice in writing of intention to claim a lien was given under the proviso in sec. 6. It was argued that Vannatta is entitled to a lien as having "placed" material under sec. 6, but I have come to the conclusion that the expression "places" is not equivalent to "delivers," for it imports the handling of such material after the bare delivery on the ground.

The reasoning in *Webster* v. *Real Est. Imp. Co.* (1886), 6 N.E.R. 71, seems sound, and the true distinction drawn between helpers, hod-carriers and conveyers of material upon the premises, and the bare conveyers of material to the premises, and it makes no difference in principle if the helper or hod-carrier should have to carry the material to the work, from, *e.g.*, a heap or pile of such material deposited for convenience upon the highway outside of the boundary of the lot upon which the work was being done. At the same time I recognize that in all matters where the question of degree is an important feature, it is hard to draw precisely the real line of demarcation.

It follows that this claim should be dismissed.

As to Dilley's claim, it is agreed that he is entitled to $172.10 if we are in his favour as to the road not being a public street or highway, and, therefore, his claim should be allowed.

The other claimants are all of the same class (except Gillespie, in part as hereafter noticed), and their claim is based upon the fact that they supplied teams of horses, wagons, and drivers to the contractor for hauling sand, gravel and earth upon the property for which they were paid so much per day, and said teams, wagons and drivers were subject to the control and orders of the contractor's foreman, and did only what work he required of them. It is contended by the defendant that these teams, wagons and drivers should be considered as legally of the same nature as plant or tools hired to the contractor. The point turns on the expression in sec. 6: "Every person who does work or service or causes work or service to be done upon," etc., which is difficult to exactly define as it is at once a comprehensive and loose expression. I have reached the conclusion, after some hesitation, that it does not cover the present claims. It is clear that a master who hires out his servant to work for an-

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other has no lien for his services though the servant himself would have; nor is it the less clear, that one who hires out teams, *solus*, has a lien. And I am unable to see that the mere conjunction of teams with drivers alters the principle, because both are simply supplied on the ground, subject to the order of the contractor, and they stand there idle and ineffective till the will of the contractor, in whose exclusive employment they are for the time being, "causes" them to work—in other words, the primary and moving cause of the work is the will of the contractor, and the men and teams placed under his control for the purposes of his contract are the mere instruments of his will to that extent. It follows that these claims should be dismissed.

As to Gillespie, he drove one of his own three teams, and it is conceded that, if there is a lien at all, he would, in any event, be entitled to one-third of his claim, but it follows from the view I have taken that he should have a lien for the full amount of his claim.

Galliher, J.A.

GALLIHER, J.A.:—If liens can attach, then, in my opinion, MacLeod, Gillespie, Cameron & Calwell and Dilley are entitled to liens for the full amount of their respective claims.

The learned trial Judge has held that the lands comprising "Lot X" are highways, and that therefore, under sec. 3 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, a lien cannot attach for work done thereon, nor can it attach to the lands benefited thereby.

At first blush, that might seem to be so, but after looking into the whole history of the transaction, and considering clause 6, sub-sec. (*c*) of the Mechanics' Lien Act, above referred to, in connection therewith, I have come to the conclusion that the lands benefited thereby and enjoyed therewith, are subject to liens.

The registered owner of what is now known as the Uplands is the defendant Gardner, who has, by agreement, transferred these lands to the defendants, The Uplands Limited.

These latter have sub-divided the lands into residential lots, opened up and laid down roads and streets, and filed a plan of their sub-division.

The whole scheme is to provide a strictly high-class residential section, and, in order to enable them to place it upon the market advantageously, and to enhance the value of their holdings, and in fact to make it possible for them to sell their holdings as residential sites of the class aimed at, they marked out and constructed expensive roads and streets and also sewers and waters mains, etc.

It is quite clear from the foregoing that all this was done

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for the purpose of enhancing and did enhance and benefit their private holdings.

It was in connection with this work that the liens were claimed.

There has been no dedication of these roads as highways, in fact in the agreement with the municipality of Oak Bay, the limits of which include this property, it is specifically agreed that nothing therein contained shall be deemed a dedication of said "Lot X" to the public or to the municipality as public roads or streets: see schedule C. to ch. 72, B.C. Statutes 1910; and the only way in which they can be said to be public highways is that the public by said agreement are for all time to have free right-of-way over them.

This may be sufficient to constitute them public highways in that sense, but not such public streets or highways as are contemplated by sec. 3 of the Act, having regard to the fact that they form so essential a foundation for the development scheme of this whole area of private property as laid out and constructed by private interest, controlled, maintained and kept open only to the public on completion.

For work done on these roads and streets done in the first place (and before they were open to the public) solely in the interest of the defendants and those who should become holders under them, and undoubtedly for the benefit of the lands, I think there is a right of lien on those lands.

I have never known, nor have I been able to find a similar case.

The circumstances are peculiar, and I think warrant me in taking the broadest view possible in favour of the workman.

The appeal should be allowed with costs, and judgment entered for the four plaintiffs above-mentioned for the respective amounts claimed, with costs.

As to the Vannatta claim, I do not think his work comes within the class contemplated by the Act, being merely for teaming supplies.

Appeal allowed in part.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. July 22, 1913.

1. Electricity (§ III A—16)—Injury from—Destruction of building by fire—Crossed wires—Negligence—Lack of safety devices.

Negligence sufficient to render an electric company liable for the destruction of a building from fire originating from an electric current of abnormally high voltage being carried upon wires leading into the building, may properly be inferred from the fact that several hours before the fire the company's high voltage wires became crossed with low potential service wires on the same poles, which trouble had been corrected prior to the fire; where it also appeared that the use of a simple safety device by the electric company on the pole nearest the building would have prevented the abnormally high current entering it, and that the electrical installation for the service of the burned building was not defective.

Statement

Appeal by the defendants from a judgment in favour of the plaintiff for the destruction of a building as the result of the crossing of wires carrying a dangerous current of electricity with wires leading into the building.

The appeal was dismissed.

L. G. McPhillips, K.C., and *Duncan*, for appellants, defendants.

S. S. Taylor, K.C., and *Brown*, for plaintiff, respondent.

Macdonald, C.J.A.

Macdonald, C.J.A.:—After a careful perusal of the evidence, some of it several times, I have come to the conclusion that the verdict of the jury ought not to be disturbed. Certain facts are well ascertained. The plaintiff's electrical system was properly installed and his wires protected by insulation. The defendants' high potential and low potential wires were strung upon the same poles, the high above the low. There is evidence, that, while this in some sections of the country would not be a good practice, yet, having regard to the character of the locality, the sparseness of settlement, and the impracticability because of expense of providing two lines of poles, the stringing of the wires was not negligent.

At about 4 o'clock on the 22nd of August, lightning struck the appellants' wires, shattering a pole and causing the high potential wire which was charged with 40,000 volts to fall on the low potential or service wire, which was ordinarily charged with 2,300 volts, and which was the wire from which the plaintiff took electricity into his mill. The effect of what happened was to put the lines out of business, as it was expressed in the evidence. The damage was repaired during the afternoon, and the current was on again at 20 minutes past 7 in the evening. Two witnesses who were in charge of sub-stations say that the system was normal after that time. At about 9 o'clock the

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same evening the plaintiff's mill took fire. Brightness was observed at the point where the wires entered through the wall of the mill. The wires appear to have become incandescent from heat, causing a bright light, and shortly afterwards an explosion occurred in what is known as the oil switch in the mill, and the fire resulted. I think it can be gathered from the evidence, and I think the jury were entitled to conclude that the incandescent condition of the wires in the mill was the result of an over-load of electricity on the wires. High voltage alone will not cause incandescence or heat in the wires, to produce heat there must be amperage. The one has been described as pressure, the other as current. There must be current or flow of electric fluid to produce heat, and as the oil switch which corresponds to the throttle of a steam engine was open, thus disconnecting the current from the motor, it was contended by the appellants that there could be no path for the current, and even if high voltage were admitted, which was not, it could do no harm, there being no path beyond the oil switch.

The fact, however, is that there must have been a path somewhere otherwise there could have been no incandescence in the wires. High voltage will find a path where low voltage will not, if I rightly understand the evidence of Higman. Now, it may be said that there was no excess of voltage in this service wire just before or at the time of the fire. There is no question of lightning or atmospheric causes after the line was repaired in the evening, the lightning occurred before that. If, therefore, the appellants' system were normal from 20 minutes past 7 until the time of the fire, how could the excessive voltage be found to exist. The only explanation of it is that the jury did not accept the evidence of those who stated that the system was normal after 7.20, and I think there was reason for that refusal. No records were kept after 7.20, and the only way the witness at one of the sub-stations had of telling whether the system was normal or not was by its effect on the electric lights. He says he did not notice irregularity in the lights.

The jury had before them the evidence of a properly installed mill system, I mean the electrical part of it, running safely and properly under normal conditions which existed before 4 o'clock on that day. They had also evidence of abnormal conditions affecting the appellants' system after 4 o'clock on that day. I can find no sufficient evidence that these abnormal conditions were completely cured before the damage was done to the mill. I think once it was shewn that the appellants' system was out of order it was incumbent upon them to prove with reasonable certainty that it had been put into good order and

made safe for connection with the works of their customers. The evidence that the system was working normally after 7.20 is unsatisfactory and unconvincing. That the service wires had been surcharged with a high voltage at and after 4 o'clock I think the jury might properly infer, in fact it was not as far as I can see, contested. The expert evidence shews that what happened in the mill might happen by reason of very high voltage in the wires, that is to say, a voltage very much greater than 2,300. That was the voltage that the defendants were, I think, bound not to exceed. Hence it does not matter whether or not it was destruction of the insulation or defective insulation in the mill which caused the fire, if but for the abnormal voltage that result would not have been brought about.

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Then, as to the substitution of a copper wire for the fuse at the point where the wires ran from the service line into the mill. While there is some evidence that the fuse was for the defendants' protection, and not for the plaintiff's, yet the jury was entitled to find that it was, having regard to the danger of operating with one line of poles, required for his protection as well; in other words, that under the conditions in evidence, it was the duty of the defendants to maintain that fuse; and that, had there been a fuse there, the fire would not have occurred.

I would dismiss the appeal.

Irving, J.A.:—I would dismiss the appeal. The charge seems to me to be unobjectionable, and there is no ground for interfering with the jury's decision.

Irving, J.A.

As to the motion for nonsuit, I do not think the Judge would have been justified in withdrawing the case from the jury. The case of *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, teaches us to be slow to stop a case of this kind. Then having got past that stage, and the defendants having called evidence, Courts of Appeal will not overrule the trial Judge because they think he ought to have granted a nonsuit, if, in the opinion of the Court, the conclusion is correct: see *Groves* v. *Cheltenham*, 82 L.J.K.B. 664.

In this case, I think, the failure on the part of the company to have a proper means of preventing an excess of current getting past the fuse box on the pole near the track, gave the jury an opportunity to find as they did.

I agree with the learned Chief Justice that cases of this character could be more satisfactorily tried by a Judge with assessors than with a jury.

On the subject of putting questions to a jury, my own view is that the form of the charge is a matter for the Judge's

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discretion. In England I see that the Judge's charge is, as a rule, very much shorter and simpler than those delivered in this province. This Court, or, at any rate, the majority of the Judges of this Court, having expressed the opinion that questions should be left to the jury where practicable, I venture, with every deference to the learned Chief Justice, to say that it is unnecessary for the trial Judge to invite the jurors to decline to answer the questions he is about to submit to them. I have already expressed the opinion that counsel would not be justified in interfering to suggest to jurors that they are at liberty to act as they please.

Jurors are a part of the Court, and we should assume that they desire to do their duty and assist the Courts in rightly deciding the case.

Galliher, J.A.

GALLIHER, J.A.:—I find this a rather difficult case to decide upon the evidence, which is mostly of a highly technical nature. That the mill was burned either through some fault in the inside installation or through the high power wire coming in contact with the secondary wire is beyond question. The evidence is conflicting, and on the part of the plaintiff's expert witnesses, largely theoretical. It is urged that the jury have simply guessed at the cause, and if this were so, the plaintiff would not be entitled to maintain the verdict. The duty is upon the plaintiff to establish his case, and this must be done by evidence.

After carefully reading and weighing the evidence, I still have sufficient doubt in the matter to preclude my saying that there were not facts and circumstances proved upon which the jury could have come to the conclusion they did.

I would dismiss the appeal.

Appeal dismissed.

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REX v. RATZ.

Saskatchewan Supreme Court, Newlands, Johnstone, Lamont and Brown, JJ. July 9, 1913.

1. CRIMINAL LAW (§ I E—20)—ACCESSORY AS SUCH—ACCOMPLICE.

An accessory before the fact to the crime of murder is an accomplice with his principal within the rule requiring the corroboration of his testimony against the latter. (*Per* Newlands, and Brown, JJ.)

[*Rex* v. *Tate*, 21 Cox Cr. Cas. 693, and *Rex* v. *Beauchamp*, 25 Times L.R. 330, followed; *R.* v. *Reynolds*, 15 Can. Cr. Cas. 210, distinguished.]

2. TRIAL (§ III E 5—261)—HOMICIDE—INSTRUCTIONS — EVIDENCE OF ACCOMPLICE—CORROBORATION.

A new trial will be granted for the failure of a trial judge to caution the jury, on a trial for murder, against acting on the uncorroborated testimony of an accomplice, who had already been tried and convicted, where there was no corroborating evidence.

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APPEAL by the defendant from a conviction of murder on the testimony of an accomplice because of the failure of the trial Judge to caution the jury against acting on the uncorroborated testimony of the accomplice.

A new trial was ordered.

H. V. Bigelow, for accused.

T. A. Colclough (Deputy Attorney-General), for the Crown.

NEWLANDS, J.:—The learned Chief Justice has reserved, for the opinion of this Court, the following question:— Newlands, J.

Louis Ratz was tried by me with a jury at Prince Albert on Tuesday, May 6, 1913, for the murder of one Charles Bruggencote, and was found guilty of murder and sentenced to death. After I had charged the jury, Mr. Gregory, counsel for the prisoner, asked me to recall the jury and charge them that the witness Kovach was an accomplice, and to caution them against acting on his evidence unless it was found by them to be corroborated in some material part by other evidence. I refused to do this, and I now reserve for the opinion of the Court the following question:—

Having regard to the evidence and my charge to the jury, was I wrong in refusing to recall the jury and charge them as requested?

The test of an accomplice, as given at 12 Cyc. 445, is as follows:—

The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offence for which the accused is being tried.

In this case the alleged accomplice was tried for the same offence and was convicted of being an accessory before the fact to the murder, for which the accused was being tried, and that fact was proved at the trial. Upon this point it is stated in the same volume of Cyc., at p. 446:—

All the Courts agree that an accessory before the fact is an accomplice within the rule requiring corroboration of the testimony of an accomplice,

and, at p. 449,

It has been held that a separate indictment pending against the witness . . . cannot be proved against him to shew that he is an accomplice, as nothing but a plea of guilty or a conviction on such indictment would establish that fact.

I am therefore of the opinion that Kovach is an accomplice of the offence for which accused was being tried, even though he denied having had anything to do with it.

Whether the witness was or was not an accomplice is the only question for us to decide, as the case of *The King* v. *Tate*, [1908] 2 K.B. 680, makes it necessary for the Judge to caution the jury as to their believing his evidence without corroboration;

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and as this was not done in this case, and as there was no corroboration, there should be a new trial.

This makes it unnecessary to consider the other question raised by Mr. Bigelow, as to whether the learned Chief Justice should have explained to the jury the difference between murder and manslaughter.

Johnstone, J.

JOHNSTONE, J.:—In this case the learned Chief Justice, in his summing-up, omitted to caution the jury as to the manner in which the uncorroborated evidence of the accomplice, Kovach, should be received and considered by them. On the contrary, in such charge, the learned Judge gave expression to the following words, referring to the story of Kovach:—

> It is not a very pleasant story for you to hear. It is not a story which should commend the witness who tells it to you. But, on the other hand, this man has nothing to hope or fear in telling this story. Your verdict can have nothing to do with his case. This is just a question for you to consider, whether a man in his position, a man standing immediately under the shadow of the gallows, is likely to tell the truth or is likely not to tell the truth,

thereby leading the jury to believe that the evidence of the accomplice Kovach was entitled to at least the same credit as that of an ordinary witness.

In *The King* v. *Tate*, [1908] 2 K.B. 680, a decision of the English Court of Criminal Appeal—in a case in which the accused had been tried and convicted before Phillimore, J., and a jury, where the learned Judge, in summing up, without, in any way drawing a distinction between the evidence of an accomplice and the prisoner, as to the credit to be given to the uncorroborated evidence of the accomplice, made use of these words: "Are you going to believe the boy (the accomplice) or the prisoner? Your verdict depends on which you believe;" Lord Alverstone, in delivering the judgment of the Court, said, as to these words:—

> This passage, I think, puts the accomplice on the same footing as an ordinary witness. We are therefore of opinion that there has been a miscarriage of justice and that the conviction should be quashed

—the only result which could take place under the provisions of the English Act.

The same course was pursued in the case of *R.* v. *Beauchamp*, 25 Times L.R. 330. The English Act, 7 Edw. VII. (Imp.) ch. 23, sec. 4, conferring special powers on the English Court of Appeal, is in these words:—

> The Court of Criminal Appeal on any such appeal against a conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence, or that the judgment of the Court before whom

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the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on *any ground* there was a miscarriage of justice.

This section, I take it, is broader in its terms than sec. 1019 of the Criminal Code, which reads:—

That no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage *was thereby* occasioned on the trial.

In the English cases referred to, the words used in summing up were held to amount to misdirection; and I think the expression made use of by the learned Chief Justice in the case at bar amounted to the same thing, and a miscarriage of justice under both sections. I agree that there should be a new trial.

Lamont, J.

LAMONT, J., concurred with BROWN, J.

Brown, J.

BROWN, J.:—The accused was tried before the learned Chief Justice with a jury on the charge of murdering one Charles Bruggencote. The accused did not give evidence on his own behalf, and the only evidence connecting him with the crime was that of one Kovach. Kovach had been tried on the same charge and found guilty (as an accessory before the fact), and at the time of giving evidence, was under sentence to be hanged. Kovach, on cross-examination, admitted that he had been so tried and found guilty, but in effect asserted his innocence notwithstanding the verdict. At the conclusion of the charge to the jury, counsel for the accused requested the Judge to recall the jury and charge them that the witness Kovach was an accomplice, and to caution them against acting on his evidence unless it was found by them to be corroborated in some material part by other evidence. This the learned Judge refused to do; and he has reserved for the opinion of this Court the question: "Having regard to the evidence and my charge to the jury, was I wrong in refusing to recall the jury and charge them as requested?" In his charge to the jury the Judge did use the following words:—

The only evidence, that is direct evidence, with regard to this crime is the evidence of the witness Kovach, who, as has been shewn to you by his own testimony, has already been convicted for taking part in this crime, and is now lying under sentence.

thus indicating that this witness was an accomplice. But nowhere throughout the charge does the Judge caution the jury against acting on this evidence. On the contrary, he uses the following language:—

It is not a very pleasant story for you to hear; it is not a story which

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should commend the witness who tells it to you; but, on the other hand, this man has nothing to hope or fear in telling this story; your verdict can have nothing to do with his case. It is just a question for you to consider whether a man in his position, a man standing immediately under the shadow of the gallows, is likely to tell the truth or is likely not to tell the truth. You will have to consider that for yourselves, and you will have to come to the conclusion yourselves on that point.

thus rather indicating that the witness, in the circumstances in which he found himself, was not likely to tell an untrue story. The questions for our consideration are: Was the witness Kovach an accomplice; and, if so, did the charge under the circumstances amount to a misdirection? An accomplice is defined in the Century Dictionary as "an associate in crime; a partner or partaker in guilt; technically: in law, any participator in an offence, whether as principal or as accessory." The witness was admittedly found guilty of being an accessory before the fact on this very charge, and as against him, and in favour of the accused, that verdict must be held to be binding and be given full effect, notwithstanding his protestation of innocence in the witness-box.

By sec. 69 of the Criminal Code, 1906, an accessory before the fact is a party to and guilty of the offence; and, therefore, the verdict of the jury in the *Kovach* case is equivalent to a verdict of guilty of the offence charged. In my judgment, therefore, Kovach was clearly an accomplice with the accused in this crime. With reference to the second question, in view of what has been laid down in the case of *Rex* v. *Tate*, 21 Cox C.C. 693, by the Court of Criminal Appeal, I am of opinion that, Kovach, being an accomplice, the learned Judge should have cautioned the jury against acting on his evidence, and that his failure to do so amounts to a misdirection. It is true that this Court, in the case of *The King* v. *Reynolds*, 15 Can. Cr. Cas. 209, at p. 210, is reported to have held as follows:—

> The authorities are unanimous that the evidence of an accomplice, even uncorroborated, is legal evidence, and as such, sufficient to support a conviction. A practice has, however, grown up, which at the beginning of the last century was already very generally observed, for the trial Judge to advise the jury not to convict on such evidence. But it being evidence, it should go to the jury; and if, disregarding the Judge's advice, the jury bring in a conviction, the conviction will stand. It seems equally well established that if a Judge fails to advise a jury as stated, the omission will not be ground for a new trial.

But the statement there made, that, "it seems equally well established that if a Judge fails to advise a jury as stated, the omission will not be ground for a new trial," is simply a dictum, and was not necessary for the purpose of determining that case.

I am of opinion, that in this case, there must be a new trial.

New trial granted.

CORNING v. TOWN OF YARMOUTH.

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(Decision No. 3.)

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, and Drysdale, JJ. April 12, 1913.

1. PARTIES (§ III—12*a*)—ACTION BY TOWN SOLICITOR—RIGHT OF MAYOR TO INTERVENE—CONDITION AS TO COSTS.

In an action brought against an incorporated town by a firm of solicitors, of which the town solicitor is a member, in respect of a claim which a majority of the town council are in favour of paying, but which is resisted by the mayor as illegal and unauthorized, the fact that the town is *inops consilii*, by reason of the interest of the town solicitor, is a reason for admitting the mayor to intervene and defend the action on behalf of himself and other dissenting ratepayers, if any, subject to the penalty of payment of costs.

[*Corning* v. *Yarmouth* (No. 2), 9 D.L.R. 277, affirmed.]

2. PARTIES (§ III—12*a*)—INTERVENTION OF MAYOR — LOCUS STANDI OF A RATEPAYER.

The liability as a ratepayer to pay a proportion of the amount involved in a claim against a municipal corporation, is such a special interest as to give the mayor a *locus standi* on the hearing of the application for leave to intervene and defend.

[*Hart* v. *Macilreith*, 39 Can. S.C.R. 657, followed; *Corning* v. *Yarmouth* (No. 2), 9 D.L.R. 277, affirmed.]

Statement

APPEAL from the order of Russell, J., in Chambers, *Corning* v. *Town of Yarmouth* (No. 2), 9 D.L.R. 277, 12 E.L.R. 208, granting an application by S. C. Hood, to intervene and defend.

W. E. Roscoe, K.C., for plaintiffs, and *J. L. Ralston*, for the town council, in support of appeal.

The judgment of the Court was delivered by

Drysdale, J.

DRYSDALE, J.:—This appeal involves an application by Samuel C. Hood, as mayor and a ratepayer of the defendant town to intervene and defend the action brought by plaintiffs against the town. The town council refuses to defend, and Mr. Hood applied at Chambers to Mr. Justice Russell to be allowed to intervene, and that learned Judge granted an order permitting the said Hood to intervene, and upon putting up security for costs to defend the action in the name of the town on behalf of himself and other ratepayers. From such order an appeal was taken and argued before us.

The action is upon a bill of costs rendered by the town solicitor for services in respect of which the town is said to be liable. The town council, by a majority vote of council, admit the claim and refuse to defend.

It was argued that if the town council exercised a *bonâ fide* discretion in respect to the payment of said bill and as to the

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amount thereof, such discretion should not, and could not, be interfered with. The whole question turns upon the *bonâ fides* of the council's action. If an outside solicitor rendered a bill such as we see in this case, a council doing its duty would, I think, refer the bill to its own solicitor for examination and report. Here we have the town council, if a reference at all took place, referring the solicitor's bill to himself, and when the mayor desires to intervene and contest the account, or portions of it, objecting to any defence or judicial determination of the various amounts claimed.

It is contended by Mr. Hood on behalf of the ratepayers, that some of the items claimed for are *ultra vires* the council, even if authorized, that others come within the ordinary duties of the town solicitor, and should not properly be the subject of a special charge against the town, and that, at least, there should be some judicial determination before the account is made the subject of a resolution for payment.

I am of opinion these questions should not be determined on this motion, but should be settled in the action. The questions raised are very arguable, and, I think, should be determined upon trial of the action. The mere fact that the plaintiffs should not occupy a double capacity, viz., that of plaintiffs and of advisers of the council, taken together with the items of the account, and the action of the council thereon, raises a just, and I am obliged to say, a well-founded suspicion that the action of the majority of the council in refusing to defend was not a *bonâ fide* exercise of discretion of a matter within their control.

It is apparent, I think, that there ought to be a judicial adjustment of the claim, and I am of opinion that Hood, as a ratepayer, has standing to intervene under the circumstances disclosed in this case: *Hart* v. *MacIlreith*, 39 Can. S.C.R. 657, seems to me to settle the ratepayers' right to so intervene.

I think the order of Mr. Justice Russell was properly made, and that the appeal should be dismissed with costs.

Appeal dismissed.

PICARD v. REVELSTOKE SAW MILL CO. et al.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. CORPORATIONS AND COMPANIES (§ IV G 2—116*a*)—POWERS OF MANAGING DIRECTOR.

The managing director of a company who has authority to manage and conduct its business, does not have implied authority to sell the entire assets of the company as a going concern, since such a sale does not relate to the carrying on of its business.

[*Picard* v. *Revelstoke Saw Mill Co.*, 9 D.L.R. 580, varied.]

2. CORPORATIONS AND COMPANIES (§ IV G 5—150)—LIABILITY OF OFFICER—ACTS BEYOND AUTHORITY—GIVING OPTION FOR SALE OF BUSINESS.

The managing director of a company is answerable in damages to an optionee, where, without authority, he gave an option for the sale of the assets of the company, leading the optionee to believe that he was empowered to do so.

Statement

APPEAL by the plaintiff from the judgment of Morrison, J., 9 D.L.R. 580, in favour of the defendants in an action for commissions on the sale of certain property.

The appeal was dismissed as to some of the defendants and allowed as to one of them.

Bodwell, K.C., and *J. M. Macdonald*, for the plaintiff, appellant.

S. S. Taylor, K.C., and *Carter*, for the defendants, respondents.

Irving, J.A.

IRVING, J.A.:—We have already determined that the plaintiff had no case against the Yale company. I am satisfied that the plaintiff brought about the sale and that he undertook that work on a commission promised him by Lindmark, the president of the Revelstoke Company, but I am not able to say his apparent authority could bind that company. As Lindmark had no authority to bind the Revelstoke Company, he himself would be liable on the doctrine of *Collen* v. *Wright*, 7 El. & Bl. 301, 26 L.J.Q.B. 147; and in the Exchequer Chamber, 8 El. & Bl. 647, 27 L.J.Q.B. 215, if he exceeded his real authority, as I have no doubt he did. In my opinion he is liable on the implied contract that he had authority to bind the company, independent of any question of fraud.

I would allow the appeal as against Lindmark, and dismiss it as against the other two respondents.

Galliher, J.A.

GALLIHER, J.A.:—In the face of the evidence, I think it is impossible to fix liability on the company. As to them this appeal fails. On the evidence, I would find that the sale was brought about through Picard, or his agents, bringing the property to the attention of Cecil Ward and to Blaylock, to whom

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an option was given, July 25, 1910, which led up to the sale eventually effected.

I do not think any useful purpose would be served by dealing with this evidence at length, suffice it to say that it points clearly to the fact that the property was first introduced to Blaylock and his associates through Picard's agents, and although they afterwards refused to recognize Picard in the matter, that does not affect his position. Two things have to be considered in regard to Lindmark's liability. Did he hold himself out to Picard as having authority to deal with this property, and, if so, would the notice of cancellation, dated May 27, 1910, relieve him? The evidence of Picard is very explicit as to assurances being given him from time to time by Lindmark that he, Lindmark, had such authority. Mr. Briggs, a solicitor at Revelstoke, who drew up the option, acting for both parties, is called for the purpose of strengthening this, but his evidence does not carry us much further. His recollection of what was alleged to have been said in his office as to authority is not at all clear, and the furthest he will go is to say that it left an impression in his mind that Lindmark conveyed the idea that he had authority.

I don't think Picard acted very prudently in not seeing to the nature of Lindmark's authority, still we find Lindmark described in the option as the managing director of the Revelstoke Saw Mill Company, although he signed simply "Chas. F. Lindmark," and he was also mayor of the city, and, according to Picard, when approached on the subject to have the option confirmed by the directors, stated that it was all humbug, was not necessary, to go ahead and put through the deal and never mind details. Considering all this, if those facts were uncontradicted, there would undoubtedly be a holding out of authority which Picard might reasonably accept as a fact, and which would justify him in proceeding as he did. On the other hand, Lindmark flatly contradicts this, and says that Picard knew, and he frequently told him, he had not authority, and that he never represented himself as having authority.

The learned trial Judge has taken Lindmark's version of the matter, and with that I would not interfere were it not for some significant facts appearing from the documents and correspondence.

Take the option in question. It purports to deal with two properties, viz., the Revelstoke Company and the Yale-Columbia Company. At the bottom of that document, after discussion between Lindmark and Picard, the following memorandum was made and signed:—

It is understood that the opinion above given on the Yale-Columbia property is contingent upon the vendor obtaining the sanction of the eastern owners of the property.

That to my mind has a two-fold significance. That as to the Revelstoke property, Lindmark required no confirmation, but as to the Yale-Columbia, he did. Picard went on to Seattle, and not receiving any word from Lindmark as to confirmation by the Yale-Columbia people, went back to Revelstoke about a week after, December 6, 1909, being the date he wired Lindmark as to confirmation, and there saw Lindmark, who first told him he had wired for confirmation, but received no answer, and then next day said he had received confirmation; at all events they went down to Mr. Briggs' office, cancelled the memorandum calling for confirmation and initialled it—thus leaving the option not subject to confirmation in any respect. After reading this document and the correspondence between Lindmark and Picard taken in conjunction with the evidence of Picard, and that of Briggs (slight though it may be), I have come to the conclusion that there was a holding out by Lindmark as of one having authority.

As to the notice cancelling the option, it is given under a clause in the option as follows:—

It is agreed that the aforesaid property will not be optioned or sold to other parties or this option cancelled without the vendor first giving to the purchaser written notice to the address hereinafter mentioned, and affording the purchaser reasonable opportunity to complete any negotiations he may have in progress towards carrying out this agreement. Such notice shall be sufficiently given by mailing the same postpaid and registered, addressed to Edmond Picard at 128 Faubourg Poissonniere, Paris, France.

I interpret that to mean that the notice should specify a time reasonable for the purpose of concluding any *bonâ fide* negotiations under way after which it would take effect, or, at all events, that it should not take effect until such reasonable time had elapsed. W. A. Ward's evidence shews that during the latter part of April, 1910, he and O'Brien, who were both acting for Picard, brought the property to the notice of Blaylock and gave him information regarding it. During January, February, March and April, Picard was in communication with Lindmark, from which Lindmark knew that Picard had clients with whom he was negotiating. On May 27, Lindmark sent the notice of cancellation, ex. 43:—

Revelstoke, British Columbia.

To Edmond Picard.

Sir,—I hereby give you formal notice that the option granted you on November 29, 1909, for the purchase of the properties of the Revelstoke

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Saw Mill Co., Ltd., is hereby cancelled. This notice is given in pursuance of clause three of the option agreement of Nov. 29, 1909.

Yours truly,
CHAS. F. LINDMARK.

Edmond Picard,
128 Faubourg, Poissonniere,
Paris, France.

This notice was sent to Paris, and only reached Picard, who was in Seattle, on July 3rd, 1910, when the following letter was written to Lindmark:—

Seattle, U.S.A.,
July 3, 1910.

C. F. Lindmark, Esq.,
Revelstoke Saw Mill Co., Ltd.,
Revelstoke, B. C.

Dear Sir,—I have just been advised from Paris that you sent me a letter cancelling the option you gave me last November.

But I am very pleased to let you know that I have a party in hand with whom we are in full negotiations for the sale of the Revelstoke and Westley properties.

Meanwhile I remain,

Very respectfully yours,
EDMOND PICARD.

Registered, P.O., Seattle, Wash.,
No. 257, 4th July, 1910.

And again on July 6th:—

Seattle, Washington,
July 6, 1910.

C. F. Lindmark, Esq.,
Revelstoke Saw Mill Co., Ltd.,
Revelstoke, B. C.

Dear Sir,—I beg to confirm my registered letter of the 3rd inst. I am glad to state that an English company advised us by cable the day their agent left England and that we are expecting him west about the first of next week. This agent represents a firm to which we put up the sale of Revelstoke and Westley properties about two months ago. By former correspondence they know all about the deal, and we have a great chance to close it with him.

On the other hand, I have been advised by another party by letter of July 2nd, that the representative in the United States of another English company had forwarded that same day to his principals in London, further and fuller particulars of R. and W. properties (proposition put before them many months ago). He asked them to answer by cable and that within two or three weeks we shall have final answer.

As stated above, we will have to meet first party in a very few days, probably the end of this week.

I shall keep you posted without losing one day, of the principal matters of these negotiations.

I feel confident that you will recognize not only that I am in full ac-

cordance with the option you kindly accorded me last November, but that sometimes perseverance must be rewarded.

Very respectfully yours,

E. P.

c/o Hotel Washington.

And again on July 13th:—

Seattle, July 13, 1910.

C. F. Lindmark, Esq.,
Revelstoke Saw Mill Co., Ltd.,
Revelstoke, B. C.

Dear Sir,—I beg to confirm my letter of the 6th inst. I am glad to state that I have just received the following telegram: "London parties not here yet. Stopping over at Toronto a few days. Expect them daily. Will advise you immediately upon their arrival. Think we have a good chance for business." I want to add that the party to whom I referred to you in my registered letter of April 6th last, and who did let the matter drop, has nothing to do with the two parties mentioned in my letter of the 6th inst.

As you can see, we expect the English party every day, and I shall write you accordingly.

Very respectfully yours,

EDMOND PICARD.

P.S.—Your registered letter of May 27th was received in Paris on the 20th day of June, and I was surprised that you did not send it to Seattle.

And again on July 26th:—

Vancouver, B. C.
July 26, 1910.

C. F. Lindmark, Esq.,
Revelstoke Saw Mill Co., Ltd.,
Revelstoke, B. C.

Dear Sir,—I beg to confirm my registered letter of the 3rd inst., and also my letters of the 6th and 13th inst.

I am glad to state that Mr. Cecil Ward, manager and director of the Dominion Land, Timber and Saw Mill, Ltd., of London, and of the Brazilian Canadian and General Trust Co., Ltd., of London etc., etc., has been considering the purchase of the Revelstoke and Westley properties and seems to be willing and ready to close the deal.

This present proposition has been put to above Mr. C. Ward by the Pretty's Timber Exchange of Vancouver on the date of May 16th last, and they have sufficient acknowledgment of it in their correspondence.

The said Pretty's Timber Exchange were acting under agreement I made with them on the day of February 8th last, and by which they were authorized to find a purchaser, viz.: under the option you gave me, the 29th of November, 1909.

This is to inform you that as soon as Mr. Cecil Ward or the Dominion Land, Timber and Saw Mill, Ltd., of London, or one of the different companies in which he is connected or any one of the different companies under control of his directors or partners or any person or persons

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connected with him or with them, have completed the purchase of the Revelstoke and Westley property, I shall be entitled to my commission as mentioned in the option you granted me last November.

Very respectfully yours,
EDMOND PICARD,
c/o Washington Hotel, Seattle, Wash.

Registered, P.O., Vancouver, B. C.
No. 482, 27th July, 1910.

Lindmark was present at a meeting of the directors of the Revelstoke Saw Mill Company, July 25, 1910, when a resolution was passed authorizing the entering into an option with Blaylock for the property, when he had full knowledge of the negotiations being carried on by Picard as detailed in his letters of 3rd, 6th and 13th July.

On July 28, Lindmark, without referring to above letters, replied as follows:—

Maundrell Meat Market,
Revelstoke, B. C., July 28, 1910.

Edmond Picard, Esq.,
Washington Hotel, Seattle, Wash.

Dear Mr. Picard,—Yours of the 26th to hand, and I am sorry to inform you that the whole plant at the Big Eddy was burned to the ground within the last week. As I had previous to this given you due notice that the deal was off on account of you not being able to close the deal that I have given you from time to time.

As it now stands the deal is off on account of the destruction of the plant by fire.

Yours truly,
CHAS. P. LINDMARK.

In my view of the effect of the clause under which notice of cancellation was to be given, and of the above recited facts, I hold that Picard's option was improperly cancelled.

The appeal should be allowed as to Lindmark.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal in part, that is, as against the defendant Lindmark.

Martin, J. (dissenting)

MARTIN, J. (dissenting):—I would dismiss the appeal.

Appeal allowed in part.

FITZGERALD v. WILLIAMSON.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. MECHANICS' LIENS (§ VIII—62)—ENFORCEMENT — NOTICE—NECESSITY —SUB-CONTRACTOR FURNISHING LABOUR AND MATERIALS.

A sub-contractor who furnishes both labour and materials for the construction of a building for a lump sum is entitled to a lien therefor without giving the notice required by sec. 6, of the B.C. Mechanics' Lien Act, R.S.B.C. 1911, ch. 154.

[To the same effect see *Irvin* v. *Victoria Home Construction Co.*, 12 D.L.R. 637; and see Annotation on Mechanics' Lien law, 9 D.L.R. 105.]

2. MECHANICS' LIENS (§ VIII—70) — DEFENCES — PLEADING — NOTHING DUE CONTRACTOR.

A defence under sec. 8 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, that no money is payable by the owner to the principal contractor, must, under B.C. County Court rule 175, order 11, r. 18, be pleaded in the dispute note filed in an action brought by a sub-contractor to enforce a lien for the balance due to him by the principal contractor.

Statement

APPEAL by the defendant from a judgment giving a sub-contractor a mechanics' lien for labour and materials furnished for the construction of a building.

The appeal was dismissed.

J. A. Clark, for appellant, defendant.

Todrick, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal for reasons given by Irving, J.A., in *Irvin* v. *Victoria Home Construction Co.*, 12 D.L.R. 637.

Irving, J.A.

IRVING, J.A.:—In my opinion the plaintiff, a sub-contractor for the painting, himself doing the work and supplying paint, does not fall within the provisions of sec. 6. Therefore, he may obtain a lien under the Act without giving a notice.

It is said that evidence was given at the trial without objection that there was no money payable by the owner to the contractor, and that, therefore, sec. 8 afforded the owner a defence.

Order 11, r. 18, in my opinion does not require sec. 8 to be pleaded as a defence. On the contrary, I think the right to a lien being foreign to the common law, it would be the duty of the plaintiff to set out in his plaint that there was money due the contractor from the defendant owner, then the defendant could deny it. There is no presumption that there is money in the hands of the owner. The limitation placed on the right to a lien can hardly be called a statutory defence. In any event, if it was necessary for the defence to plead that the contractor had been paid in full, although O. 11 does not cover the case,

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by rule 1*a* of O. 11, the dispute note shall state the several grounds of defence, and as rule 2 limits the defence to the matters stated in the dispute note, the defendant ought to have pleaded the payment in full to the contractor, whether the plaintiff in his plaint alleged the matter or not. The plaintiff was at liberty to waive that protection, and if the evidence was given and no objection taken, the plaintiff must be taken to have waived the point. But I cannot find in the appeal book any evidence on the point.

Ex parte Firth, 19 Ch.D. 419, lays down two rules. The first that it is the duty of the appellant to have his tackle in order before he comes into the Court of Appeal. That is a good wholesome rule, and we have given effect to it. The second is, that the Court of Appeal has power, by way of indulgence, in a case where a note of oral evidence has been accidentally lost, to allow that evidence to be taken over again. Should we allow the evidence to be received now? This question has troubled me very much. This is not like the case which we decided the other day. The Judge here was taking notes and counsel might very well assume he would take down the defendant's evidence that there was nothing due to the contractor, but owing to the omission in the dispute note, the Judge did not appreciate the point.

The Court of Appeal has power to grant a new trial on the ground of mistake or inadvertence (*e.g.*, where a witness made a mistake as to a date) but we are told it is a power that should be exercised with great caution: *Germ Milling Co., Ltd.* v. *Robinson*, 3 Times L.R. 71. The objections to awarding a new trial are well set out in *Caswell* v. *Toronto R. Co.*, 24 O.L.R. 339, at 350.

But on the whole, I think, that, under the circumstances of this case the defendant ought to be allowed to give this evidence on payment of costs here, and the costs thrown away in the Court below.

Martin, J.A.

MARTIN, J.A.:—The plaintiffs are sub-contractors, under an entire contract with the defendant Williamson to paint a house which the latter was erecting, for the sum of $582, including materials, and a lien is claimed for work done and materials furnished, which with extras allowed, amounted to $601.80, for which sum judgment was given. The work is not segregated from the materials either in the particulars in the affidavit, or in the evidence at the trial. The learned trial Judge held in effect that the proviso in sec. 6 as to written notice does not extend to a sub-contractor (or contractor) who contracts to do work as well as "supply" or "place" or "furnish" material, and I agree with my learned brothers that this is the correct view to take of that section, and therefore the plaintiffs were

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not required to give such notice, and the lien is valid for both work and material. A sub-contractor who agrees to supply material alone is in the same category as a bare materialman.

But the owner, Richardson, now attempts to set up as the defence, that under section 8, the amount of the lien, if any, should, in any event, be restricted to the "sum payable by the owner to the contractor:" to which it is objected that this is a special defence which should have been raised in his dispute note under County Court rule 175, O. 11, r. 18, and, in my opinion (since no application was made to amend, nor any evidence given on the point without objection which might operate as a waiver), the objection must prevail, because if an owner seeks, under sec. 8, to reduce wholly, or in part, the amount of the lien which otherwise would attach to the full extent under the preceding sections, the onus is upon him to do so.

Gallihier, J.A.

GALLIHER, J.A.:—I would dismiss the appeal.

Appeal dismissed.

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ST. LAWRENCE REALTY CO. Ltd. v. MARYLAND CASUALTY CO.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. May 19, 1913.

1. INSURANCE (§ VI F—405)—INDEMNITY INSURANCE—SUBROGATION—LIABILITY FOR SPRINKLER LEAKAGE—PAYMENT OF LOSS TO TENANT—LIABILITY OF LANDLORD—NEGLIGENCE.

Under arts. 1614, 1065 and 1067 of the Quebec Civil Code, the owner of a building must indemnify an insurance company that is compelled to pay damages to a tenant for loss sustained by the breaking of a fire sprinkler pipe as the result of the settling of a beam where the settling might easily have been prevented.

Statement

ACTION between the insurer of a lessee against damage caused to his goods by the rupture of a fire sprinkler pipe and the lessor's *ayant droit*. The appellant seeks the reversal of the judgment of the Superior Court of April 29, 1912, condemning it to pay to the respondent $786.16 indemnity for these damages.

The appeal was dismissed.

E. Lanquedoc, for appellant.

R. E. Heneker, K. C., and *Walter S. Johnson*, for respondent.

The judgment of the Court was delivered by

Gervais, J.

GERVAIS, J.:—Respondent sued on June 28, 1910, alleging that Daoust, Lalonde & Co., Ltd., had leased for ten years the old Ames-Holden shoe factory on Victoria Square from May 1, 1908; that the lessor, John Hannan, sold the same to the appellant; that on February 15, 1909, a pipe of the sprinkler system broke as the result of the settling of beams; that the respondent, who had

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insured Daoust, Lalonde & Co. against such accidents, had been obliged to pay this firm the sum of $786.16 with subrogation. The Superior Court maintained the action.

The appellant seeks the reversal thereof for the following reasons:—

Therefore, to resume, we say that if the theory adopted by the learned Judge of the Superior Court is assumed to have been proved and the accident to have been caused by settling, then the *grosses reparations* having been assumed by Daoust, Lalonde & Co., they alone could be held answerable in this regard.

If that theory is not adopted, either the accident was caused by the vibration of Daoust, Lalonde & Co.'s machinery, or by some latent defect in the system itself, and in both these alternatives the action must be dismissed; and, finally, that the only other possible explanation is that the accident was a mere fortuitous event for which nobody can be held responsible. And that in any event no claim for damages can be read into art. 1614 C.C.

(The learned trial Judge reviewed the evidence on the question of fact and found that the damages claimed for had really been suffered, and that the cause thereof was the settling of the beam on the trunk pipe of the sprinkler system. And, continuing, he said: According to C.C. 469 the repairing and resetting of the beam which caused this pipe to break is a *grosse reparation*; doctrine and jurisprudence are at one on this point.)

But had the respondent through its auteur assumed, as stated by the appellant, the repair of this beam? Evidently not, as the lease of July 18, 1907, only stipulated a renunciation on the part of Daoust, Lalonde & Co. to the damages which might result from *grosses reparations* by the lessor; for the deed says:—

Should any *grosses reparations* be deemed necessary in the said leased premises, the said lessees shall permit the same to be performed. . . .

Is the appellant responsible for the damages caused either in virtue of the guarantee which it owes to its auteur as proprietor, or as lessor to the auteur of the respondent lessee? Arts. 1614, 1065 and 1067 C.C. give an affirmative answer. Art. 1614 does not reproduce the last paragraph of 1721 C.N., which says:—

If any damage result from these defects the lessor is obliged to indemnify the lessee.

But C.C. 1065 states that

every breach of obligation renders the debtor liable in case of a breach of it on his part,

and 1067 that

the debtor may be put in default . . . by the sole operation of law.

Surely these two articles entitle the respondent to claim damages even in the absence in art. 1614 C.C. of the last paragraph of C.N. 1721. For art. 1614 declares most emphatically that the

lessor is obliged to warrant the lessee against all defects and faults in the thing leased which prevent or diminish its use, whether known to the lessor or not. Our code has put an end to the old law controversy as to known and unknown defects. Many judgments have held, and rightly, I think, that the same does not always hold true as regards the lessee's knowledge of defects and that he cannot claim for apparent defects.

But art. 1614 does not, as regards the lessor's responsibility, distinguish between defects known to the lessor and defects which are not known. We accept the holding in the case of *Peatman* v. *Lapierre*, 18 R.L. 35. But it has no application in this case, as the respondent's auteur was ignorant of the defect which caused the accident. The appellant and his auteur may, perhaps, have been unaware of this defect of construction, but they are bound nevertheless to warrant the respondent against it. The appellant's auteur has evidently not fulfilled his explicit and absolute obligation as laid down by C.C. 1614; and in virtue of arts. 1065 and 1067, the appellant's auteur has incurred liability for the damages claimed. Our jurisprudence and that of France do not differ on this point. *Vide* Planiol Droit Civil, vol. 2, nos. 1686, 1687; 3 Delvincourt 191; 7 Colmet de Santerre No. 167, bis 1; 4 Aubry & Rau 477, note 16, par. 366; 4 Masse and Verge sur Zachariae 362 and note 6, par. 701; Agnel No. 270, 25 Laurent No. 122.

These damages are evidently not the result of a fortuitous event, as they could easily have been avoided by the placing of a few pieces of wood or iron. No flaw was discovered in the pipe after its breaking. The damages are due in virtue of C.C. 1614, 1065 and 1067.

The appeal is dismissed with costs.

Appeal dismissed.

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ROBINSON v. GRAND TRUNK R. CO.
(Decision No. 3.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, and Anglin, JJ. May 6, 1913.

1. CARRIERS (§ III G—441)—LIABILITY OF RAILWAY TO CARETAKER OF STOCK—REDUCED FARE—NO PRIVITY BETWEEN CARETAKER AND RAILWAY—LIABILITY, STIPULATION AS TO.

One travelling upon a railway in charge of live stock at a reduced fare, which is paid by the shipper of the live stock, it not bound by a special contract between the shipper and the railway company relieving the company from liability in case of his death or injury, of which he had no knowledge, to which he was not a party, and from which he derived no benefit, where the railway company failed to do what was necessary to bring the special conditions of the contract to the attention of the traveller.

[*Robinson* v. *Grand Trunk R. Co.*, 8 D.L.R. 1002, reversed; *Robinson* v. *Grand Trunk R. Co.*, 5 D.L.R. 513, restored.]

Statement

APPEAL from a decision of the Court of Appeal for Ontario 8 D.L.R. 1002, 27 O.L.R. 290, reversing the judgment at the trial, 26 O.L.R. 437, in favour of the plaintiff.

The appeal was allowed and the judgment at trial restored.

Argument

McKay, K.C., and *Haight*, for the appellant:—The appellant could not become a party to this special contract without his assent, obtained expressly or by reasonable implication. It was not so obtained and the case is within the principle of *Parker* v. *South Eastern R. Co.*, 1 C.P.D. 618, 2 C.P.D. 416, approved in *Richardson* v. *Rowntree*, [1894] A.C. 217, and *Bate* v. *Canadian Pacific R. Co.*, 18 Can. S.C.R. 697, Cam. S.C. Cas. 10. See also *Stephen* v. *International Sleeping Car Co.*, 19 Times L.R. 621; *Hooper* v. *Furness R. Co.*, 23 Times L.R. 451; *Marriott* v. *Yeoward Bros.*, [1909] 2 K.B. 987, at 992; *Ryckman* v. *Hamilton, Grimsby and Beamsville R. Co.*, 10 O.L.R. 419, at p. 422.

D. L. McCarthy, K.C., for the respondents:—If appellant was lawfully on the train he could only be so by the contract with the company. The company may limit its liability for injury to a passenger through negligence: *Parker* v. *South Eastern R. Co.* 2 C.P.D. 416; *Burke* v. *South Eastern R. Co.*, 5 C.P.D. 1. The appellant's assent to the limitation by the contract is clearly implied. The fact that he did not read the conditions did not free him from their effect: *Harris* v. *Great Western R. Co.*, 1 Q.B.D. 515; *Coombs* v. *The Queen*, 4 Ex. C.R. 321, 26 Can. S.C.R. 13.

Sir Charles Fitzpatrick, C.J. (dissenting)

SIR CHARLES FITZPATRICK (dissenting):—I am very clearly of opinion that this appeal should be dismissed. The appellant was travelling on a freight train where he had no right to be except under the special agreement made with respect to the carriage of the horse of which he was presumably in charge. That special agreement contained a limitation of the company's liability in case of accident, and I agree with the Judges below who found that the company did everything that was reasonably sufficient to draw the appellant's attention to that limitation.

DAVIES, J.:—The judgment below proceeded upon the assumption that the plaintiff must either have been travelling under the contract made between the owner of the horse and the railway company and that he was bound by such contract, or that he was a trespasser to whom the company owed no duty.

I think his position was not, under the circumstances of this case, one or the other. I do not think he was travelling under and by virtue of a contract, which was made between his master and the company without any knowledge on his part of its conditions which he was not asked to sign or agree to, and which contained special clauses relating to him as man in charge of the horse not called to his attention, and of which he had no knowledge. One of these special clauses printed in the body of the contract declared the company "to be free from liability in respect of his death, injury or damage; and whether it be caused by the negligence of the company or its servants or employees or otherwise howsoever."

It was headed "Grand Trunk Railway System"—"Live Stock Special Contract." On the margin was written "Pass man in charge half-fare." The plaintiff was the man in charge of the horse to be carried by the contract. A special notice on the back required the company's agents to see that such man wrote his own name on the back of the contract. This may have been for the purposes of identification merely; but the evidence is clear that the plaintiff had not his attention called in any way to the clause by which the company attempted to contract themselves out of any liability for damages caused by their own or their servants' negligence.

The plaintiff's position on the car was certainly not that of a trespasser, but rather that of a licensee. The contract was not made with him or by him, and he cannot be held bound by provisions of such a startling character as the contractual exemption relied upon here unless his assent had been first obtained by his special attention being directed to the clause affecting him and his acceptance of it either expressly or impliedly.

There was nothing when this "Live Stock Special Contract" was handed to him to lead him to believe that it contained any such special exemption of liability with respect to his carriage as the one I have cited. If the plaintiff had been told the substance of this condition respecting his carriage as man in charge, or had he read the condition and in either case had not objected, but had accepted his passage with such knowledge, he would probably have been held to have assented to the terms of the condition and been bound by it. But there not being, in my opinion, any obligation on him to read this "Live Stock Special Contract," and he not having, as a fact, read it, or been invited to do so, or had his attention called to the condition with respect to himself, I cannot think he was bound by it.

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The cases cited of *Parker* v. *South Eastern R. Co.*, 1 C.P.D. 618, and in the Court of Appeal, 2 C.P.D. 416, and *Richardson, Spence & Co.* v. *Rowntree*, [1894] A.C. 217, amply support the conclusion that in a case like the present one, the company has not the right, under such circumstances as are here proved, to invoke a contractual exemption from liability arising out of their own or their servants' negligence, as this contract contains. They fail because the plaintiff, the man in charge of the horse, had no knowledge of the condition they seek to invoke against him and because their servants neglected to do what was reasonably sufficient to bring such notice to his knowledge or attention.

I would allow the appeal with costs.

Idington, J.

IDINGTON J.:—The appellant was sent by Dr. McCombe from South River to bring him from Milverton a horse purchased there by a friend, Dr. Parker, to be shipped by him from Milverton to South River.

The respondents required as a term of receiving such a shipment for a distance greater than a hundred miles, that the animal shipped should be accompanied by a man in charge of it. Hence the necessity for Dr. McCombe sending appellant to Milverton to take charge of the horse and travel on same train as it did. Dr. Parker signed a contract of shipment as required by respondents' agent in a form which had the approval of the Board of Railway Commissioners. He paid nothing. The charges were to be paid by Dr. McCombe. The form of contract signed by Dr. Parker expressly absolved the respondents from all liability in case of accident happening the man thus in charge of the horse. The contract was not read by Dr. Parker, but he had the opportunity to have read it if he chose. The respondents' agent was present when it was signed, but nothing was said by any one as to its terms. Dr. Parker had suggested mailing it to Dr. McCombe, but the company's agent said no, let the man take it as he might need it for identification by the conductor. Dr. Parker accordingly folded it up and handed it to appellant, who put it in his pocket without reading it and never knew what it contained until a week or so after the accident in question. Dr. McCombe on getting it then from respondents paid the charges, which consisted of freight for the horse and half-fare for the appellant's transportation. There was, as result of respondents' negligence, a collision between another train and the train on which the appellant travelled with the horse, whereby the appellant suffered serious damages for which respondents would admittedly be liable even if carrying gratuitously unless prohibited by the terms of the contract I have referred to.

There was indorsed on the back of the contract a memorandum which was as follows:—

GRAND TRUNK RAILWAY SYSTEM.

LIVE STOCK.

TRANSPORTATION CONTRACT.

From.....
To.....
Date.....19 .
Shipper.....
Names of persons entitled to a free pass or reduced fare in charge of this consignment—

.....
.....
.....
.....
.....Agent.

NOTE.—Agents must require those entitled to free passage or reduced fare in charge of live stock under this contract to write their own names on the lines above.

Conductors may, in cases where they have reason to believe contracts have been transferred, require the holders to write their names hereon, to compare signatures.

This contract must be punched by conductors of each division.

This was never filled up or signed by any one. The question raised is whether or not a man occupying the position of the appellant put in charge of the said horse and travelling as its caretaker, is without being made expressly aware of the terms of the contract his employer had entered into, debarred by virtue thereof from all right of recovery for injury suffered by "reason of the negligence of the company's servants or otherwise howsoever," as the terms of exemption I have referred to put it.

In regard to this question there is some similarity between this case and the case of *Bate* v. *Canadian Pacific R. Co.*, 18 Can. S.C.R. 697. There the signature of the passenger was got by telling her such signing was necessary for identification. Here no signature or assent of any kind was required, but incidentally to handing appellant the contract instead of mailing it as proposed by Dr. Parker, it was stated in appellant's presence that he might need it for identification. And as it turned out he never needed it for such purpose.

It seems to me the appellant, who was not asked to sign anything, but thus thrown off his guard, has quite as much ground to be excused as the plaintiff in that case who was induced to sign what she could not read by reason of sore or defective eyes, but did sign, though she might have insisted on the paper being read to her.

Then we have the cases of *Richardson, Spence & Co.* v. *Rowntree*, [1894] A.C. 217, following *Parker* v. *South Eastern R. Co.*, 2 C.P.D. 416, and *Henderson* v. *Stevenson*, L.R. 2 H.L. Sc. 470, which in principle seem to cover the whole ground involved in

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the dispute herein by requiring knowledge on the part of those concerned of the conditions pleaded and relied upon. The appellant was invited to trust himself to the care of respondent in discharge of its duty to carry appellant safely, and it pleads something his master, but not he, agreed to.

It seems rather a startling proposition of law that an employer can of his own mere will and motion so contract that his servant shall be treated as of less value than a horse or dog shipped as freight. It seems to me to come to that if we are to uphold the judgment appealed from, for there is no fair ground on the facts to impute to appellant an assent to something he knew nothing of. If appellant had by his occupation been shewn to be accustomed to undertake such services, there might have been some basis for inerring assent to a something he in fact knew nothing of, but ought to have known.

If the principle of identification is to be carried so far, where would it not extend if applied in other relations of contractors with those for whom they undertake something to be done and on behalf of those in their employment presume, without their knowledge or assent, to bind them to assume all risks? All the appellant was concerned with was that he was to be carried safely and for aught he knew gratuitously if you will. All he knew was that the railway company needed him to go.

Is there anybody else than railway managers and lawyers who can be conceived of as presuming that a man so sent for and invited by the company to ride upon its car in order to serve its purposes of protecting itself must know that he has agreed without recourse to be killed by the negligence of their servants "or otherwise howsoever." Not only is that to be presumed as part of common knowledge, but also that the horse had to be paid for in such case, but not the man. Indeed, also he is supposed to know that the Railway Commissioners of Canada were such a set of humorists as to have approved thereof.

The learned trial Judge by what transpired at the trial must be taken to have reserved to himself to dispose of what was not submitted to the jury and he seems to have had no doubt in regard to essential facts which they were not asked in regard to and did not pass upon. I think the appeal must be allowed with costs throughout and the judgment of the learned trial Judge be restored.

Duff, J.

DUFF, J.:—The defendant was *de facto* accepted as a passenger on their train by the railway company which thereby *primâ facie* incurred an obligation to use reasonable care to carry him with safety. The company says that this *primâ facie* obligation was limited to the condition in the shipping bill. I do not understand that it was contended on behalf of the company that Dr. Parker, who signed the shipping bill on behalf of the consignee, had authority to bind the appellant by entering into an agreement

on his behalf limiting this obligation. I am not required by law to hold that he had such authority and there is no evidence justifying a finding that the appellant had made him (or held him out as) his agent in fact for that purpose. The evidence, moreover, is clear that the condition referred to was not actually brought home to the knowledge of Dr. Parker or of the appellant. In these circumstances the contention of the company is and must be that the company's agent took reasonable steps to notify the appellant that they were accepting him as a passenger on the special terms contained in the shipping bill and that the appellant's conduct in not perusing the bill shewed that he was content to accept the conditions without reading them; and that he must, consequently, in law be held to be bound by it. I think this contention must be rejected. The gist of it is that a normal person in the situation of the appellant would have read the bill unless he was content to abide by any reasonable conditions it might contain. I am not obliged by any rule of law, to say that that is so. Treating the question as a matter of fact I think it is not so. I think the appeal should be allowed and the judgment of the trial Judge restored.

Anglin, J.

ANGLIN, J.:—I am unable to discover any distinction in principle between this case and such cases as *Richardson, Spence & Co.* v. *Rowntree*, [1894] A.C. 217; *Henderson* v. *Stevenson*, L.R. 2 H.L Sc. 470; *Parker* v. *South Eastern R. Co.*, 1 C.P.D. 618, 2 C.P.D. 416; and *Bate* v. *Canadian Pacific R. Co.*, 18 Can. S.C.R. 697, Can. S.C. Cas. 10.

Upon evidence warranting such a finding the trial Judge held that the plaintiff was unaware of the special conditions contained in the shipping contract under which the defendants claim exemption from liability to him for personal injuries, and, if not expressly, I think impliedly, that neither the circumstances under which he received the contract nor what was done by the defendants' agent would suffice to convey to his mind (or "to the minds of people in general") the fact that it contained special conditions affecting him or would justify imputing to him notice of them. The learned Judge says that the plaintiff had "neither notice nor knowledge" of the special terms. By this I understand him to have meant that the plaintiff had not notice of any kind, actual or constructive. As put by Mellish, L.J., in *Parker* v. *South Eastern R. Co.*, 2 C.P.D. 416, at page 423:—

> The proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

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It is this "reasonable notice" that I understand the learned trial Judge to negative in the present case by the word "notice," which he uses in contradistinction to the word "knowledge" by which he negatives actual notice.

If, however, the learned Judge did not find that the defendants had failed to do what was necessary to bring the special conditions in the shipping contract to the attention of the plaintiff, treating him as a man of ordinary intelligence and acuteness, the Court of Appeal had power to make that finding (Ont. Jud. Act, sec. 53, Ont. C.R. No. 817), and upon my view of the evidence should have made it. Our statutory duty is to render the judgment which the Court of Appeal should have given.

On the single ground that the present case is governed by the authorities above cited, and without expressing any opinion upon the other interesting points taken by the appellant, I would, with respect, allow this appeal with costs in this court and the Ontario Court of Appeal, and would restore the judgment of the learned trial Judge.

Appeal allowed.

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WHITFORD v. BRIMMER.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Drysdale, and Ritchie, JJ. April 28, 1913.

1. EVIDENCE (§ II E 7—191)—FRAUDULENT CONVEYANCE—PRESUMPTION OF FRAUDULENT INTENT.

In order to set aside a voluntary conveyance of all of a debtor's property, fraudulent intent need not be shewn where the effect of the conveyance is to prevent his creditors obtaining satisfaction of their claims.

[*Whitford* v. *Brimmer*, 7 D.L.R. 190, affirmed.]

2. EVIDENCE (§ II E 7—191)—FRAUDULENT CONVEYANCE—PRESUMPTION OF FRAUDULENT INTENT—MEAGRENESS OF INDEBTEDNESS.

The fact that the amount owed by a grantor was small does not affect the presumption that his voluntary conveyance was intended to defraud his creditors, where the effect of the transfer was to denude the grantor of all of his property.

[*Whitford* v. *Brimmer*, 7 D.L.R. 190, affirmed; *Townsend* v. *Westacott*, 2 Beav. 340, considered.]

Statement

APPEAL by defendant in an action brought by plaintiff as sole administrator of the estate and effects of the late Henry Brimmer, against defendant, the widow of said Henry Brimmer, seeking to set aside as voluntary, without consideration, and made for the purpose of defeating, defrauding, hindering, and delaying the plaintiff and other creditors of said Henry Brimmer, a conveyance of all his real and personal property made by the deceased to defendant.

The cause was tried before Russell, J., who gave judgment for plaintiff. *Whitford* v. *Brimmer*, 7 D.L.R 190.

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J. A. McLean, K.C., and *J. W. Margeson*, for appellant.
V. J. Paton, K.C., for respondent.

The judgment of the Court was delivered by

RITCHIE, J.:—This action is brought to set aside a deed from Henry Brimmer, deceased, to his wife, Margaret E. Brimmer, one of the defendants. The deed purports to convey all the real and personal property of the grantor and is attacked under the statute of Elizabeth.

The defendant, Margaret Brimmer, conveyed the property, by way of mortgage, to the defendant Ella May Cameron. The deed in question is a voluntary one and made without consideration; it is therefore bad as against creditors; it is not necessary to establish a fraudulent intent as a fact by evidence. The mere fact of a man, with his creditors unpaid, giving away his estate, is by presumption and construction of law fraudulent.

It was urged by Mr. McLean that the evidence was inconsistent with frauds on the part of Brimmer, and that the debts he owed were so small that the presumption of law to which I have referred does not arise, and on this point he cited *Townsend* v. *Westacott*, 2 Beav. 340, 9 L.J. Ch. 241, 4 Jur. 187. In that Lord Langdale laid down the rule as follows:—

> There has been a little exaggeration in the arguments on both sides as to the principle on which the Court acts in such cases as these; on one side it has been assumed that the existence of any debts at the time of the execution of the deed would be such evidence of a fraudulent intention as to induce the Court to set aside a voluntary conveyance and oblige the Court to do so under the statute of Elizabeth. I cannot think the real and just construction of the statute warrants that proposition, because there is scarcely any man who can avoid being indebted to some amount, he may intend to pay every debt as soon as it is contracted and constantly use his best endeavours and have ample means to do so, and yet may be frequently, if not always, indebted in some small sum. There may be a withholding of claims contrary to his intention by which he is kept indebted in spite of himself. It would be idle to allege this as the least foundation for assuming fraud or any bad intention. On the other hand it is said that something amounting to insolvency must be proved to set aside a voluntary conveyance, this too is inconsistent with the principle of the Act and with the judgments of the most eminent Judges.

The rule, as above stated, has been frequently approved of in subsequent cases and I do not, in any way, dissent from it, but I think it is not applicable in this case.

The question as to whether a man's indebtedness is large or small is a relative question, and, in determining it regard must be had to his financial position. If a man of large means, able and anxious to pay his debts, made a voluntary deed, it is obvious that it could not be held to be fraudulent because the

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butcher's bill for the month had not been sent in, and therefore not paid; but Brimmer was a man in very humble circumstances and of small means; he was indebted to the plaintiff and also owed a number of other debts, very small to a wealthy man, but not small to a man in the financial condition of Brimmer; he made a conveyance of all his property, both real and personal; he realized that he was indebted to various persons and said his debts would have to be paid, but he denuded himself of all his property without paying his debts. His daughter, Mrs. Cameron, paid some of the debts after her father's death, but not others.

I think it is not going too far to hold that the giving away of all his property was followed as a necessary consequence by the hindering and delaying of creditors, and where this is the case, it is not necessary to prove any actual fraudulent intent.

The only remaining question involved is as to whether or not the plaintiff has established that Henry Brimmer was indebted to him at the time the deed was made. The learned trial Judge has found in favour of the existence of the indebtedness before the making of the deed, and that Henry Brimmer gave to the plaintiff a note for $184.92, and he was satisfied that a portion at all events of that sum was owing from Henry Brimmer to the plaintiff. It is a question of fact, it is true, that a Court of Appeal should act on its own considered conclusions of fact as well as of law, and that the duty is to re-hear the case, but nevertheless, the presumption is, that the decision of the Court below as to the facts was right, and that presumption must be displaced by the appellant; he must satisfactorily make out that the Judge was wrong, it is not sufficient to leave the matter in doubt.

To this extent the burden is on the appellant. I am of opinion that he has not sustained this burden; on the contrary, I am inclined to take the same view of the facts as the learned trial Judge, though the plaintiff's case is not free from some suspicious circumstances. I am by no means satisfied that the full amount of $184.92 is owing, but I am satisfied that there was an indebtedness which is all that is necessary. The existence of an indebtedness from Brimmer to the plaintiff is established by the evidence of other witnesses as well as by the existence of the old note.

I do not decide that corroboration is necessary in this case, but, if necessary, there is, in my opinion, ample corroboration as to the existence of an indebtedness from Henry Brimmer to the plaintiff. The appeal will be dismissed with costs.

Appeal dismissed.

DARKE v. CANADIAN GENERAL ELECTRIC CO.

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Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Magee, and Hodgins, JJ.A., and Lennox J. February 26, 1913.

1. MASTER AND SERVANT (§ II B 5—165)—ASSUMPTION OF RISK—SCOPE OF EMPLOYMENT—ENGAGING OUTSIDE OF DUTIES.

An employee who was directed by his foreman to be present during the testing of a machine in another department of a factory, in order to attend to mechanical details during the test, was acting in the course of employment where he was killed while attempting to fasten the machine more securely to the floor.

[*Darke* v. *Canadian General Electric Co.*, 4 D.L.R. 259, affirmed.]

2. MASTER AND SERVANT (§ II E 5—256)—SUPERINTENDENCE—WHO HAS.

One whose duty it was to set in motion a machine he was testing is a person charged with superintendence, within the meaning of sec. 3 (2) of the Workmen's Compensation Act, R.S.O. 1897, ch. 160, over a workman from a different department of a factory detailed to assist in the test, although the former did not have general superintendence over such workman.

[*Darke* v. *Canadian General Electric*, 4 D.L.R. 259, affirmed; *Kearney* v. *Nicholls* (1883), 76 L.T.J. 63; *Wilson* v. *Boulter* (1899), 26 A.R. (Ont.) 184, referred to.]

3. MASTER AND SERVANT (§ II E 5—256)—LIABILITY OF MASTER FOR DEATH OF SERVANT—NEGLIGENCE OF PERSON HAVING SUPERINTENDENCE — STARTING MACHINE WHILE SERVANT IN POSITION OF DANGER.

Under the Workmen's Compensation Act, R.S.O. 1897, ch. 160, an employer is liable for the death of a servant as the result of the negligence of an expert electrician, charged with the duty of testing an electric generator, in starting it without ascertaining whether the deceased, who was detailed from a different department to assist in making the test, was in a place of safety; since the tester was a person having superintendence over the deceased within the meaning of such Act.

[*Darke* v. *Canadian General Electric Co.*, 4 D.L.R. 259, affirmed.]

4. MASTER AND SERVANT (§ II A 2—46)—METHODS OF WORK—LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE—STARTING DANGEROUS MACHINERY—SIGNALS—DUTY TO ADOPT.

The failure of an employer to adopt a proper system of signals for setting dangerous machinery in motion will render him liable for the death of a servant by the starting of machinery, as the result of improper signalling, while he was in a place of danger.

[*Darke* v. *Canadian General Electric*, 4 D.L.R. 259, affirmed; *Choate* v. *Ontario Rolling Mills Co.* (1900), 27 A.R. (Ont.) 155; *Ainslie Mining and R. Co.* v. *McDougall*, 42 Can. S.C.R. 420, 426; *Fralick* v. *Grand Trunk R. Co.*, 43 Can. S.C.R. 494, 519, followed.]

Statement

IN a negligence action involving *inter alia* defective system, the defendant company appealed from the judgment of the Divisional Court to the Ontario Court of Appeal, now the Appellate Division.

Argument

G. H. Watson, K.C., for the appellant company, analysed the evidence in detail, arguing that the learned Chief Justice who tried the case, and who had seen the witnesses and had accurate knowledge of all the circumstances, was justified in finding that

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there was an absence of evidence to support the jury's finding that Thompson had intrusted to him any superintendence over the deceased Darke, and their finding that the deceased was acting under the orders of his foreman, Jeffries, when endeavouring further to secure the machine. There was, therefore, no liability under either sub-sec. 2 or sub-sec. 3 of sec. 3 of the Workmen's Compensation for Injuries Act. The acts of Darke were unauthorised and voluntary, and the accident was caused by his undertaking to do something which he had no direction to do, and by doing which he placed himself in a position of extraordinary danger. He referred to the following cases and authorities: *Kellard* v. *Rooke* (1888), 21 Q.B.D. 367; Ruegg's Employers' Liability Act, 8th ed., p. 132; *Hooper* v. *Holme and King* (1896), 13 Times L.R. 6; *Howard* v. *Bennett* (1888), 58 L.J.Q.B. 129; *Wild* v. *Waygood*, [1892] 1 Q.B. 783; *Garland* v. *City of Toronto* (1896), 23 A.R. 238, 240; *Carnahan* v. *Robert Simpson Co.* (1900), 32 O.R. 328; *Ferguson* v. *Galt Public School Board* (1900), 27 A.R. 480; *Anderson* v. *Mikado Mining Co.* (1902), 3 O.L.R. 581; *Holden* v. *Grand Trunk R.W. Co.* (1903), 5 O.L.R. 301, 308; *Wood* v. *Canadian Pacific R.W. Co.* (1899), 30 Can. S.C.R. 110; *Thompson* v. *Ontario Sewer Pipe Co.* (1908), 40 Can. S.C.R. 396.

D. O'Connell, for the plaintiff, the respondent, argued that the injuries which resulted in Darke's death were caused by the negligence of Thompson, who was in the service of the appellant company, having superintendence intrusted to him, and that the appellant company was also liable by reason of the employment of a defective system, in not providing a proper code of signals. The jury had made all findings necessary to support the verdict, except that they had not assessed the damages for which the appellant company was liable at common law, for which purpose alone the case should be sent back. He referred to *Smith* v. *Baker & Sons*, [1891] A.C. 325; *Pearce* v. *Lansdowne* (1893), 62 L.J.Q.B. 441; *Wilson* v. *Boulter* (1899), 26 A.R. 184; *Schwoob* v. *Michigan Central R.W. Co.* (1905-6), 9 O.L.R. 86, 92, 13 O.L.R. 548. It was not necessary that the superintendence exercised by Thompson should have been exercised over Darke: *Kearney* v. *Nicholls*, 76 L.T.J. 63, a case which has been referred to with approval in the text-books—see Roberts and Wallace, 3rd ed., p. 261; Ruegg, *op. cit.*, p. 132. The *Kellard* case was one of manual labour; in the *Garland* and *Carnahan* cases there was no question of superintendence. There is a finding, and there was evidence, that the appellant company employed a defective system: *Choate* v. *Ontario Rolling Mill Co.* (1900), 27 A.R. 155.

Watson, in reply, argued that, as the plaintiff had not cross-appealed, he was not in a position to raise the questions which

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he had suggested in that connection. There was absolutly no evidence of defective system as regards signals, and there was no complaint on the record in that regard. The *Garland* case, at p. 243, shews that a mere scintilla of evidence does not justify the Judge in leaving the case to the jury; there must be evidence on which they may reasonably and properly conclude that there was negligence.

February 26. The judgment of the Court was delivered by HODGINS, J.A.:—Counsel for the appellant company urged very strongly that the acts of Darke, if not actually contrary to orders, were, under the circumstances, unauthorised and voluntary. The generator had been set up and finally clamped down by the mechanical department, and had been turned over to the electrical department for testing; and the point raised is, that to allow any one to interfere with and revise the work finished by the proper department, *i.e.*, the mechanical department, would disorganise the working of any industry and lead to unfortunate results, as, undoubtedly, this act of Darke's did. Whether this would be a complete answer may be doubtful. See *Burns* v. *Poulsom* (1873), L.R. 8 C.P. 563.

I have studied the evidence with some care to see if this position is justified in fact. The material parts are fairly set out in the judgment of the Divisional Court, and it is not necessary to repeat them.

It is clear that the generator had been set up, and that the foreman of the mechanical department had finally passed it as complete. The motor, which is movable, was moved to and put in its proper position, and the belt attached in order to transmit the power to the generator.

The motor was not, I think, a machine or engine on a railway or tramway, within sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act, as it was fixed and in position, and was not, in the operating or testing, moving or intended to move. The power applied was electricity, which was turned on to the motor by Thompson, and by means of the belt the generator was operated.

What the case must turn upon, in my judgment, is the communication made by Darke to Jeffries, the foreman, and his consequent directions. These were, as stated by Cartner, that Cartner was to stay with Darke "until the load was on the machine," to see that everything was all right. This, of course, means either the initial application of electricity to the generator (see Patterson's evidence, p. 30) or its increase to the full load required (Thompson, p. 129); but, in either event, Darke's duties would continue till the switch was turned by Thompson, and Cartner's presence would have been useless unless some-

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thing antecedent to the test was intended by the express order of Jeffries.

Now, Darke was, according to Cartner (p. 75), in charge of the machine, *i.e.*, as between the two of them; and Darke had apparently the idea that the machine was not then secure; so that his conversation with Jeffries could only have related either to that present fact, or, as is suggested by the evidence, to his doing anything necessary after the generator had begun to operate. The latter seems a quite inadequate explanation, in view of Jeffries' earlier instructions on that point. Regard must be had to the further fact that Cartner was told to remain, in addition to Darke, for some reason arising out of Darke's conversation, and only until the load was on the machine. I think it is fair to infer, as the jury have done, that Jeffries' instructions to Darke were that he was to be present prior to as well as at the electrical testing, and to do all necessary mechanical work arising during that whole period.

If so, what Darke was doing was in the course of his employment, and pursuant to instructions; and, if he was injured by any act for which the appellant company is liable, the respondent is entitled to recover.

As to negligence, the respondent rests this upon two principal grounds: first, that the accident was caused by the negligence of Thompson, as a person having superintendence intrusted to him and whilst in the exercise of such superintendence; secondly, that the appellant company's system was defective, in that no proper system of signalling was adopted.

Upon the first ground. When the test was being undertaken, Thompson was put in charge of it and of the machine. See Walker's evidence, p. 88, as well as that given below. Thompson's duty was not merely to ascertain whether the generator, when set in motion, produced certain desired electrical results, but included applying electricity to the motor, so that it would cause the belt to revolve, and thus set the generator in motion. It cannot be said that, before he did this, he had no duties of superintendence intrusted to him. His helper was there and was under his instructions (see p. 133). Darke and Cartner were also there. It was, I think, clearly the duty of Thompson not to set the mechanism in motion—a purely physical act, such as applying steam to the works of a locomotive—until he had examined and seen that everything was clear and ready.

Patterson, the general superintendent of the appellant company's works, on the question as to when the power was to be turned on (p. 29), says that Thompson was to do it "as soon as the conditions were such that it was prudent to do so;" and at p. 31: "I think he would see that everything was clear; I understand he did." Thompson so understood his duty. (See pp. 133, 134.)

No one else was charged with this duty, which was not manual labour; and it is by ignoring this part of his work, and magnifying his subsequent occupation of watching the operation of the generator, that that element indicating superintendence has been ignored.

In the case cited by the Divisional Court, *Kearney* v. *Nicholls*, 76 L.T.J. 63, Denman, J., held that the superintendence is not over the injured workman but over the work in hand, though in another department of the work or business. That learned Judge had just previously taken part in the decision of *Osborne* v. *Jackson* (1883), 11 Q.B.D. 619.

In *Wilson* v. *Boulter*, 26 A.R. 184, the lad injured was not working under Wall, but was pushing a truck through the room containing the retort which exploded. Wall was in charge of the retort and was held to have had superintendence (of the retorts) and to have been negligent while in the exercise of such superintendence.

If Thompson comes within the definition of sec. 3, sub-sec. 2, there was evidence that he was guilty of negligence, which could not have been withdrawn from the jury; and, as they have found him negligent, their view must prevail. Cartner says he told him "not to start up, we were going to fix this pillow block" (p. 82).

I think there was some evidence that no proper system of signalling was adopted by the appellant company, which would justify the jury in making the finding they did. If so, the law would seem to support liability upon that ground: *Choate* v. *Ontario Rolling Mill Co.*, 27 A.R. 155; *Ainslie Mining and R.W. Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420, at p. 426; *Fralick* v. *Grand Trunk R.W. Co.* (1910), 43 Can. S.C.R. 494, at p. 519.

While I fully appreciate the difficulty which may arise from unauthorised actions, I think that here there was a natural and proper act, based upon instructions reasonably direct, and sufficiently connected with the acts done to bring them within the ordinary and proper course of Darke's employment. In an operation that sets in motion a large amount of transmitted power, it is not unfair to insist upon a degree of care that might not be asked in a less dangerous situation.

The appeal should be dismissed.

Appeal dismissed with costs.

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REX v. ST. CLAIR.

Ontario Supreme Court, Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. February 26, 1913.

1. OBSCENITY (§ I—4)—OFFENCE—CIRCULATING OBSCENE PRINTED MATTER.

To have in possession and to circulate among the clergymen of a city, as well as four laymen, printed matter containing grossly disgusting details of an obscene character, describing a theatrical performance, is a violation of sec. 207 of the Criminal Code, as amended, relating to the possession and circulation of printed matter tending to corrupt public morals.

2. OBSCENITY (§ I—4)—OFFENCE—CIRCULATING OBSCENE PRINTED MATTER —DEFENCE—SUBSERVIENCE OF PUBLIC WELFARE.

No public good, sufficient to absolve a person from liability under sec. 207 of the Criminal Code, as amended, for circulating obscene printed matter tending to corrupt public morals, is shewn from the facts that the purpose of the circulation among the clergymen of a city of printed matter containing grossly disgusting details of an obscene character, describing a theatrical performance, was to arouse public sentiment leading to the suppression of performances of such character.

3. OBSCENITY (§ I—4)—OFFENCE—CIRCULATING OBSCENE PRINTED MATTER —SUBSERVIENCE OF PUBLIC WELFARE—EXCESS IN STATEMENT.

Even if the circulation among the clergymen of a city of printed matter containing grossly disgusting details of an obscene character, describing a theatrical performance, was to serve the public good by arousing public sentiment leading to the suppression of performances of such character, the person who circulates it will be liable to prosecution under the Criminal Code for any excess in the publication beyond what the public welfare demanded.

4. EVIDENCE (§ II C—122)—CRIMINAL OFFENCE — CIRCULATING OBSCENE PRINTED MATTER—ONUS TO SHEW SUBSERVIENCE OF PUBLIC WELFARE.

The onus of shewing that the circulation of a grossly disgusting description of an obscene nature, describing a theatrical performance, was for the public welfare, rests on the person circulating it.

Statement

The defendant was charged in the County Court Judge's Criminal Court for the County of York, before Denton, Jun.Co. C.J., for that he, the defendant, "knowingly and without lawful justification or excuse, did sell, distribute, and circulate," and "did have in his possession for sale, distribution, or circulation, certain obscene circulars, tending to corrupt morals," contrary to sec. 207 of the Criminal Code, as amended by 8 & 9 Edw. VII. ch. 9.

The Judge, after hearing the evidence and declining to receive some of that tendered on behalf of the defendant, found the defendant "guilty;" and, at the defendant's request, stated a case for the opinion of the Court of Appeal on the following questions:—

1. Was the bulletin in question obscene printed matter tending to corrupt morals, within the meaning of sec. 207, sub-sec.

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1 (*a*), of the Code, having regard to the form in which it was proved to have been circulated by the accused?

2. Was there evidence upon which I could reasonably find, as I did find, that the public good was not served by the printing and circulating of the bulletin in question, assuming that the occasion of the printing and circulating were such as might be for the public good?

3. Was there evidence upon which I could reasonably find, as I did find, that, assuming that the public good was served by the printing and circulating of the bulletin in question, there was excess beyond what the public good required in the manner, extent, or circumstances in, to, or under which the printing and circulating was done?

4. Was the evidence tendered by the accused and rejected by me improperly rejected?

5. If question 4 is answered in the affirmative, was any substantial wrong or miscarriage of justice occasioned at the trial by such rejection?

6. Should the conviction stand?

Statement

W. E. Raney, K.C., for the defendant:—There was no offence under sec. 207 of the Criminal Code, as amended by 8 & 9 Edw. VII. ch. 9, in one clergyman informing another clergyman of these conditions. The bulletin did not tend to corrupt public morals: *The Queen* v. *Hicklin* (1868), L.R. 3 Q.B. 360; *Rex* v. *Beaver* (1905), 9 O.L.R. 418. The statute law of England has no reference to circulating such a document as this. The matter is governed by the common law: Broom's Common Law, 10th ed. (Odgers), p. 219. In fine, the publication was justifiable; and, at all events, it should be excused by reason of the publication having served the public good, without being in excess of what the public good required.

Argument

J. R. Cartwright, K.C., for the Crown:—There can be no doubt about the obscenity of the bulletin, nor its publication. There has been no justification proved. It has been rightly found that the public good was not served by the publication: Stephen's Digest of the Criminal Law, 6th ed., pp. 133, 134. Excess is a question of fact, and has been determined: Archbold's Criminal Pleading, 24th ed., pp. 451, 1314.

Raney, in reply.

February 26, 1913. MEREDITH, J.A.:—I have no manner of doubt that the defendant was rightly convicted.

Meredith, J.A.

It is admitted that he prepared, had printed, and had in his possession for publication, a thousand copies of the "Special Bulletin" in question, which, it is also admitted, contains disgusting details of an obscene character—described in the "bul-

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letin" itself as a "revolting report" and as "unprintable." That these facts, *primâ facie*, constitute the grave crime of which the man has been convicted, is obvious, and, indeed, is also admitted.

But it was urged that the publication was (1) not without lawful justification; and also that it was (2) excused by reason of the publication having served the public good, without being in excess of that which the public good required.

The motive of the man is quite immaterial on the question of guilt or innocence; though, of course, of much moment on the question of the penalty to be paid, if guilty.

Neither a good nor a bad motive can alter the character of the act, in such a case as this. If unlawful, a good motive will not make it lawful, nor, if lawful, will a bad motive make it unlawful; good motive and good character may make some things more, rather than less, harmful—give them weight when inherently they have less or none.

So, too, the truth or falsity of the publication cannot change the character of the words used; it can neither turn decent words into indecent words, nor foul into fair.

Of lawful justification there is no reasonable pretence. The Criminal Code, which defines the crime of which the defendant is convicted, deals with lawful justification expressly in many instances, such as the lawful justification for the acts of those who carry into execution the judgments of the Courts, or execute lawful warrants, reasonable correction of children by parent, person *in loco parentis*, schoolmaster, or master, and so forth: see the Criminal Code, secs. 16 to 68; so, too, or by analogy, any one whose lawful duty requires him to do that which otherwise would constitute the crime in question, is not guilty because such duty is such a lawful justification. That the defences "lawful justification" and "public good" are two different things is obvious upon the face of the enactment: "lawful justification or excuse:" the Criminal Code, sec. 207; the one justifies, the other excuses, the act.

So that, unless it can be considered that the publication of the grossly obscene words in question served the public good, and were not excessive, the conviction must stand.

That the publication of such disgusting details is an invasion of decency tending to degrade morality seems to me very evident; and the more so because, if the defendant has the right to employ such methods, every one else—including those he attacked—has an equal right to do so; involving a deplorable state of affairs; against which the waste paper basket, or the fire, would not afford complete protection. No one has any sort of right to offend another's sense of decency and clean mind

by placing in his hands, or bringing into his home, such a publication.

We cannot, however, re-try the case here; we can consider only such questions of law as have been reserved by the trial Judge.

It is a question of law, or at least a question for the Court, as distinguished from a question for the jury, whether (1) the occasion of the publication was such as might be for the public good; and, if it might and were, then (2) whether there was evidence of excess—publication of obscenity beyond what the public good required; the other questions involved being questions for the jury, or for the Judge exercising the functions of a jury, only.

The onus of proving that the public good was served by the publication of this obscene pamphlet was upon the accused; he must excuse his obscene publication.

His one excuse is, that the interests of morality required the suppression of the play, or performance, the worst features of which were condensed and accentuated in the publication.

Is that really any excuse?

It is said that by that means public feeling might be aroused and such performance stopped. But why send the condensed prurient matter broadcast in a thousand pamphlets, with all the possibilities of leakage beyond those to whom they were to be sent, why indeed put such "unprintable" filth in enduring print at all; and, emphatically, why when the law provides simple and direct methods of accomplishing the desired end? Why not prosecute the offenders, and give them a chance to defend themselves? Why not apply to the proper persons to withdraw the license of the offending house? Why not confer with the Chief of Police, or, if need be, with the Police Commissioners, or even with higher officials—in all cases without contaminating pen or tongue with the condensed disgusting details? To say that that would be ineffectual, I cannot believe to be true. It would be neither fair nor truthful to say it without having first tried and failed; and that was not done. Indeed, as one of the Judges here pointed out, the pamphlet itself bears evidence upon its face to the contrary; no complaint of this nature is made in it; but, on the contrary, the only reference to any peace officer contained in it is of a distinctly complimentary character.

But, even if it could be that a thousand persons should be awakened to a knowledge of an obscene stage performance, surely there could be no need for disgusting details; the defendant's contention that the persons to whom the publication was to be sent could not be aroused to a sense of their duty without a descent to the obscene is very uncomplimentary to them,

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and is inconceivable to me; it needs much more than the defendant's contention to give me even a suspicion that such men cannot be aroused to a sense of duty as well, indeed much better, by clean and wholesome words.

An ounce of ordinary every-day legal methods, ready at the hand of every one willing to put them in force, is far more effectual than a ton of hysterics. If the performance were as bad as the learned trial Judge—behind the back of the persons implicated, fairness compels me to say—declares it to have been, an ounce of ordinary methods ought to have, and doubtless would have, resulted in a speedy Police Court trial and a speedy conviction and imprisonment of the offenders, the surest of cures for such offences, and the surest of preventives also; all done perhaps almost without letting the one hand know that which the other had accomplished.

On the other hand, the course of conduct pursued by the defendant has resulted in, only, much delay, much loss of time and energy, much loss of money in law costs, and his lawful and just conviction of a serious offence against morality; and those he aimed at—and others—have had much "advertising" at no cost; whilst the moral atmosphere of the locality has been to some extent permeated with this nauseous subject, long drawn out. It cannot be in the real interests of any one that a mountain should be made of a molehill of indecency, when that molehill could and should have been crushed under one foot.

The public good would be infinitely better served by calling attention to the thousand to one good places in the community, whilst vigorously, but unobtrusively, stamping out the evil, by lawful procedure.

In my opinion, therefore, this publication, in so far as it contained obscene matter, could not in any reasonable way be deemed to have served the public good; and, even if it could, there was abundant evidence to support the finding of the trial Judge that there was excessive obscenity.

Those who do not think, or do not know the circumstances, may, no doubt, deem it strange that the, said to be, well-meaning man should be convicted, and the ill-acting players escape; but whose fault is that? Plainly the defendant's. He might have had the wrong-doers upon the stage quickly arraigned and tried, and, if guilty, fittingly punished; but rather than do that he chose to condense and emphasise, and put in print to circulate, the very evils he might have restrained; he took the obviously mistaken course of committing a crime himself rather than the open and regular method of preventing, by punishment, the crime of the stage actors, if, after a fair trial, with every reasonable opportunity of defending themselves, they were found guilty.

Whatever his intention may have been, his act was a crime; and, being duly prosecuted and convicted, after being given every opportunity to defend himself, he must take the consequences; and let others take their punishment, but only when likewise prosecuted and convicted.

That the arm of the law is long and strong enough to deal effectually with immoral theatrical performances, the following provisions of the Criminal Code shew:—

"208. Every person who, being the lessee, agent or person in charge or manager of a theatre, presents or gives or allows to be presented or given therein any immoral, indecent or obscene play, opera, concert, acrobatic, variety, or vaudeville performance, or other entertainment or representation, is guilty of an offence punishable on indictment or on summary conviction, and liable, if convicted upon indictment, to one year's imprisonment with or without hard labour, or to a fine of five hundred dollars, or to both, and, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both.

"2. Every person who takes part or appears as an actor, performer, or assistant in any capacity, in any such immoral, indecent or obscene play, opera, concert performance, or other entertainment or representation, is guilty of an offence and liable, on summary conviction, to three months' imprisonment, or to a fine not exceeding twenty dollars, or to both.

"3. Every person who so takes part or appears in an indecent costume is guilty of an offence and liable, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both."

And the doors of the Courts are always wide open to every reasonable prosecution; a prosecution which may be instituted by any one having reasonable grounds for laying an information.

The first three and the sixth questions, reserved by the trial Judge, should be answered in the affirmative; the fourth in the negative; the fifth is, consequently, immaterial.

GARROW, J.A.:—I agree. Garrow, J.A.

MAGEE, J.A.:—Some of the contents of the bulletin in question being admittedly obscene, the answers to the questions reserved should, in my opinion, be as follows:— Magee, J.A.

1. Inasmuch as sec. 207 makes the distribution or circulation of an obscene book or circular an indictable offence only when it is done without justification or excuse, and as, in order to find the accused "guilty," the trial Judge must have found that it was done without justification or excuse, and as no ques-

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tion as to justification or excuse is submitted to this Court, this question can only be answered in the affirmative.

2. This question is one of fact and not of law. Under sec. 207, the onus is on the defendant to prove that his act was for the public good. The only question of law would be whether there was any evidence that it was for the public good, not whether there was evidence to the contrary.

3. Inasmuch as there was proof of the delivery of one of the printed circulars to one person, as to whom, in the absence of evidence of the defendant's reasons for delivery of such copy, the trial Judge could reasonably find that the delivery to him could not be expected to be for the public good, this question should, as to the circulating and distributing, be answered in the affirmative.

4 and 5. Evidence tendered on behalf of the defendant, referred to in the statement of the case, was properly rejected.

6. The conviction, in so far as relates to selling or having in possession for sale, should not stand, as there was no evidence to support it. In so far as relates to distribution, or circulation, or having in possession therefor, the question is a mixed one of law and fact. In so far as it is a question of law, in view of the answer to the third question, I would answer in the affirmative.

Hodgins, J.A.

HODGINS, J.A.:—The defendant, by his counsel at the trial, and again before us, admitted that the pamphlet printed and published by him was obscene.

At the trial his counsel said to His Honour Judge Denton: "I say to you frankly that this is necessarily an obscene, indecent, and immoral paper, because it describes an obscene, indecent, and immoral thing."

And later His Honour said: "Your contention is that this show was an obscene one."

Mr. Raney: "Certainly."

His Honour: "And your description of it is an act of indecency?"

Mr. Raney: "Yes."

His Honour: "So your defence rests upon this sub-section."

Mr. Raney: "Certainly. If we had not gone to this theatre and published this description for the benefit of people who could not get there and pander to their salacious instincts"—

His Honour: "This case turns on the question whether you are able to prove that the public good was served by the publication of these matters?"

Mr. Raney: "Certainly."

In his judgment his Honour Judge Denton says: "No one who reads this pamphlet can reasonably hold any other opinion as to its obscenity."

The sub-section referred to is found in the Criminal Code, sec. 207. The section provides, so far as is applicable to this case, for the imposition of a penalty on any person who "knowingly, without lawful justification or excuse . . . distributes or circulates, or causes to be distributed or circulated, or has in his possession for . . . distribution or circulation . . . any obscene book or other printed . . . matter or any . . . other object tending to corrupt morals." Then follows the sub-section on which reliance is placed, as follows: 2. "No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done, and that there was no excess in the acts alleged beyond what the public good required."

It is, by sub-sec. 3, made a question for the Court or Judge whether the occasion of such publishing (assuming that "publishing" includes distribution or circulation) is such as might be for the public good, and whether there is evidence of excess beyond what the public good required in the manner, extent, or circumstances in, to, or under which the publishing is made; but it is to be a question for the jury whether there is or is not such excess. By sub-sec. 4, evidence of motive is irrelevant.

[The learned Judge then set out the questions reserved by the learned County Court Judge for the Court of Appeal.]

In dealing with these questions, this Court is relieved by the admissions of counsel, and indeed by the judgment, from the necessity of considering whether the pamphlet in question was obscene. No defence was offered save that, by the acts alleged, the public good was served, and that there was no excess beyond what the public good required.

In order to raise this defence the Judge has first to rule that the occasion of the publishing, etc., is such as might be for the public good. The word "publish" is not used in sub-sec. (*a*). If "publishing" does not mean and include distribution and circulation (*cf.* sec. 318), then sub-secs. 3 and 4 do not apply to this case. But the procedure would be the same, in my opinion, without these sub-sections, in case the accused, under sec. 207, desired to take advantage of sub-sec. 2. The Judge did so rule in effect. It is necessary to consider what led to that ruling, in order to determine some of the questions submitted.

The acts proved were: (1) the drawing up of a report of the performance at the Star Theatre during the week of the 26th February, 1912; (2) reading it at a general meeting of the association or vigilance committee, at which there were present a considerable number of men and women; (3) incorporating it in the bulletin; (4) printing copies of the bulletin to the number of 1,000; (5) handing or sending copies—as found by the learned trial Judge—to four persons, none of whom were clergymen, and only one of whom was associated with St. Clair in his work.

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The learned County Court Judge, however, admitted evidence of St. Clair's motives or intention as to circulation, and, to a certain extent, the views of various clergymen and others as to whether the public good would have been served by the carrying out of this intention. The right to give this evidence is doubtful, in view of sec. 207, sub-sec. 2, and, if applicable, sub-sec. 4; but I propose to consider the case as if that evidence was properly received.

There was also tendered evidence dealing with the alleged supineness of the police authorities in dealing with prostitution, which the learned trial Judge rejected, and properly, in my opinion; while he admitted evidence as to complaints on other occasions of performances at the Star Theatre, both before and after the week of the performance which gave rise to the bulletin in question.

The objectionable performance took place on the 26th February, 1912, and performances continued during the week in a more or less objectionable form. The bulletin describing them is dated the 1st May, 1912, or two months later. I have studied the evidence with care to see what is proved to have occurred in the interval. This appears to be limited to a performance on the 19th March, 1912, some complaint made to the police department as to it, and later a letter written on the 12th April, 1912, by Staff Inspector Kennedy to St. Clair, thanking him for his assistance in matters connected with his department, but not referring to theatres.

In detail, what happened during the week of the 26th February, 1912, is as follows. St. Clair saw the performance on Monday the 26th February, 1912, on which date P. C. Thompson attended, and ordered some things to be cut out. Then Dr. Shearer, after receiving a report from St. Clair on Tuesday the 27th February, 1912, telephoned Staff Inspector Kennedy and asked him to visit the theatre that night. He did so and so did Dr. Shearer. The latter then telephoned to Staff Inspector Kennedy again and told him what he thought of the play. The Staff Inspector expressed himself as fearful that it might not be possible to bring it within the prohibition of the Criminal Code, and said that he had cut out a number of things that evidently had not been cut out by the member of his staff who had censored it the day before, i.e., P. C. Thompson.

On Wednesday the 28th February, 1912, the Rev. Donald McGregor went to see the performance, at Dr. Shearer's request. On the same day Staff Inspector Kennedy sent P. C. Bloodworth, who reported that nothing had been introduced which had been cut out.

On Thursday the 1st March, 1912—to quote from the circular—St. Clair went "and found the show fairly mild, twelve cuts in all having been made since the Monday performance."

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On Friday the 2nd March, 1912, Mr. Lynn, aged twenty-one —called for the defence—who had been going to the theatre for two years, saw the play; and he verified generally the statements in the circular; but as to one dance, and probably the worst described in the circular, he cannot say that it looked to him improper.

On Saturday night, Thomas Morrow, aged twenty-two, who had attended the Star performances fifteen times in fourteen months and had never seen a decent show there, went to the Star theatre. He verifies the statements in the circular. William Marlatte, a member of the vigilance committee, accompanied St. Clair to this same evening performance. He also verifies the statements in the circular; making, however, somewhat the same qualifications as Lynn and on the same point.

From the evidence given by those mentioned above, it would appear to me that St. Clair had sufficient evidence to justify a conviction if he had laid an information, or, at all events, had enough material to warrant him in laying the matter before the Police Commissioners. I do not find that either step was taken; and no evidence is given that any further communication was had by him with the police on the subject. Dr. Shearer, as well as Dr. Moore, however, made representations in reference to a performance which appeared on the 19th March, 1912. So that the police department cannot claim that they had not sufficient knowledge of the subsequent conditions; but there is nothing to connect the accused with this later complaint, unless it can be attributed to his activity on the subject a few weeks previously.

The evidence convinced the learned County Court Judge that the play was indecent, obscene, and immoral; and I think no other conclusion was possible.

Under the circumstances which I have given in detail above, I think that he was bound to rule in favour of the accused on the question as to whether an occasion had arisen on which the public good might be served. I think it is clear that such an occasion had arisen, either because the police censors had grown indifferent or lax, or because the activity shewn in having the play visited so often by those interested in the suppression of vice was being nullified by inaction. That inaction by the police department might have been grounded, as they say, in a belief that they would find it difficult to secure a conviction under the Criminal Code, or upon the fact that they regarded their own method of dealing with the matter—i.e., censoring—as being the best.

But, however, that may be, the situation or occasion was, I think, such that a private citizen was justified in taking some action other than waiting for the police. Such action might consist in laying a criminal information himself, and thus for-

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cing the theatre licensee or the performers into court; or appealing directly to the Police Commissioners; or, failing that, appealing to the public through the press or otherwise.

This brings me, then, to the consideration of the question whether "the public good was served by the acts alleged to have been done;" the onus of proof of which is laid on the accused. It will be observed that the question is strictly limited to the acts done, and that it is not made sufficient that the motive of the accused in doing them was prompted by a desire for the public good (sub-sec. 2 of sec. 207).

Counsel for the accused, assuming that his client was justified in using the occasion, thus puts his position: "I am going to shew that . . . the relationship of the police department to that theatre (the Star) was such as made it absolutely impossible for this defendant, if he were to do any thing along the lines of suppressing such conditions in the Star Theatre, to do otherwise than to appeal from the police department of Toronto to the public of Toronto." And again: "If they" (i.e., the police department) "had paid attention to the representations made to them by St. Clair weeks before this publication, there would have been no occasion for the publication, and we should have difficulty in making it good."

From this it appears that the police department, of which Staff Inspector Kennedy was the head, were accused of doing nothing to suppress conditions in the Star Theatre, and of ignoring representations made to them by St. Clair weeks before the bulletin was printed; and that, therefore, an appeal was to be made, and had to be made, directly to the public.

The acts done were, therefore, naturally referable to this line of defence.

No one can be convicted under the section in question unless "without lawful justification or excuse" he does the act for which the prosecution is brought. The duty of shewing the absence of this justification or excuse is on the Crown; while the onus of proving that the public good was served is thrown on the accused.

Now, as lawful justification or excuse must exist in fact, and not in mere belief—see *Lyons & Sons* v. *Wilkins*, [1896] 1 Ch. 811; *Read* v. *Friendly Society of Operative Stonemasons*, [1902] 2 K.B. 88, 732; *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 1 K.B. 118, [1903] 2 K.B. 545—so the public good must be actually served, and an intention so to serve it is not sufficient.

The same test, therefore, may be applied in determining whether a lawful justification or excuse existed in fact, or whether the public good was in fact served.

I have taken it for granted that something might and should

have been done, and have indicated three courses which were open. It is what was actually done that was objected to.

It is to be remembered that this bulletin is admittedly obscene. The bulletin is worse than that admission indicates. It contains obscenity that not only oversteps the law but goes beyond the performance it describes. Where the latter was suggestive, the bulletin is literal and descriptive, and there is no escape from its bald recital of vice. To justify putting it forth, it must surely be shewn that it was either impossible or absolutely impracticable to take any other reasonable steps. Such steps would naturally be those I have indicated. Is it to be taken for granted that, if tried, all these efforts would have failed? None of them were made; and yet it is urged that circumstances necessitated an appeal to the public only in the method adopted.

In this I cannot agree. Common sense as well as zeal must be used if public sentiment is to be attracted and held. What makes this the more apparent is the fact that the circumstances at that juncture, as it seems to me, were such as neither required nor justified the issuing of a literal "word picture" of a vicious play as the first shot in the campaign.

Apparently, during the very weeks succeeding the initial performance, the friendliest relations existed between St. Clair and Staff Inspector Kennedy, the head of the department which is now described as inefficient and inactive.

In the middle of April, 1912, about four weeks after the February performance, and about the same time before the printing of the bulletin, a letter had been received by the accused from Staff Inspector Kennedy thanking him for his assistance and co-operation in the work of the police department.

St. Clair's counsel, in the early part of the trial, said: "So far as Inspector Kennedy is concerned, I don't want him to understand that anything I am saying in this case has any personal application to him at all. He is carrying out the instructions of his superiors, and I believe him to be a very excellent and conscientious officer; and he is carrying on the system to the best of his ability, I believe."

The circular itself, dated the 1st May, 1912—and, therefore, speaking two months after the performance in question—says: "During the past nine months this organisation has gathered evidence and complained against a number of persons for maintaining houses of ill-fame. Of this number sixty-one have been closed. The vigilance association workers have had the active assistance of Staff Inspector Kennedy and his department, for which we are very thankful."

Dr. Shearer, in giving his evidence, answers thus:—

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"Q. You know Mr. Kennedy; how well? A. I know him very well. I have come in contact with him a great deal.

"Q. Your work and his also run in parallel lines? A. Yes.

"Q. And I suppose you don't always see eye to eye; but you give him credit for a desire to promote the general welfare? A. I have a very high estimate of Mr. Kennedy as a man and officer."

It is obvious that, if Staff Inspector Kennedy was an able and conscientious officer and deserving of the high opinion of Dr. Shearer, it would have been impossible for the Judge to have blamed either the department of which he was the head or the Police Commissioners, to whom he was bound to report, except upon the clearest evidence that he was not being obeyed in his own department, or that the Police Commissioners, with his reports before them, were overruling him and refusing to act in accordance with his ideas. No such evidence was given.

The foregoing leaves no doubt in my mind that no crisis had arisen on or before the 1st May, 1912, owing to a new and unfriendly attitude of the police department, but rather the reverse, and that nothing had so precipitated matters as to compel the accused to adopt the method he did, without first attempting to influence or arouse the Police Commission or to put in force such lawful means as would have awakened the public conscience, before he printed such a document as he did.

This is not the case of a sudden ebullition of profanity caused by some exasperating occurrence, but rather a deliberate decision to break the law in a striking and objectionable form.

These considerations, and the situation in which they leave the matter, coupled with the absence of any testimony from St. Clair himself, lend an appearance of unreality to the defence. If St. Clair feels as strongly as his counsel expressed himself, it would seem natural that he would, when asking the Court to justify his action, put the Court in possession of everything that had transpired to influence him to overstep the law.

No one can read the evidence in this case without being shocked by the presence of such so-called plays in our midst. They come and go, and do an immense amount of harm to those who see them. But there is, to my mind, a depth below that, namely, the reproduction either by picture or literature of not only what is said or done at these performances, but what is suggested by them.

I am unable, therefore, to differ with the learned County Court Judge in his finding that, while the occasion was one on which the public good might be served, the method adopted of printing and circulating this bulletin did not so serve it.

I should have been better pleased if evidence, readily available, had been offered, which could have cleared up effectually

the question whether the policy of the Police Commissioners was so deliberate and unalterable that no appeal would have caused them to act upon the evidence then collected. Such adherence to their opinion could only have been justified by a belief that the criminal law was so defective that a prosecution could not be successful, even in such a vile case as the one criticised in the bulletin. And, if that were so, it would at once have forced to the front the question of their ability or their willingness to cancel the license of a theatre where such performances were of common occurrence.

As this course was not adopted, but one so extremely objectionable was taken, it seems naturally to follow from the foregoing that the question of whether or not there was excess beyond what the public good required must be resolved against the accused. The opinion of the learned County Court Judge on that point is amply justified. The bulletin itself goes far beyond the law; and in its language and make-up, the use of capital letters to emphasise the obscene inferences from suggestive remarks, and its descriptions of the incidents of the night, it is most objectionable. I quote extracts from the evidence of some of the witnesses upon the question of the language in which parts of the bulletin are expressed.

Robert Rogers, editor of "Jack Canuck," was called by the Crown. The accused had specially sent him a circular. He says: "I am not in sympathy with the publication of the letter which was shewn to me. It shewed very bad judgment on his part." Mr. Raney: "You mean the bulletin?" A. "Yes."

The Rev. Mr. McGregor (in answer to a question containing a quotation from the bulletin): "I would not use that language." A. "No, as I saw it on Wednesday afternoon, I would not use that language."

The Rev. Dr. Shearer (as to a dance): Q. "And as mentioned in that circular?" A. "Well, I don't know that I would have used that phrase for describing it." Again (as to an incident described in the bulletin): Q. "You wouldn't use the description St. Clair used?" A. "No."

The Rev. J. Bennett Anderson: Q. "But why use language like this?" A. "I don't defend that language."

The Rev. Mr. Moore: Q. "Would you send that (the bulletin) to the lady school teachers of our city?" A. "Personally, I wouldn't write it that way." Again (in reference to a quotation from the bulletin): A. "Not in that language. If it fell to my lot to send it out, I would describe it without using that language."

I do not suggest that these extracts do more than indicate some difference between those who approve the circular altogether and those who, while sympathising, think it went too far.

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I have expressed my own personal opinion as to the contents of the bulletin; and it is some satisfaction to find that those clergymen who are identified with movements to stamp out vice in this city agree with me to the extent I have pointed out.

In regard to circulation, too, there was evidence that, while St. Clair said it was to be restricted to clergymen, or chiefly to clergymen, it had been sent to others; and the Judge so finds.

Dealing with the legal aspect of the questions submitted by the learned County Court Judge, they assume that it was proved that what the accused did, he did knowingly and without lawful justification or excuse, because nothing in the reserved case, as stated, raises the question of lawful justification or lawful excuse. But, as I have indicated, I think that the answers to questions 3 and 4 must cover the same ground, and that, while in law the onus is different, it would not be possible in fact to answer those questions in the affirmative without at the same time negativing lawful justification or excuse.

Blackburn, J., in *The Queen* v. *Hicklin* (1868), L.R. 3 Q.B. 360, at p. 375, says: "If he does an act which is illegal, it does not make it legal that he did it with some other object. That is not a legal excuse, unless the object was such as under the circumstances rendered the particular act lawful."

I should be disposed to think that the words "tending to corrupt morals" apply to everything which precedes them in subsec. (*a*). See *Rex* v. *Beaver*, 8 Can. Crim. Cas. 415, at p. 422, 9 O.L.R. 418, at p. 424; *Rex* v. *Britnell* (1912), 4 D.L.R. 56, 20 Can. Crim. Cas. 85, at p. 93, 26 O.L.R. 136, at p. 143. In *The King* v. *Macdougall* (1909), 15 Can. Crim. Cas. 466, at pp. 476, 480, they are so applied.

In the cases of *The Queen* v. *Hicklin*, L.R. 3 Q.B. 360 (see pp. 370, 375), and *Steele* v. *Brannan* (1872), L.R. 7 C.P. 261 (see pp. 266, 270), tending to corrupt morals is made the test of obscenity.

As to the second and third questions, it is interesting to note the opinions of the learned Judges who decided the *Hicklin* and *Steele* v. *Brannan* cases; as in them the idea was not to circulate obscene matter as such, but honestly and *bonâ fide* to expose the errors and practices of the Roman Catholic Church, in the matter of confession.

In the former, Cockburn, C.J., says, at p. 370: "I think that if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and of an honest character." And further, at p. 371: "I take it therefore, that, apart from the ulterior object which the publisher of this work had in view,

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the work itself is, in every sense of the term, an obscene publication, and that, consequently, as the law of England does not allow of any obscene publication, such publication is indictable. . . . The question then presents itself in this simple form: May you commit an offence against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is, emphatically, no." At p. 372 he asserts that "the old sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals."

In *Steele* v. *Brannan*, Bovill, C.J., says, at p. 267: "There is no doubt that all matters of importance to society may be made the subject of full and free discussion, but while the liberty of such discussion is preserved, it must not be allowed to run into obscenity and to be conducted in a manner which tends to the corruption of public morals." Keating, J., at p. 270, adds a few words most applicable to the present case: "It would be strange indeed that in order to prevent the pollution of the public morals the law should allow pollution to be circulated."

I do not find in either of these cases any limitation which would narrow down the offence to circulation among those outside any special class of persons. Cockburn, C.J., in the *Hicklin* case, states the test of obscenity to be whether its tendency is to corrupt those whose minds are open to such immoral influences and into whose hands a publication of the sort there dealt with *may* fall; and he suggests young people of either sex "or even persons of more advanced years;" and Blackburn, J., speaks of it falling into the hands of "school boys and every one else."

It is quite true that in both these cases there was public sale and circulation; but it is because the natural effect of such sale and circulation is that the publication might fall into the hands of more than those who bought it or those for whom it was primarily intended, "the unwary," that its effect is to corrupt *public* morals. Here, although there was no sale, there was circulation or distribution—and the results would be the same.

As to the fourth question, I have already indicated that no evidence dealing with the Star Theatre performances before or after the 26th February, 1912, or complaints thereabout, was rejected.

Coming to the formal questions submitted, I think the proper answers to make to them are the following:—

1. The bulletin in question was obscene printed matter, tending to corrupt morals, within the meaning of the Criminal Code, having regard to its form and the manner of its circulation.

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2. Yes.
3. Yes.
4. No.
5. Unnecessary to answer.
6. Yes, except as to sale, as to which no evidence was given, and as to which the conviction should be amended.

In concluding my judgment, I again express my regret that, owing to the method adopted, the avoidance of an obvious and, I think, primary procedure, and the course of the trial, the real question which it was intended to raise has not been tried, and that, in the end, the apparent result is only a conviction (made inevitable for the reasons I have endeavoured to state) against an individual for unlawful acts committed, presumably, by reason of his excessive zeal. He has really defeated himself.

What is urgently wanted is an amendment of the Criminal Code which will make it as impossible for a theatre to hold its license if immoral or indecent plays are given therein, as it is for a tavern to retain its right to sell liquor if its licensee breaks the law; and as easy to reach and punish the licensee of a theatre as the licensee of an hotel. The Criminal Code might also be amended so as to prohibit not merely an indecent play, but any play containing indecent acts; and by so altering the procedure and punishment as to shift the burden of proof to the accused—a burden which will be heavy enough to make the licensee think twice before he permits his theatre to be used for such degrading performances. The Police Commission should be given power to cancel or suspend any theatre license granted by them whenever, in their opinion, objectionable plays are being shewn. This power, if exercised, would so disorganise the season's business that the licensee would exercise great vigilance to avoid the consequences of being unable to fulfil his contracts.

Maclaren, J.A. (dissenting).

MACLAREN, J.A. (dissenting):—The accused was charged in the County Court Judge's Criminal Court at Toronto, before the Junior County Court Judge, for that he, "knowingly and without lawful justification or excuse, did sell, distribute, and circulate" and "did have in his possession for sale, distribution, or circulation, certain obscene circulars, tending to corrupt morals," contrary to sec. 207 of the Criminal Code, as amended by ch. 9 of the statutes of 1909.

The Judge, after hearing the evidence and declining to receive some of that tendered by the defence, found the accused guilty, and, at his request, stated a reserved case for the opinion of this Court on the following questions: (setting them out as above).

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The circular or bulletin in question is a four-page document, the last page being headed "Toronto Vigilance Association," describing its objects to be the prevention of white slavery, prosecution for the sale of indecent literature, the inspection of theatrical performances, and other lines of moral and social reform.

The first three pages are in the form of a letter signed on behalf of the association by the president (a city clergyman), the vice-president (a doctor), and the secretary. It is headed "(Private and Confidential)" and addressed "Reverend and Dear Sir," and says that it is necessary that the clergy of the city should know what is being presented on the stage of the Star Theatre, as appears from the report of the superintendent of the department of investigation of the association, the Rev. R. B. St. Clair (the accused), which was read at a general meeting of the association.

Then follows a statement regarding the proceedings at the Star Theatre on Monday afternoon the 26th February, 1912, and during that week; that the Police Staff Inspector, who was present on Tuesday, ordered some parts to be left out; that Mr. St. Clair attended again on Thursday afternoon, when it was not quite so bad; but, hearing that on Saturday nights the worst parts were usually restored, he went and found that the performance was even worse than on Monday afternoon.

Following this are two pages from the report giving details of the objectionable features of the Monday afternoon performance, extracts from the dialogues, descriptions of the indecent dances, etc., foul, filthy, and disgusting.

After this is a claim that the license should be revoked and the proprietor prosecuted, the circular closing with an appeal to clergymen to influence their leading laymen to demand of the Police Commissioners that this theatre be no longer licensed.

One of these bulletins having come into the hands of the police authorities, a search warrant was issued, and at the office of the association a large number of the bulletins found. The accused was not at the office; but, on his return, on learning that there was a warrant out for him, he went and gave himself up to the Staff Inspector. The Inspector said at the trial that the accused admitted to him that he had about 1,000 of the bulletins printed, chiefly for clergymen, and had sent them out only to clergymen; but afterwards said that he was not sure about the words "chiefly" or "only" or the exact words used.

It will be seen that the charge does not in terms comply with sec. 207, under which it is laid. The words "tending to corrupt morals" in the Code are not used or made applicable to a book or other printed or written matter, but only to a "picture, photograph, model, or other object tending to corrupt

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morals." The test prescribed for a book is that it be "obscene;" the phrase "tending to corrupt morals" is applicable only in so far as it may be involved or included in the word "obscene." This, however, might be regarded as surplusage.

The charge as to "selling" the obscene circular was based upon an information sworn to by the Police Staff Inspector. There was, however, no evidence offered as to any sale, and all the circumstances rebutted any intention of selling. The trial Judge, however, inadvertently convicted the accused of selling and of having the circulars for sale. If this had been true, it would have destroyed the whole defence that they were private and confidential, and intended only for clergymen and those interested in and in sympathy with the objects and work of the association.

A still more serious defect in the judgment is the failure to take any notice of what is a most important part of sub-sec. 1 of sec. 207, viz., that the accused can be found "guilty" only if the sale, distribution, etc., is made "without lawful justification or excuse." This is not referred to at all in the judgment, and in the reserved case it is only mentioned in the introduction where the charge is set out, and not referred to at all in the findings or questions.

Counsel for the accused admitted at the trial and before us that the bulletin was *primâ facie* obscene, inasmuch as it was a true description of an immoral, obscene, and indecent play at the Star Theatre; but undertook to justify or excuse it on account of the circumstances preceding and attending its printing and distribution.

Early in the trial he said: "If the police department had taken the steps it ought to have taken, and which I will shew by evidence they ought to have taken, if they had paid attention to the representations made to them by Mr. St. Clair, weeks before this publication, there would have been no occasion for the publication, and we should have had difficulty in making it good. We justify it, however, because the police department was not doing its duty."

This, however, we are precluded from taking into consideration in connection with the first question submitted to us. We must answer the question as it is asked by the trial Judge. Under the admissions of the accused and the evidence, it must be answered in the affirmative. If it had included the words of sub-sec. 1 as to its being done "without lawful justification or excuse," as is the ordinary and, in my opinion, the proper form of question, I would, under the evidence and the findings of the trial Judge himself, about to be referred to, in connection with the remaining questions, have answered that it was not done without excuse.

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The conflict of evidence at the trial was largely as to the character of the plays at the Star Theatre, especially during the week commencing the 26th February, 1912. The defence sought to prove that the performance was vile and was correctly described in the bulletin; the prosecution belittled the charges and sought to prove the opposite. The police had two censors for the Star Theatre: one of them, who had been censoring it for three years, attended three performances there during the week in question. When asked if he had ever seen any performances there which were indecent, he answered, "I don't think I have;" said that he had never heard any dialogue that had appeared to him to be indecent; and, when asked if he had ever seen an indecent dance, said "I can't say I ever did." He had cut out things that were "a little out of place." It was "just a matter of taste." He says that he cut out "a little thing here or there—improved it like." When asked if he had complained of it that week, he replied, "I didn't think I had very much kick about it personally." Asked if he thought the bulletin indecent, he said, "Nobody but a scoundrel would have written such a thing."

The other police censor for the Star Theatre had been censoring theatres for seventeen or eighteen years, and at the Star since it was built, about twelve years ago. He had ordered something to be cut out there perhaps twenty times, because he "thought they were not right and proper." When asked if they were indecent, he answered, "I would not class them as indecent." Asked if he went back afterwards to see that these things were cut out, he answered, "No;" and he did not know whether they were or not. As a rule, either he or the other censor went to the Monday afternoon performances at the Star. He understood the law as laid down in the Criminal Code to be that "the proprietor is asked to eliminate these objectionable features before you can make an arrest." Asked if the performances would deprave the youth of Toronto, he could not say that, but "we look upon it as one of our liveliest theatres." He attended on Tuesday evening the performance described in the bulletin. He ordered certain things to be cut out, but does not know whether they were, as he did not go back. He has seen boys at the Star. They go to the gallery; he went to the front on the ground-floor.

The following day, Mr. St. Clair took a typewritten copy of his notes of the Monday afternoon performance to the Rev. Dr. Shearer, secretary of the Moral Reform Council of Canada, and secretary of the Board of Social Service of the Presbyterian Church, who, after reading them, telephoned Staff Inspector Kennedy, head of the Police Morality department, telling him of the nature of the report and suggesting that the inspector go

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that evening himself to the Star. Dr. Shearer went there with a friend and found that the performance agreed with St. Clair's description in his report, and with what later appeared in the bulletin. He found it was "vilely suggestive, indecent, salacious, and demoralising." After the performance he called up the Inspector, who said he did not think it came within the Criminal Code. He also received other reports from St. Clair and others about the Star, which, as a rule, he forwarded to the police. He had known St. Clair, for a year and a half before this, as an officer of the vigilance committtee.

The Staff Inspector said that he had been head of the Police Morality Department for nearly three years, and had known St. Clair for over a year. St. Clair called on him once or twice, and they discussed matters connected with his work and that of the vigilance committee. St. Clair had sent him reports, some of them through Dr. Shearer. He read the letters and reports and put them in the waste-paper basket. He did not make any inquiries whether his representations were true. He went to the Star on Tuesday evening at Dr. Shearer's request, and the show, in his opinion, was not "immoral, indecent, or obscene," according to the Criminal Code; but he cut out some things as objectionable. He went to the Star about once a week.

The Chief of Police testified that he could not recall knowledge of any act of indecency on the stage of the Star Theatre. He was asked: "Are you saying that the reason there has been no prosecution of the Star Theatre by the police of Toronto is that there never has been an act of indecency committed on the stage of the Star Theatre to the knowledge of the Toronto police?" Answer: "Quite so." He was present when St. Clair, with a deputation from the vigilance association, attended a meeting of the Police Commissioners about the Star Theatre. He thought deputations waited on them more than once on the same matter.

The defence called half a dozen witnesses who attended the Star during the week in question, and who testified that the account and description in the bulletin were correct and not overdrawn.

On this issue, the learned trial Judge says that, without considering the evidence of the clergymen at all, "I find that the report of the play made by the accused, was, except in some comparatively unimportant particulars, a fair and accurate description of the objectionable things that he heard and saw, and that the inferences and meanings drawn by him were the inferences and meanings that any reasonable person attending that show would have drawn. That being so, it does not require any high standard of morality to denounce the show as indecent or immoral or obscene. It was all these combined. And it

follows from this that the so-called censorship of this play by the police was inefficient."

As to the distribution of the bulletins, the evidence shews that, in addition to those sent to some ministerial members of the association (the number of which does not appear), the accused gave out three copies: one to a brother of the Commissioner of the Salvation Army, who was a sympathiser with his work, and with whom he had discussed the subject; and the other two were left with an elderly man in charge of the office of the editor of a weekly paper; one of these under cover for the editor, who was also a sympathiser and had discussed the matter with him. The caretaker told St. Clair that he had been at the Star two years before, and that it was then a rough show. The trial Judge speaks of the accused having given out four copies to persons not clergymen. The fourth was the editor of a city daily, who received a copy through the mail, but did not know from whom. There is no evidence that it came from the accused. The only one of these that would be open to question is the caretaker. To give to him alone would not be to "distribute or circulate" (the words of the Act): mere publication is not an offence, as in libel where the giving of one copy would suffice.

Even as to the whole four copies, the answer to the second question should, in my opinion, be that there is no evidence on which the Judge could reasonably find that the public good was not served by the printing and circulation of the bulletin in question.

As to the third question, it cannot be said that there is evidence on which the Judge could reasonably find that there was excess as to the printing and circulating of the bulletin.

It is to be noted that the accused did not print the bulletin; and, moreover, printing is not an offence, nor is it an offence to "cause to be printed," as it is to "cause to be distributed or circulated."

So much for the facts; what is the law applicable to them? I think that the true rule is that laid down by Cockburn, C.J., in *The Queen* v. *Hicklin*, L.R. 3 Q.B. at p. 371, where he says: "The test of obscenity, is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." This test was approved and adopted in England in *Steele* v. *Brannan*, L.R. 7 C.P. 261, and in this Court in *Rex* v. *Beaver*, 9 O.L.R. 418. In the first two of these cases the books were sold indiscriminately, and in the last the sheet was scattered broadcast, and this was made the foundation of all the judgments. No case was cited to us, nor have I found any, where distribution to a select class

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of interested adults as here, not liable to be corrupted, was held to be an offence. All the remarks in the above cases apply to the facts of those cases, that is, to sale or general distribution; and should not be strained so as to be applied to this case, where there was no sale and no general distribution, actual or intended.

The trial Judge quotes the definition in the *Hicklin* case, but entirely overlooks the latter part of it. One cannot infer that the minds of the clergymen, or of the three or four elderly business men, were open to immoral influences; and they were the only persons into whose hands this bulletin was shewn to have actually fallen or was intended to or would be likely to fall.

Would any one accuse the person who handed a copy to the Police Commissioners of an attempt to corrupt their morals? I think it is to be presumed that the recipients in this case, sympathisers with the work of the accused, would be equally proof, and that the bulletin would not even "tend to corrupt," but would rather disgust them.

As pointed out by Osler, J.A., in the *Beaver* case, the section does not apply to language that was "merely coarse, vulgar, and indecent."

Sub-section 3 of sec. 207 is not made applicable to "having in possession," so that the question of the public good or excess with respect to them does not arise; and sub-sec. 2 could not apply, as they could not possibly affect the public in one way or another, so long as they remained in the possession of the accused. A point was sought to be made of the printing of 1,000 copies, but the president of the association testified that it had about 1,000 members. In any case this is quite immaterial.

As to the rejection of evidence by the trial Judge, I am of opinion that he was right in rejecting the questions as to matters not connected with the Star Theatre; but wrong in rejecting evidence as to the former complaints and proceedings against it.

An important point which affects the merits, and especially the last question, is, whether the accused in distributing the three copies acted "without lawful excuse." As I have said, this was wholly omitted from the first question and was not dealt with in any way in the judgment; but, in my opinion, it should be considered in answering the sixth question, as to whether the conviction should stand. The accused in the course of his duty having become aware of the character of the performance, and seeing that the police were not doing their duty, took prompt steps by advising the Rev. Dr. Shearer, the secretary of the Moral Reform Council of Canada, and reading to him his notes the next day. If he had sent these to the head of the Police Morality department, they would probably have followed his

other letters and reports into that official's waste-paper basket. The Chief of Police was asked this question: "If complaints had been made to you by Mr. St. Clair, and he had shewn you the typewritten report he had shewn Dr. Shearer, and your Staff Inspector, and your censor, Mr. Thompson, had given the evidence they have given in this case, you would, of course, have preferred their reports to that of Mr. St. Clair?" Answer: "I believe my own officers, most certainly."

A reading of the evidence of the two so-called censors is quite sufficient to shew their unfitness for their position, and it is not surprising that the trial Judge should find, as he did, that the facts were the very opposite of what they stated.

St. Clair and his co-workers went before the Police Commissioners on the subject of the Star Theatre, and there appeared to be no outcome from that. So that it is not surprising that, after waiting for weeks, and there being no prosecution (not even up to the trial in September following, according to the evidence of the Chief of Police), he came to the same conclusion as Dr. Shearer when he said: "If the law is not being enforced, then the only recourse is to appeal to public opinion, to rouse the public conscience. The public conscience cannot be reached, public opinion cannot be aroused, without giving the facts, and giving the facts in a very direct and concrete form."

In my opinion, it would be of little avail to sprinkle some rosewater on this cess-pool of filth, immorality, and obscenity.

But it was said that the motives of the accused in this matter were wholly irrelevant; and sub-sec. 4 of sec. 207 was quoted in support. This sub-section does not apply to the accused. It reads, "The motives of the manufacturer, seller, exposer, publisher or exhibitor shall in all cases be irrelevant." Now, the accused does not belong to any of the classes named. Even the word "publisher" in this sub-section has reference only, as appears by sub-sec. 1 (c), to one who "publishes an advertisement of . . . any medicine, drug," etc.

I would answer the questions submitted to us as follows: 1: Yes (with the qualification above stated); 2: No; 3: No; 4: Yes (in part); 5: Yes; 6: No.

Conviction affirmed; MACLAREN, J.A., *dissenting.*

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MERRITT v. CITY OF TORONTO.

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. May 6, 1913.

1. WATERS (§ II A—66)—RIGHT OF RIPARIAN OWNER TO ACCESS TO NAVIGABLE WATER—MARSHY GROUND INTERVENING.

One whose land is separated from navigable water by marshy ground is not a riparian proprietor in respect of the navigable water.

[*Merritt* v. *City of Toronto*, 6 D.L.R. 152, 27 O.L.R. 1, affirmed.]

Statement

APPEAL from a decision of the Court of Appeal for Ontario, *Merritt* v. *Toronto*, 6 D.L.R. 152, 27 O.L.R. 1, affirming the judgment of a Divisional Court, 23 O.L.R. 365, which maintained the judgment at the trial dismissing the plaintiff's action.

The plaintiff's action was brought to compel the city to remove a bank of earth from Ashbridge's Bay which had been thrown up in excavating a channel and which, it was claimed, impeded or destroyed his right, as riparian owner, of free access to the waters of the bay. By the judgments of all the Courts below the action was dismissed.

Argument

Mowat, K.C., for the appellant:—Adjoining appellant's land is a water lot which is navigable even if it is shallow at times: see *Stover* v. *Lavoia*, 8 O.W.R. 398; *Gardiner* v. *Chapman*, 6 O.R. 272; *Tanguay* v. *Canadian Electric Light Co.*, 40 Can. S.C. R. 1.

Geary, K.C., and *Colquhoun*, for the respondent:—*Niles* v. *Cedar Point Club*, 175 U.S.R. 300, is precisely this case. See also *The King* v. *Montague*, 4 B. & C. 598; *Baldwin* v. *Erie Shooting Club*, 127 Mich. 659.

Davies, J.

DAVIES, J.:—The plaintiff sues in this action, claiming to be a riparian proprietor on the shore of Ashbridge's Bay adjoining or forming part of the harbour of Toronto. His complaint is that his riparian rights of free and uninterrupted access to the waters of the harbour and bay to and from his lands, have been interrupted by the defendant, who dug a channel running east and west along the north side of the bay, and in and across lots owned by them lying to the south of plaintiff's lots, and threw up the excavation from the cut made by them upon its north side, thus impeding, if not destroying, the rights of access of plaintiff to the navigable waters of the bay.

The land lying between plaintiff's lot in which he claims to have riparian rights, is wet, marshy, boggy land, and to maintain his claim for an injunction to prevent interference with his alleged riparian rights the onus lay upon the plaintiff of proving that this lot owned by him was really, as a substantial fact, bounded or covered in part by the waters of the bay, affording

him navigable access to the deeper waters outside and beyond his land; in other words, that he was what the law calls a riparian proprietor or owner of lands with rights of access, which had been impaired or destroyed by defendant's works.

There was much evidence, some of it conflicting, and some equivocal and indefinite, given at the trial as to the real nature and character of this marshy land, and in the result the trial Judge dismissed the action simply without giving any reasons. It is difficult to see how he could have dismissed the action unless he found against the plaintiff on the crucial point of the case, and on an appeal to the Divisional Court against this judgment the learned Chancellor states plainly that "this action was dismissed by my brother Magee on the ground that the plaintiff's property was land and not water, and that he was not in any sense a riparian proprietor." I assume he must, before making that statement, have consulted with the trial Judge. The Judges of the Divisional Court unanimously concurred with the finding of fact of the trial Judge, holding that the plaintiff was not a "riparian proprietor" and did not possess any of his claimed riparian rights, and that the law governing his case was that pertaining to the ownership of marsh land only.

The Court of Appeal for Ontario has made the same findings of fact, Maclaren, and Clute, JJ., dissenting.

After examining such parts of the evidence as were called to our attention by Mr. Mowat, I am not able to conclude that the findings of fact of the three Courts were wrong. On the contrary, I have reached the same conclusion as those Courts did, which, as I understand it was, that plaintiff's rights by virtue of his ownership of the land in question were not those of riparian owner at all, but were those of the owner of marsh land simply.

It was claimed that this marsh or boggy land was simply a floating mass of vegetable matter more or less movable and with an appreciable depth of water below it.

I think the evidence called to our attention by Mr. Geary as to the character of the marsh and soil in front of this land of plaintiff's, as shewn from the actual cutting of the ditch made by the defendant and the excavations taken from it, sufficiently dispose of that claim as applicable at any rate to the lands lying between plaintiff's claimed *ripa* and the deep water of the bay. The "floating marsh" evidence was not applicable to the locality in front of plaintiff's land.

Not entertaining any reasonable doubt on the crucial facts relating to the character of this marsh and bog land in front of and bordering upon plaintiff's lot, and not finding him to be in any proper sense of the term a riparian proprietor, I think the appeal should be dismissed with costs.

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IDINGTON, J.:—Such remote and slim possibilities of riparian ownership relative to the navigable waters of Lake Ontario as appellant's predecessor in title may have had long ago, seem to have been effectually extinguished by the forces of nature and of social, commercial and political development.

If ever there was a time when the waters of Lake Ontario reached in such depth and volume the appellant's little plot as to make the owner thereof a riparian proprietor entitled to invoke the law he relies upon herein, it must have been before the Don and other earth carriers had deposited their loads in that vicinity to such an extent as to produce the growth of hay to be found in such close proximity to said plot as to prevent easy navigable approach thereto.

Even if the hay may be of a coarse variety and grown upon a floating vegetable mass having no contact with the soil beneath, as is argued, and as does happen with aquatic plants in tropical climes, the barrier to commercial utility developing out of that sort of riparian ownership is rather formidable.

And it seems as if the social and political forces had got to work and constructed a break-water and other things calculated to help the Don to fill up and make of this land-locked bay, solid land in spots, soft land in other spots, with tufts of reed or grass thereon, and that floating vegetable mass peculiar to the climate, in other spots, and all interspersed with water holes, here and there. Indeed, long before these later developments had been dreamed of there were dreamers in Toronto who got, in A.D. 1847, a license of occupation from the Crown to the good city to have, hold and occupy a large tract of land and marsh and water which, if we have regard to the illuminating effect of a statute of a later date defining the harbour, must have comprised the marsh whereon the works now complained of have been executed.

That license reserved the "free access to the beach for all vessels, boats and persons." It does not appear that the hay lands in close proximity to the appellant's land constituted a beach or part of that beach.

Then in 1855, the legislature by way of confirming, as the title of the Act indicates, the city in the possession of the peninsula and marsh held by it under said license, passed an Act enabling a grant to be made by the governor of the province in council of said peninsula or marsh or any part thereof subject to such conditions or restrictions as he might be advised to impose.

That Act recites large sums of money had been expended by the city in laying out lots, etc., in said area. The result seems to me to be that the province had rights therein which the British North America Act would have enabled it to execute in accordance with the intent of such legislation which might, but

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for that, have been of more doubtful effect, having regard to the powers assigned by said British North America Act to the Dominion over harbours. Be that as it may the province did make a grant in 1880 to the city and a confirmatory grant or one having that effect was got from the Dominion in 1903. These several transactions seem to raise a rather formidable barrier in appellant's way when he cannot shew himself possessed of a clearer right as a riparian proprietor than the evidence discloses. The mandatory order and the restraining injunction he seeks herein are remedies requiring some clearer basis for a Court to act upon than is made apparent in face of the foregoing history. And as to actual damages he seems to have suffered none that I am able, from reading his evidence to appreciate. It is not a case of trespass in which the bare invasion of his right might entitle him to nominal damages. Again the work complained of seems to have been done pursuant to some authority directing it for sanitary reasons, and if he had, through interference with his rights in said lands suffered by reason of the injurious affection thereof his remedy would probably be by way of arbitration.

This latter ground has not been so relied upon, though pleaded, as to make clear we should rest thereon alone. It seems unnecessary to dwell thereon, for, upon the findings of fact, concurred in by so many Courts, there seems to be no interference with any riparian rights such as appellant imagines he has had.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I think the weight of evidence supports the conclusion reached by the Court of Appeal and the Divisional Court that the *locus in quo* is land, not water. There is, consequently, no foundation for the claim put forward by the appellant that he is entitled to riparian rights.

Anglin, J.

ANGLIN, J.:—The judgments of the Divisional Court and of the Court of Appeal upholding the conclusion of the trial Judge, who dismissed this action without assigning reasons, rest upon a finding of fact that the plaintiff's lot on its southern side abuts not upon water, but upon land. This finding is supported not merely by evidence sufficient to sustain it, but I rather think by the weight of the evidence in the record. It is certainly quite impossible to say that it is so clearly erroneous that it should be disturbed in this Court. It follows that the plaintiff has not the riparian rights upon which his action is founded and that his appeal fails and must be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—I entirely concur in the opinion of Mr. Justice Davies.

Appeal dismissed.

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COLONIAL DEVELOPMENT CO. v. BEECH.

British Columbia Supreme Court. Trial before Clement, J. May 28, 1913.

1. ASSIGNMENTS FOR CREDITORS (§ III A—11)—WHO MAY BE ASSIGNEE — COMPANY AS SUCH.

A company cannot act as an assignee under the Creditors Trust Deed Act, R.S.B.C. 1911, ch. 13.

[*Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 857, referred to.]

Statement

TRIAL of an action brought in the name of the plaintiff company as assignee for creditors of one Beech under a deed of assignment purporting to be under the Creditors Trust Deed Act, R.S.B.C. 1911, ch. 13. The action was so brought for the benefit of the False Creek Lumber Co. which held a judgment against the assignor and had obtained authority to enter this action in the name of the assignee for creditors to set aside certain alleged preferential transfers of property made by the debtor to certain other creditors whose interests were now represented by the Crane Company, defendant.

The action was dismissed.

J. A. Findlay and *C. J. White*, for plaintiff company.

W. A. Macdonald, K.C., and *C. S. Arnold*, for the Crane Company.

No one appeared for the debtor.

Clement, J.

CLEMENT, J. :—Were this transaction impeached in a properly constituted action I do not think it could stand; but I feel forced, reluctantly, to give effect to Mr. W. A. Macdonald's contention that a company cannot be an assignee for the benefit of creditors under our Creditors Trust Deed Act. It was not suggested that the plaintiff company has any status to attack the transaction in question here except as an assignee under the Act and, as I have said, I have come to the conclusion that a company is not within the intent of the Act as a possible assignee. As the point was not taken in the pleadings and as it might have been taken and disposed of at an early stage as a point of law, I dismiss the action without costs.

No authorities were cited upon the question upon which this judgment turns. Mr. Macdonald based his contention upon the wording of the Creditors Trust Deed Act itself, R.S.B.C., ch. 13, and particularly upon secs. 42, 29 and 64:—

42. No person other than a permanent and *bona fide* resident of this Province shall be qualified or have power to act as an assignee under this Act, nor shall an assignee under this Act have power to appoint as deputy or delegate his duties as assignee to any person who is not a permanent and *bona fide* resident of this Province, and no charge shall be made or recoverable against the assignor, or his estate for any services or expenses of any assignee, deputy or delegate of any assignee, who is not a permanent and *bona fide* resident of this Province.

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29. In case any such assignee refuses or neglects to deliver over to such new assignee so appointed by the creditor, or a Judge, any of the property of the estate, or refuses or neglects to execute any document required for the purpose of vesting such property in such new assignee, a Judge of the Supreme Court may, on the application of such new assignee, or of any creditor of such estate for one hundred dollars or more make an order calling upon such assignee to deliver over such property, or to execute such document or documents and to pay the costs of such application, and failure to obey such order shall be punished by committal as for contempt of Court.

64. Every assignee shall be subject to the summary jurisdiction of the Supreme or County Court in the same manner and to the same extent as the ordinary officers of the Court are subject to its jurisdiction, and the Court may compel him to perform his duties, or may restrain him from taking or continuing proceedings which are not in the interest of the estate, or of the creditors generally, and obedience by the assignee to any order of the Court may be enforced by the Court under the penalty of imprisonment as for contempt of Court, and by removal from his office.

I have read the Act and these particular sections in the light of the judgment of the House of Lords in *Pharmaceutical Society* v. *London & Provincial Supply Association*, 5 App. Cas. 857, 49 L.J.Q.B. 736, and am of opinion that a human being and not a fictional person such as a company was in the mind of the legislature in the enactment in question. Sec. 42, standing alone, would not in my opinion exclude a company, which may well be a permanent and *bona fide* resident of the province: see *Wilmot* v. *London Road Car Co.*, [1910] 2 Ch. 525, 80 L.J. Ch. 1; *Chuter* v. *Freeth & Pocock*, [1911] 2 K.B. 832, 80 L.J.K.B. 1322, and cases cited. In fact, it may be doubted if a provincial company, acting within its powers, can have a true residence outside the province: see the judgment of Mr. Justice Duff in *C.P.R.* v. *Ottawa Fire Ins. Co.* (1907), 39 Can. S.C.R. 405 at 471.

But secs. 29 and 64 cannot apply to a company which cannot suffer imprisonment; and that is the only sanction provided to insure obedience by an assignee to the orders of the Court respecting the important and comprehensive matters referred to in those sections, particularly sec. 64. Reading the Act apart from those sections, the strong impression made upon my mind is that a human assignee was contemplated throughout but possibly there is not enough "contrary intention" shewn to satisfy the clause in the Interpretation Act under which "person" is to be read as including a corporation unless from the context a contrary intent appears. But in my opinion secs. 29 and 64 do shew such a clear contrary intent that I am forced to conclude that it was not the legislature's intention that a company should act as an assignee under the Act in question.

Action dismissed.

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Re LAND REGISTRY ACT and CANADA REALTY SYNDICATE, Ltd.

British Columbia Supreme Court, Morrison, J., in Chambers. May 30, 1913.

1. LAND TITLES (§ IV—60)—PLANS — ALTERATION—SUB-DIVISION OF LAND INTO CITY LOTS.

The Plans Cancellation Act, R.S.B.C. 1911, ch. 179, does not apply to require a judge's order under that Act where the larger blocks of land, under a prior registered plan, are merely to be sub-divided by another plan.

Statement

PETITION for an order directing the Registrar-General of Titles to record a certain sub-division plan.

The petition was granted.

Neil Mackay, for the application.

H. C. Hanington, contra.

Morrison, J.

MORRISON, J. :—The petitioners, the Canada Realty Syndicate, are the holders of an agreement for sale, dated January 4, 1913, over lands known as part lots 2, 3 and 4 of sec. 4, Victoria District (now City), map 263, made between one Edward Welch of Vancouver and the petitioners. The petitioner, the Royal Financial Corporation, is the holder of an assignment of a half interest in the said agreement under an assignment dated January 14, 1913.

The said Welch is the registered owner of the said lands subject to certain rights of way. The petitioners have caused those lands to be sub-divided into lots, and upon application to the Registrar-General of Titles for the deposit of a plan setting forth such sub-division he refused to so deposit the said plan, giving his reason in a letter addressed to the petitioner's solicitors, a copy of which is as follows:—

Land Registry Office.

Victoria, B.C., 5th May, 1913.

Messrs Mackay & McDiarmid,
Barristers, &c., Victoria, B.C.

Dear Sirs,

I beg to acknowledge the receipt of your application of the 28th ulto. for the deposit of a plan of subdivision of part of Lots 2, 3, and 4 of section 4, Victoria District (now City) map 263, and have to say that while the subdivision conforms with section 90 (1) of the Land Registry Act and is otherwise in order, I have to refuse to deposit said plan on account of a ruling of the Supreme Court, but previous to the repeal of section 99 of said Act; and it being also held that such a re-subdivision is a variation of the former plan, and that application must be made under the Plans Cancellation Act before the plan can be received on deposit, and on instruction of the Honourable the Attorney General, to decline to receive any re-subdivision plans which subdivide any one lot or block shewn on a deposited plan.

Yours truly,

S. Y. Wootton,
Registrar-General of Titles.

As for the first ground for refusal, I have failed to find that there is any reported ruling such as is referred to by the registrar. As to the second ground, that the Honourable the Attorney-General has given instructions to the Registrar-General to decline to receive such sub-division plan for deposit. I am presuming that the learned Attorney-General based those instructions upon the alleged decisions above referred to.

I am of opinion that on neither of these grounds should the Registrar-General have refused to receive the plans in question.

I think the Plans Cancellation Act is not applicable to the present case, and since the repeal of sec. 99 of the Land Registry Act, under which, I think, all the rulings, if any, were made, the only method to be followed is the one adopted by the petitioners.

The prayer of the petition is therefore granted.

Petition granted.

WILLOUGHBY v. WAINWRIGHT.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 9, 1913.

1. LIMITATION OF ACTIONS (§ II A—40)—WHEN STATUTE RUNS—LIEN NOTE.

The statute of limitations does not begin to run on a lien note until the day following the due date stated therein, as an action could not be brought until the expiry of the due date.

[*Kennedy* v. *Thomas*, [1894] 2 Q.B. 759, followed; *Sinclair* v. *Robson*, 16 U.C.Q.B. 211, not followed; *Keddy* v. *Morden*, 15 Man. L.R. 629, specially considered.]

Statement

APPEAL by plaintiff from the judgment of the County Court Judge in an action to recover the amount due on a lien note.

The appeal was allowed.

W. S. Morrisey, for plaintiff.

S. H. McKay, for defendant.

Richards, J.A.

RICHARDS, J.A.:—This action is an instrument of the kind usually called lien notes, by which the defendant promised to pay to the plaintiff, "on or before the first day of November, 1904," sixty dollars at a certain bank, with certain interest. Apparently nothing was ever paid.

On November 1, 1910, the plaintiff brought his action in the County Court of Neepawa. The defendant pleaded the Statute of Limitations. The learned trial Judge gave judgment for the defendant, following an expression used, I regret to say, by myself in *Keddy* v. *Morden*, 15 Man. L.R. 629, at 632, where I stated, with regard to an instrument similar to the one now in question, and which became due on December 1, 1892, that the

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remedy on it would be barred by the Statute of Limitations on the expiry of the last day of November, 1898.

I think that in so stating I must have had in mind the decision in *Sinclair* v. *Robson*, 16 U.C.Q.B. 211, where it was held that in the case of a dishonoured promissory note payable at a bank the holder was entitled to sue out process on the due date after close of the business hours of the bank where the note was payable.

The plaintiff's counsel in the present case admitted on the argument that under *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495, the instrument now sued on was not a promissory note, so that the defendant was not, when it came due, entitled to days of grace. That question is, therefore, not before us. He, however, disputed the correctness of the decision in *Sinclair* v. *Robson*, 16 U.C.Q.B. 211, and of the above dictum in *Keddy* v. *Morden*, 15 Man. L.R. 629, and argued that the law was settled by *Kennedy* v. *Thomas*, [1894] 2 Q.B. 759. In *Kennedy* v. *Thomas*, *supra*, a bill of exchange payable at a bank was presented there for payment on the third day of grace at about 2.30 p.m. Payment was refused, and at a later hour on the same day the plaintiff issued his writ. It was held by the Court of Appeal in England (Lindley, Lopes, and Davey, L.JJ.) that the plaintiff had no right to bring his action until after the whole of the third day of grace had expired.

In considering whether the acceptor was entitled to the whole period up to the end of the third day of grace in which to pay the bill, Lindley, L.J., says:—

> Primâ facie, I should have thought it plain that according to ordinary principles of law he was so entitled.

Lopes, L.J., says, on the same point:—

> If he has not the whole of the third day during which to meet the bill I cannot see how he gets three days of grace.

Then he quotes from Byles on Bills, 15 ed., 297 (referring to the third day of grace):—

> The acceptor has the whole of that day within which to make payment; and though he should, in the course of that day, refuse payment, which refusal entitles the holder to give notice of dishonour, yet if he subsequently on the same day makes payment the payment is good, and the notice of dishonour becomes of no avail.

Mr. Justice Lopes adds:—

> In my opinion the true view is that the acceptor is entitled to the full benefit of the three days of grace.

Davey, L.J., says that, in his opinion,

> No right of action accrues to the holder of the bill until the expiration of the third day of grace.

In *Sinclair* v. *Robson*, 16 U.C.Q.B. 211, the learned Judges thought that the fact that, by the then law of Upper Canada,

all protests of promissory notes for non-payment might be made at any time after three o'clock in the afternoon of the day of dishonour, entitled the holders to brlng action at once after that hour.

It seems to me that, in so viewing the matter, they confused the right to give notice of dishonour with the right to bring action. The former was a special statutory privilege given for the convenience of banks and other holders of negotiable paper. But it surely went no further than, on its face, it purported to go. To add to it a right to anticipate the right of action by one day is going further than I think could have been intended.

In *Sinclair* v. *Robson*, 16 U.C.Q.B. 211, Robinson, C.J., distinguishes *Wells* v. *Giles*, 2 Gale 209, which is the case followed in *Kennedy* v. *Thomas*, [1894] 2 Q.B. 759, by pointing out that it was an action on an inland bill, which

> Could not be protested for non-payment till after the three days' grace . . . and therefore could not be put in suit before because according to the statute the party could not be in default before.

With every deference, I think the learned Chief Justice in stating the above was confusing the right of action with remedies merely meant to hold the liability of parties other than the acceptor.

Sinclair v. *Robson*, *supra*, was considered in *Edgar* v. *Magee*, 1 O.R. 287, where the Judges differed as to its being an authority. But even if it were such, in so far as it turned on whether the protesting a note on the due date did or did not justify its holder in bringing his action on that date, we could not hold it as an authority here, as the instrument sued on is admitted not to be a promissory note, and is therefore not liable to protest.

It is true that in *Sinclair* v. *Robson*, 16 U.C.Q.B. 211, the learned Chief Justice held that even without the statute as to protests the plaintiff was entitled to bring his action on the third day of grace after the close of the business hours of the bank where the note was payable. He says as to that:—

> The defendant engaged to pay it at that place on that day, and if the bank hours were suffered to elapse without his paying it he certainly was in default and was, therefore, as I think, liable to an action for his default.

I do not gather from the report that the other Judges concurred in that view, and I cannot bring myself to think that the fact that the bank hours closed at three p.m. affected the matter any more than the fact that a merchant's business closed daily at that hour would affect the right to sue on a note made payable at his place of business.

With the utmost respect, the decision in *Kennedy* v. *Thomas*, [1894] 2 Q.B. 759, seems to me to be more logical and reasonable than that in *Sinclair* v. *Robson*, and I think this Court should follow it. If I am right in that, then the defendant had all of 1st November, 1904, within which to pay, and the plaintiff had

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no power to sue till the 2nd. If that is correct, then the six years began to run on the last-named date, and would not expire till the end of the day on which the action was brought, November 1, 1910.

I regret the dictum in *Keddy* v. *Morden*, 15 Man. L.R. 632, which the learned trial Judge followed. The action there was not begun till December 3, 1898, so that it was immaterial whether the six years did or did not include the 1st of December, and the dictum was purely *obiter*.

I would allow the appeal with costs, and set aside the judgment for the defendant in the Court below, and enter judgment there for the plaintiff for $88.36 with costs.

Haggart, J.A.

HAGGART, J.A.:—This is an action upon a lien note of which the following is a copy:—

Neepawa, Manitoba, April 22, 1904.

No.

$60.00

On or before the First day of November, 1904, for value received I promise to pay to William Willoughby or order the sum of Sixty.... Dollars at the Union Bank of Canada, here, with interest at 8 per cent. per annum till due, and 12 per cent. per annum after due till paid. Given for one black mare and one osring mare in foal.

THE TITLE ownership and right to the possession of the property for which this note is given shall remain at my own risk in William Willoughby until this note or any renewal thereof is fully paid with interest and if I make default in payment of this, or any other note made in his favour, or should I sell or dispose of or mortgage my real or personal property or if William Willoughby should consider this note insecure, he has full power to declare this and all notes made by me in his favour, due and payable at any time and he may take possession of the property and hold it until this note is paid, or sell the said property at public or private sale, the proceeds thereof to be applied in reducing the amount unpaid thereon; and the holder hereof notwithstanding such taking possession or sale, shall have thereafter the right to proceed against me and recover, and I hereby agree to pay the balance then found to be due hereon.

PO..... Sec..... Tp. Rg.....

Witness..... (Sgd.) WM. WAINWRIGHT.

Minnedosa.

The suit was commenced on the 1st day of November, 1910. The defendant pleaded the Statute of Limitations. The sole question was whether the statute began to run as against the plaintiff on the 1st or on the 2nd day of November, 1904, and whether the defendant had all of the 1st day of November to make payment.

The trial Judge gave judgment for the defendant, holding, of course, that the statute began to run on the 1st, giving as his authority *Keddy* v. *Morden*, 15 Man. L.R. 629.

I do not think this case can be an authority. The learned Judge there was considering the question whether such a docu-

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ment as the above, containing such stipulations, was a promissory note or not, and would have the three days of grace. For the disposal of that case it was not necessary to make any finding on this point. The statement relied on is *obiter dictum*.

Sinclair v. *Robson*, 16 U.C.Q.B. 211, was cited by the defendant. There it was held by the majority of the Court (Cameron, J., dissenting) that suit might be commenced after banking hours on the day the note matured, because by statute protest was allowed after three o'clock, and because the defendant was then in default when banking hours were passed and the note was then overdue.

Kennedy v. *Thomas*, [1894] 2 Q.B. 759, a decision of the Court of Appeal, seems to settle the law upon this point, in which it was held that when payment of a bill of exchange is refused by the acceptor at any time on the last day of grace, the holder, though he is entitled at once to give notice of dishonour to the drawer and endorsers, has no cause of action against either the acceptor or the other parties to the bill until the expiration of that day, and that an action brought by the holder against the acceptor on the last day of grace must be dismissed as premature.

Wells v. *Giles*, 2 Gale 209, is a clear decision that an action on a dishonoured bill cannot be commenced on the third day of grace, and was followed in *Kennedy* v. *Thomas*, [1894] 2 Q.B. 759. See *Westaway* v. *Stewart*, 8 W.L.R. 907; Maclaren on Bills and Notes, 4th ed. 265; Halsbury, vol. 19, p. 45; Roscoe, N.P. (1907) 678.

The appeal should be allowed with costs, and the judgment of the trial Judge set aside, and judgment entered for the plaintiff in the Court below for the amount of the plaintiff's claim, $88.60, with costs.

HOWELL, C.J.M., PERDUE, and CAMERON, JJ.A., concurred.

Howell, C.J.M.
Perdue, J.A.
Cameron, J.A.

Appeal allowed.

BRUNO v. INTERNATIONAL COAL & COKE CO.

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Alberta Supreme Court, Harvey, C.J., Scott, Simmons, Beck, and Walsh JJ. June 18, 1913.

1. MASTER AND SERVANT (§ II A 1—43)—LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF INJURY—FAILURE TO GIVE—EXCUSE—IGNORANCE OF LEGAL RIGHTS.

An employee's ignorance of the fact that he was entitled to compensation for injuries is not a mistake that will excuse his failure to give notice thereof in the manner required by sec. 4, of ch. 12, of the Alberta Workmen's Compensation Act of 1908.

[*Roles* v. *Pascall*, [1911] 1 K.B. 982, followed.]

2. MASTER AND SERVANT (§ II A 1—43)—NOTICE OF INJURY—FAILURE TO GIVE—NON-PREJUDICE OF EMPLOYER—EFFECT.

The failure of an employee to give notice of an injury within the time prescribed by sec. 4 of the Alberta Workmen's Compensation Act of 1908, ch. 12, is not fatal unless the omission is prejudicial to the employer.

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THIS is an appeal by the defendant from an award under Alberta Workmen's Compensation Act, for an appellate declaration as to excuses for tardy notice of accident under the captions (*a*) mistake, (*b*) want of prejudice.

The appeal was dismissed on the ground of want of prejudice, but on a purely mathematical ground the amount of the award was reduced.

Colin Macleod, for appellant.

J. R. Palmer, for respondent.

Harvey, C.J.

HARVEY, C.J.:—The District Court Judge has found that the notice of accident was not given as soon as practicable but he has also held that the failure to give it was due to mistake and that the company was not prejudiced by it.

The mistake which he finds is a mistake of law. The applicant did not know that he had a right to compensation. The fact that he was a foreigner does not in my opinion affect the case. The case of *Roles* v. *Pascall*, [1911] 1 K.B. 982, appears to settle the point that ignorance of his legal rights is neither a mistake nor reasonable cause within the meaning of the Act to serve as an excuse for the failure to give the notice.

The District Court Judge has however found that the company was not prejudiced by the failure and if that finding can be supported it relieves the appellant from the consequences of his failure to give the notice. I do not think that on the facts I would have come to that conclusion, but the evidence on this point must necessarily be almost wholly circumstantial, and it cannot be said that there is no evidence to support the finding. The burden is, of course, on the applicant to establish the fact, but if there is evidence to satisfy the Judge the burden has been met.

In *Burrell* v. *Hollaway*, 4 B.W.C.C. 239, it was held that there was no evidence to support the findings of want of prejudice. In that case, however, the circumstances were very much stronger in the employer's favour than they are here, and though I should think that an employer must almost necessarily be prejudiced who is not given an opportunity to investigate the cause of an accident and the nature of the injury at an early stage, yet as it is a question of fact from which there is no appeal I do not see how the finding of the District Court can be disturbed.

I agree with my brother Beck that the award should be reduced to $235, but I see no reason why the appellant who has succeeded to a substantial extent should pay all the costs of the appeal. I would give no costs to either party.

Scott, J.
Simmons, J.

SCOTT, and SIMMONS, JJ., concurred.

Beck, J.

BECK, J.:—This is an appeal from the award under the Workmen's Compensation Act of His Honour Judge Crawford.

whereby he awarded the applicant Bruno $385 with costs: the $385 being made up of $235 as being the amount which, assuming liability, the applicant was entitled to for the period during which he could not work and $150 for the difference between what he actually earned from August 7 to December 1 amounting to $157 and what he would have earned, which from the evidence would have been practically twice as much. The $150 seems to include part of the same period as is represented by the $235; and to be wholly included in it. The learned Judge seems to have added the amount owing to an oversight. I think it should be disallowed and the award in any case reduced to the $235.

The award is attacked *in toto* on the following grounds:—

1. The injury was not caused by "accident."
2. The injury did not arise "in the course of the employment."
3. The notice of accident was not given "as soon as practicable" and this default has not been excused by mistake, absence or other reasonable cause or rendered unimportant owing to the respondents not being prejudiced.

I think the learned Judge has dealt satisfactorily with the first two questions. With regard to mistake, I think he is wrong in holding that a mere mistake of law and nothing more is a mistake within the meaning of the Act. It seems to be quite settled otherwise. There was, however, I think more than a mere mistake. The workman was a foreigner, a Slavonian, he understood the English language very indifferently (he gave his evidence through an interpreter). Being also ignorant whether he was entitled to compensation he practically put the matter promptly into the hands of the Miners' Union for the purpose of their attending to it on his behalf. They seem to have then undertaken to do so; for they ultimately prepared the notice which he gave to the respondents. All this it seems to me makes more than a mistake in law and I should be inclined to hold to be a sufficient excuse within the words of the Act—"mistake . . . or other reasonable cause."

I think, however, it is fairly well established that the respondents were not prejudiced by the want of an earlier notice. In addition to what the learned Judge says in this connection, it appears that within a day or two of the accident the applicant consulted a local physician, Dr. Ross—on the argument it was admitted that he was the physician who attended to the miners by arrangement between them and the respondents—that during this and subsequent visits Dr. Ross learned the history of the case, which he was able to detail at the trial; that Dr. Ross recommended the applicant to go and consult an eye specialist at Lethbridge—Dr. Taylor; that he did so; that he was subsequently treated by Dr. Ross; that Dr. Ross then advised him to consult Drs. Blow and Smith, eye specialists of Calgary; that

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he did so; that these gentlemen made a written report to Dr. Ross, to whose care the applicant again returned. With all this expert and independent knowledge initiated promptly after the accident—I cannot see how the respondents could be prejudiced. There is no room for the suggestion under such circumstances that the claim might be fraudulent or the applicant a malingerer or that a personal examination under the provisions of the schedule to the Act, would have been of any additional advantage to them.

As to costs, the appellants on this appeal contested the applicant's claim *in toto*. They have succeeded in my judgment to an amount equivalent, taking the costs below into account, to about one third of the amount involved. It was occasioned, I think, too, by a mistake rather of the Judge than of counsel. I think the appellants may well pay the costs of the appeal.

Walsh, J.

WALSH, J., concurred.

Appeal allowed in part.

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MURPHY v. McGIBBON.

Nova Scotia Supreme Court, Trial before Graham, E.J. April 3, 1913.

1. TRUSTS (§ II B—46)—TITLE OF TRUSTEE TO REALTY—DIRECTIONS TO CONVERT ESTATE FOR DISTRIBUTION.

Testamentary directions to trustees to convert an estate for distribution will vest in them the legal title to the testator's real property.

[*Davies* v. *Jones and Evans*, 24 Ch.D. 190; *D'Almaine* v. *Moseley*, 1 Drew 629, 632; *Re Fisher*, 13 L.R. Ir. 546; *Carlisle* v. *Cooke*, Ir. R. 1 Ch. 269, and *Plenty* v. *West*, 6 C.B. 201, specially referred to.]

Statement

ACTION to enforce specific performance of a contract for the sale of land. The principal question raised was as to the validity of the plaintiff's title which he acquired by purchase from trustees to whom property was devised for conversion and distribution.

Judgment was given for the plaintiff.

T. N. Murphy, for the plaintiff.

W. A. Henry, K.C., for the defendant.

Graham, E.J.

GRAHAM, E.J.:—This action is in form an action for specific performance. But it is really to settle a doubt about the title, the plaintiff having just sold a valuable property to the defendant. The question arises under the will of the late John Murphy, who owned this land at the time of his death. In the will he first appointed three persons thereinafter called "my trustees, my executors and trustees hereunder."

The following provision is the one on which the question turns:—

5. My trustees shall divide my estate on its conversion including such sums as may arise from the sale of my said partnership interest in said business into seventeen equal shares and pay one of such equal shares to each of my sons and invest and keep invested in good and safe securities two of such equal shares for each of my daughters paying the income arising therefrom to each daughter during her life, and on the death of any daughter, my trustees shall pay the principal of such two equal shares and the moneys or investments of which said shares may then consist to such person or persons as said daughter may by deed or will appoint, and in default of appointment to her children, and in default of appointment and in case she dies childless to and among such person or persons as will be my said daughter's next of kin at her death. In case any of my children shall die before me leaving a child or children, such child or children shall take its or their parent's share, and in case any of my children die before me leaving no children, the number of equal shares into which my estate shall be divided for the purposes of distribution shall be calculated by giving to each of my daughters two equal shares; to each of my sons one equal share.

The trustees acting upon this provision sold and conveyed this land to the plaintiff. I am satisfied that the word "estate" in that provision covered the testator's real estate: *D'Almaine* v. *Moseley*, 1 Drew. 629, at 632.

There is no express gift of this land in question to the trustees, but I am of opinion that there is a gift of the fee to them by implication because they cannot carry into effect the directions given without of necessity having the legal estate in fee vested in them. They are charged with active duties as trustees under the terms of the will. Here the fund is to be used from the real estate mixed and blended with the personalty.

In Jarman on Wills, 6th ed., p. 1830, it is said:—

> A direction that annual or gross sums shall be paid out of an estate by persons who are appointed executors of the estate (*Doe d. Gillard* v. *Gillard*, 5 B. & Ald. 785; *Doe* v. *Woodhouse*, 4 T.R. 89; *Bush* v. *Allen*, 5 Mod. 63; *Jenkins* v. *Jenkins*, Willes 650) or of the will (*Oates* v. *Cook*, 3 Burr. 1684), or trustees "to see justice done," or the direction alone without such appointment (*Ex parte Wynch*, 5 DeG. M. & G., at p. 220; *Re Boyce*, 33 L.J. Ch. 390), is, it seems, an implied devise of the fee to those persons; so also a direction for payment of debts, etc., and distribution of the residue, without saying by whom such payment and distribution is to be made, has been held to give the legal estate in fee to the executors.

For the last proposition the author cites a case very much in point: *Davies* v. *Jones and Evans*, 24 Ch.D. 190. In Godefroi on Trusts, 3rd ed., p. 12, it is said:—

> Under wills, the intention of the testator is regarded, and if the trustees have active duties to perform, the rule is, that they will take such part of the legal estate as is sufficient to enable them to perform those duties.

In the two following Irish cases there was a mixed fund, the produce of real and personal property to be distributed:

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Re Fisher, 13 L.R. Irish 546, and *Carlisle* v. *Cooke*, [1905] Ir. R. 1 Ch. 269. I also refer to *Plenty* v. *West*, 6 C.B. 201.

This case is stronger in some respects than some of the cases cited, and has not some of the features which some of them have.

Here there are express directions to these trustees to *divide* the estate on its conversion. In some it was only that the estate should be divided. Here it was not given directly to the beneficiaries as in some of the cases. Here there is a mixed fund as I have indicated.

Then these trustees have active duties to perform, viz., to raise this fund to invest the shares for the daughters in good safe securities paying the income to each for life and remainder over as the daughters should appoint and so on. It goes beyond the lives of the *cestuis que trustent*. Then, as to the discretion of the trustees as to selling it would nevertheless become their duty at some time or other to sell and convey the real estate to obtain the funds. For these purposes they must have the legal title and the fee.

In my opinion the title is free from doubt and there will be judgment for the plaintiff.

Judgment for plaintiff.

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WOLFF v. MACKAY.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross, and Gervais, JJ. June 18, 1913.

1. LANDLORD AND TENANT (§ III A 2—80)—LIABILITY OF LANDLORD FOR DEFECTIVE PREMISES—FALL OF WATER TANK.

A landlord is liable for the damage caused a tenant by the unexplained collapse of a water tank on the roof of the demised building, although it was placed there for the latter's benefit.

2. DAMAGES (§ III K—229)—INJURY TO BUSINESS—MEASURE — COLLAPSE OF WATER TANK—LIABILITY OF LANDLORD.

The difference between the amount of insurance received by a tenant and the actual loss sustained from the collapsing of a water tank on a demised building, may be recovered by the tenant from the landlord.

Statement

APPEAL by the plaintiff from a judgment in his favour, on the ground that a greater amount should have been awarded.

The appeal was dismissed.

F. W. Hibbard, K.C., for appellants.
A. R. Holden, K.C., for respondent.

The judgment of the Court was rendered by

Trenholme, J.

TRENHOLME, J.:—Litigation raises some very important questions in regard to the collapse of these water tanks. The present appellants, Herman H. Wolff & Co., were tenants of the

respondent on McGill street, under a lease passed in 1902. In 1905 the appellants made a proposal to the respondent, that he should put in a water tank. This was done, and the rent was increased from $2,600 to $3,300. The water tank was put in by a contractor, at the instance of the proprietor, Mackay, and it continued in good condition until the month of August, 1907, when, on going into the warehouse one morning it was found that the tank had given way, and 70,000 gallons of water had gone down through the building, and had naturally damaged the dry goods which were then stored in the building. The question arose as to who was responsible for the damage. The tenants naturally looked to the proprietor, and wished to hold him responsible for any balance that was due to them over and above the amount they received from the American Lloyds, who had insured them against loss in this building. The American Lloyds, the proprietor, and the appellants all joined in trying to have a settlement, and there were four experts appointed to value the loss. After going carefully over the goods which were injured these experts made a report in which they found the loss to be some $9,023. This was increased to $9,500. This sum was paid to the appellants, Wolff & Co.

The report of the experts says:—

> The undersigned valuators appointed to examine and appreciate the loss occasioned to Messrs. Herman H. Wolff & Co. through the falling of a water tank supplying the automatic sprinkling apparatus in the premises No. 170 McGill Street, Montreal, which occurred on August 8, 1907, report that the general description of goods, etc., damaged and the loss thereby occasioned to Messrs. Wolff & Co. to be as follow . . . .

Then follows a description of the goods which were directly injured by the water, and the amount of these goods—the value being about $53,000. The damage is also set forth, amounting to $9,023, which was increased to $9,500.

The proprietor takes the ground that this is the bill of damages, and that the appellants have been paid for the damages, and that he is not responsible for anything more. He furthermore says that this water tank was put in at the instance of the appellants, that it was put in on plans approved by them, and it was not shewn by the appellants that there was any other person who had access to it but themselves, and that they are presumed to be at fault in connection with the matter, because they were in possession of the building, and it was under their guardianship. Under these circumstances the proprietor brings an action holding the tenants responsible.

Wolff & Co. the tenants, bring an action to hold Mackay, the proprietor, responsible for the balance of the alleged loss over and above what they received from the insurance company—some $17,000 additional to the $9,500.

The question before us is, who is responsible for the collapse of the water tank?

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We have come to the conclusion that if a proprietor has a water tank put into a building as a part of the warehouse which he rents, he is liable for the stability of that structure, just as he would be liable for the stability of any other part of the warehouse. Under ordinary circumstances that would be his legal responsibility, and in this case we hold that Mackay is responsible, as towards his tenants, Wolff & Co., for the collapse of that tank. This tank fell without any apparent or known inducing cause. It might be said it fell of itself. We hold that that, in connection with the circumstances of the case, establishes the position that it fell from inherent defect, or bad construction, or both, for which the proprietor is responsible. We therefore hold that Mackay is legally responsible for the damages caused by the collapse. Of course, he has his recourse against the contractor. As a matter of fact, there is an action pending in warranty at the present time, but that action is not now before us. As between the tenants, Wolff & Co. and the landlord, Mackay, Wolff & Co. have the right to hold Mackay responsible for the damages caused.

Now comes the important question, for what amount are Wolff & Co. entitled to hold Mackay responsible? They received $9,500 as the amount of the direct loss, but they say there were other goods injured also, and that they are entitled to be indemnified for these other goods. Not only that, but they claim there was an interruption of their business for some time, owing to the accident, and that caused them further damages. They also claim damages for the loss of profits on these goods. These items, with some smaller ones, make up about $17,000 additional to the $9,500 which the appellants received from the insurance company.

The case was heard in the Superior Court before Mr. Justice St. Pierre, who heard evidence very fully in it. He came to the conclusion that (besides some minor items, such as $300 for experts, $360 for diminution in rental value, and $150.42 for increased insurance) he would allow Wolff & Co. $1,500 for interruption of business caused by the collapse of this tank and he gave judgment for some $1,825 additional to the $9,500 which was found as being due for goods directly injured by the water.

Wolff & Co. come before this Court and say :—

That is not sufficient. We want you to increase the judgment of Mr. Justice St. Pierre to the amount we claim—about $17,000.

The question before us, on the record as it is, is, are we justified in disturbing that judgment? Observe, there is no special data on which to found a judgment. It is a mere guess as to how much the appellants lost in the way of profits, because the business has not been a profitable one—it is a question as to what extent they did incur loss owing to the interruption of their business.

The trial Judge, after hearing the evidence and having made his own estimate (or guess, if you will) as to the damage, put it at eighteen hundred odd dollars, and we do not see any definite evidence in the record which enables us, with any confidence, to disturb that judgment. We accordingly confirm the judgment rendered by the trial Judge, and dismiss the appeal of Wolff & Co.

What I have just said answers the other question also. Because of the fact that Mackay is responsible there is an end to his suit against Wolff & Co. As we hold that he is responsible, therefore his suit against Wolff & Co. must be dismissed, and we dismiss both appeals with costs.

Appeals dismissed.

SNELL v. BRICKLES.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 18, 1913.

1. VENDOR AND PURCHASER (§ I A—4)—RIGHTS AND LIABILITIES OF PARTIES —TENDER OF DEED—DUTY OF PURCHASER.

A purchaser of land is not relieved from the duty of preparing the conveyance, at his own expense, by a condition of a contract of sale that the cash payment was "to be paid upon the acceptance of title and delivery of deed" and a mortgage for the deferred payments executed on the vendor's solicitor's usual form; nor is such rule altered by the fact that the vendor's solicitor submitted a draft deed to the vendee's solicitor for approval.

[*Snell* v. *Brickles*, 9 D.L.R. 840, 4 O.W.N. 707, reversed.]

2. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR THE SALE OF LAND —FAILURE OF VENDEE TO TENDER DEED AND MAKE CASH PAYMENT.

Specific performance of a contract for the sale of land of which the vendee was in possession, although he had not made expenditures in reliance on the agreement, will be denied where the contract, of which time was of the essence, was cancelled by the vendor for the failure of the vendee to prepare and tender a deed for execution, or to make the stipulated cash payment and give a mortgage for the deferred payments, within the time and manner specified in the agreement.

[*Snell* v. *Brickles*, 9 D.L.R. 840, 4 O.W.N. 707, reversed.]

Statement

APPEAL by the defendant from the judgment of Falconbridge, C.J., *Snell* v. *Brickles*, 9 D.L.R. 840, 4 O.W.N. 707, in favour of the plaintiff in an action for the specific performance of a contract for the sale of land.

The appeal was allowed.

Argument

J. E. Jones, for the defendant, argued that it was not a question of the certainty of the contract, but of delay by the purchaser in carrying it out, and that time was expressly made the essence, not merely of the offer, but of the whole contract. The contract is silent as to any condition that this deed should be drawn by the vendor at his own expense; therefore, the well-settled rule of law that it should be drawn by the purchaser

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applies: *Foster* v. *Anderson* (1908), 16 O.L.R. 565, 570, 571, 574, 575; *Stevenson* v. *Davis*, 23 Can. S.C.R. 629.

W. Proudfoot, K.C., for the plaintiff, relied upon the reasons contained in the judgment of the learned trial Judge, arguing that, notwithstanding the rule laid down in *Foster* v. *Anderson* and similar cases, it was the duty of the defendant, under the contract here in question, to prepare the conveyance and tender it to the plaintiff. It was at all events a case in which the judicial discretion of the Court should be exercised on behalf of the plaintiff.

Sutherland, J.

The judgment of the Court was delivered by SUTHERLAND, J.:—Appeal of the defendant, the vendor, from the decision of Sir Glenholme Falconbridge, C.J.K.B., in an action by the purchaser for specific performance of a written agreement for the sale of land, contained in an offer and its acceptance, dated the 20th February, 1912. The judgment went on the construction of the document and the opinion of the trial Judge that it was the duty of the defendant "to prepare and tender to the plaintiff the conveyance," and, not having done so, he could not "invoke against him the clause in question" in the contract.

The agreement is set out in full in the statement of claim. The portions of it useful to refer to are the following:—

" . . . for the price or sum of seven thousand five hundred dollars	$ 7,500
payable as follows: five hundred dollars	500
paid to G. W. Omerod as deposit accompanying this offer, to be returned to me if offer not accepted; two thousand dollars	2,000
to be paid upon the acceptance of title and delivery of deed, and give you back a first mortgage on the property for the remainder, repayable in five years from the date of closing	5,000
	$ 7,500

with interest from date of closing at 6 per cent. per annum, payable half-yearly, said mortgage to be drawn on the vendor's solicitors' usual form.

"Rent, fire insurance premiums, taxes, rates or assessments, local or otherwise, to be proportioned and allowed to date of closing, which shall be on the 15th March, 1912.

"The vendor shall not be bound to produce any abstract of title or any title deeds or any evidence of title except such as he may have in his possession, nor furnish a surveyor's plan or description.

"The purchaser shall search the title at his own expense, and

shall have ten days from said date of acceptance to examine the same; and, if no written objection be made within that time, he shall be deemed to have accepted the title.

"This offer, if accepted as aforesaid, shall with such acceptance constitute a binding contract of purchase and sale, and time shall in all respects be strictly of the essence hereof.

"Should the purchaser make default in completing the purchase in the manner and at the time above-mentioned, any money theretofore paid on account shall, at the option of the vendor, be retained by the vendor as liquidated damages, and the contract shall, at the option of the vendor, be at an end, and the vendor shall be entitled to resell the said land without reference to the purchaser."

The contract is in the form of an offer by the purchaser to one Omerod, a real estate agent, accepted by him and confirmed by the vendor. The sum of $500 in cash was paid to the said agent, in whose possession it still was at the time of the trial.

On the 21st February, 1912, the vendor's solicitors wrote to the plaintiff's solicitors enclosing a draft deed for approval; and on the 22nd, a further letter forwarding a corrected description. On the 27th, they wrote a further letter asking that the draft deed be returned approved, with objections to title, stating that their client would be in on the following Saturday, namely, the 2nd March, 1912. No written replies were apparently sent to any of these letters, but some telephone communications passed between the solicitors for the respective parties.

On the 12th March, the solicitor for the vendor telephoned the solicitor for the purchaser that the vendor was in his office, and that the 15th was the day of closing, and his client was very anxious to close. The purchaser's solicitor says that, in reply, he told him that the purchaser was ready to close, and the only point he wanted cleared up was the question of a mortgage which was apparently upon the property. During this conversation the vendor's solicitor again asked for a return of the draft deed, and the purchaser's solicitor said that he would return it. He adds that the next day he intended to do so; but, as there was no stenographer in his office to whom to dictate the letter, he left it over until the next morning.

Unfortunately, through illness, he was not at his office on the 14th or the 15th or the 16th, and so the draft deed was not returned. On returning to his office on the 18th, he telephoned to the solicitor for the vendor, and asked him if they would close the matter, stating that the purchaser was ready to do so and would like to get it closed. The reply of the vendor's solicitor then was, that his client had been in, and, as the matter had not been closed on the 15th, he refused to carry it out. The purchaser's solicitor says that he thereupon prepared the mortgage

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and had it executed, obtained a cheque from the purchaser, and discussed with the vendor's solicitor the possibility of still closing the matter, speaking of making a tender. He was told, however, that the vendor would do nothing further in the matter.

He made other attempts to open up the matter or arrange a different agreement in respect to the purchase of the property, but without avail; and the action was commenced.

The plaintiff had continued in possession of the property and had done nothing to waive his strict rights under the contract. The learned trial Judge, in his reasons for judgment, says: "The general rule, in the absence of other provision, is, that the purchaser prepares the conveyance at his own expense: *Foster* v. *Anderson*, 15 O.L.R. 362, at p. 371; *Stevenson* v. *Davis*, 23 S.C.R. 629, at p. 633. But I think that, here, the reading of the whole clause is, that it was the duty of the defendant to prepare and tender to the plaintiff the conveyance. And I think that the defendant's solicitors recognised that duty, because, on the 21st February, they wrote to the plaintiff's solicitors enclosing a draft deed for approval, and on the following day they wrote enclosing a corrected description of the lands to be conveyed."

He, accordingly, gave judgement for specific performance, with costs of action, and a reference to the Master to settle the conveyance, if the parties could not agree.

With great respect, I am unable to agree with his opinion. I cannot see that there is anything in the whole clause referred to, or anywhere in the agreement, which takes this case out of the rule stated, that the purchaser should prepare the conveyance at his own expense.

The agreement does not say that the conveyance is to be drawn by the vendor or at his expense. Indeed, I think that the expression in it, "upon the acceptance of title and delivery of deed, and give you back a first mortgage on the property for the remainder," contained in the offer of the plaintiff, indicates that the offer made contemplated that the purchaser was to follow the usual rule in that regard.

On the 15th March, the date of closing, the purchaser was, in my opinion, in default: (1) in not having prepared and tendered the deed to the vendor for execution; (2) in not having made a tender of the further cash payment of $2,000; (3) in not having obtained from the vendor a mortgage in his solicitors' usual form, and prepared, executed, and tendered such a mortgage for the remaining $5,000 of the purchase-money.

He had proposed and agreed, in his offer, accepted by the vendor, and constituting the contract, that time should in all respects be strictly of its essence. The vendor was, consequently, quite within his rights on the 18th in declining to go on with the contract, and declaring the transaction at an end.

This is not a case in which the plaintiff was let into possession and spent money on the property. It is a case in which the parties, on the face of their agreement, contemplated the completion of the transaction on a day certain, and in which the plaintiff, through his solicitor, had explicit notice that the defendant wanted it completed on that day, according to the terms of the agreement. The defendant was not in default in any way and he did not in any way waive the express condition as to time. The plaintiff was in no way ready on the day named to complete the transaction. That was not the defendant's fault. He could stand upon his rights under the contract, and consider and declare it to be at an end.

The defendant, it is true, prepared a draft deed. I am of the opinion that, under the contract, he was not required to do so. Because, voluntarily, and either to expedite the completion of the transaction on the day named, or through an erroneous conception on his part, he prepared the draft deed, which he was not required to do under the contract, is the plaintiff, on that account, to be put in a better position as to time than though the defendant had not so prepared the draft deed? I cannot think that he should be. But, in any event, the draft deed so prepared was not returned in time, though asked for and promised.

In *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519, it was held "that, in the absence of fraud, accident, or mistake, the provision that time should be of the essence was binding upon the plaintiff, and had not been waived by the defendants; that the latter had the right to rescind upon default in payment of the second instalment; that no formal notice of rescission was necessary; and that the plaintiff was not entitled to specific performance."* There is no pretext that there was any fraud, accident, or mistake in the preparation of the contract or the insertion therein of the explicit term as to time being of its essence.

With great respect, therefore, I am of opinion that no decree for specific performance should be made, and that the appeal should be allowed.

The decision, as I have already mentioned, is based upon the construction of the contract, and not upon the ground of the exercise of the discretion of the Court. It was, however, argued that it is a case in which such discretion might well be exercised in favour of the plaintiff.

In *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414, at p. 423, it is laid down that "the exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court

*Per Sir William Meredith, C.J.C.P., dissenting.

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—not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles. The conduct of the party applying for relief is always an important element for consideration."

In *Labelle* v. *O'Connor*, 15 O.L.R. 519, Anglin, J., at p. 546, says: "The right of a purchaser to specific performance is one thing; his possible equity to relief from forfeiture of purchase-money paid on account, though not entitled to the extraordinary and discretionary remedy of specific performance, is quite another." Reference to Fry on Specific Performance, 5th (Canadian) ed. (1910), p. 19, and *Harris* v. *Robinson* (1892), 21 S.C.R. 390, at p. 397.

I am unable to see that this is a case in which judicial discretion should be exercised in favour of the plaintiff.

Appeal allowed with costs here and below.

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SUN ELECTRICAL CO. v. McCLUNG.

Saskatchewan Supreme Court, Parker, M.C. July 22, 1913.

1. LANDLORD AND TENANT (§ III E—115)—RECOVERY OF POSSESSION—SUMMARY PROCEEDINGS.

Disputed questions of fact cannot be determined on an originating summons issued under Sask. rule 600 for the summary recovery of possession from an overholding tenant, since amended rule 583 (Sask. Rules of 1911), does not extend to proceedings under the former rule; but where the alleged agreement relied upon in answer by the tenant and disputed by the landlord is found not to be binding upon the landlord for lack of formal execution, the officer hearing the application may dispose of same on the question of law so raised.

2. CORPORATIONS AND COMPANIES (§ II D 1—65)—POWER TO CONTRACT—EXECUTORY CONTRACT NOT GERMANE TO PURPOSE OF INCORPORATION—SEAL.

An executory contract of a trading company unless germane to the purpose of its creation, is void unless made under its corporate seal.

[*Garland Mfg. Co.* v. *Northumberland Paper and Electric Co.*, 31 O.R. 40, followed; *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.*, 14 O.L.R. 22, and *South of Ireland Colliery Co.* v. *Waddle*, L.R. 3 C.P. 463, specially referred to.]

Statement

APPLICATION under rule 600 to recover possession of demised premises from an overholding tenant.

Judgment was given for the plaintiff.

P. M. Anderson, for plaintiffs.

P. S. Stewart, for defendant.

Parker, M.C.

PARKER, M.C.:—On April 9, 1913, plaintiffs leased from Norman Mackenzie and George W. Brown a portion of the building situated on lots 28, 29 and 30, block 307, plan old

number 33, Regina, for the purpose of carrying on their business as electrical engineers and contractors and dealers in electrical goods and supplies; the lease to commence on June 1, 1913. The premises, at the time were occupied by the defendant, whose lease with the above mentioned lessors expired May 31, 1913. By a verbal agreement between the plaintiff company and the defendant, the defendant was permitted to occupy the premises for the month of June, 1913, which agreement appears to have been duly authorized by the board of directors of the company; at least the material shews it is admitted by the president, the managing director, the secretary-treasurer and two of the directors. On June 20, 1913, the company's solicitors notified the defendant in writing that he would be required to vacate the premises on July 1. This notice was sent in confirmation of a verbal notice alleged to have been given to the defendant by the managing director of the company on June 13. On July 2, the defendant being still in occupation of the premises, the plaintiffs' solicitors gave notice in writing to the defendant taking formal possession of the premises. The defendant has refused to vacate the premises and sets up in justification of his occupation a verbal lease of the same to him by George A. Shields, secretary-treasurer of the company, on June 13, for a period of five months, from July 1 to December 1. Shields, it appears, called on the defendant about two o'clock on June 13, and the matter of an extension of the defendant's occupation was discussed. The defendant says an agreement for a five months' lease was made. Shields denies this and says the defendant made him a proposition to rent for five months for $225 per month which he undertook to submit to his fellow directors. About five o'clock the same day Shields and the managing director Mr. Wylie returned to the defendant's premises (or rather the premises in occupation by the defendant, and in question herein) and informed the defendant finally that no extension of his occupation would be granted and that he would have to vacate the premises by the end of June. After a careful perusal of the affidavits, examinations, and other material filed I am satisfied that this is a reasonable explanation of what took place and that no agreement for a lease, as alleged by the defendant was made. At all events there is absolutely nothing in the material to shew that Shields was expressly or impliedly, directly or indirectly authorized by the company to lease the premises to the defendant. In fact any such authority is denied by Shields himself, by the president, managing director, and the solicitor (who is also a director) of the company. Even if, therefore, Shields did make the lease as alleged, I am of the

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opinion that he had no authority to do so, and that he had no power to bind the company. At this point I will deal with a preliminary objection raised by defendant's counsel. It was contended by Mr. Stewart that as there was a question of fact the matter could not be disposed of by originating summons: *Independent Lumber Co.* v. *Gardiner*, 13 W.L.R. 548. That case was decided under rule 582 which refers only to originating summonses for sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee. Rule 583, however, was amended since that decision, and now the Court may, upon the return of the summons "deal with questions of fact that may arise." Defendant's counsel contended, however, that this amendment does not cover cases under rule 600 and I think he is quite right in that contention. This, however, does not help him in his case, for as I have already stated I am of the opinion that even if the fact were as alleged by the defendant, and that Shields did make the agreement for a five months' lease the company is not bound by such an agreement. In the case of the *Garland Mfg. Co.* v. *The Northumberland Paper and Electric Co.*, 31 O.R. 40, it was held as follows:—

> There is a broad and well marked distinction between contracts executed and contracts executory in the case of incorporated companies whether trading or not, and where a contract is executory a company is not bound unless the contract is made in pursuance of its charter or is under its corporate seal.

This case as well as a large number of similar cases was discussed in the case of *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.*, 14 O.L.R. 22, where the general rule is laid down, Garrow, J.A., at page 30, as follows:—

> The common law was strict that all contracts by a corporation must be executed under the common seal, but it was early departed from in the case of commercial or trading companies in matters of everyday occurrence and this departure widened until it included practically all executed contracts which with a seal would have been lawful. But in the case of executory contracts such as the one in question, although the apparent tendency has been towards greater freedom, it cannot be said that the Courts have yet fully approved of placing them entirely in the same category with executed contracts.

The learned Judge then refers to the case of *South of Ireland Colliery Co.* v. *Waddle*, L.R. 3 C.P. 463, and states that

> the broad rule there laid down and affirmed is that a trading corporation may be bound by any and all contracts entered into for the purposes for which it was incorporated, although not under the corporate seal.

The general rule appears, therefore, to be extended in the case of trading corporations to include not only "practically

all executed contracts" but also to executory contracts entered into "for the purposes for which it was incorporated."

The main question, therefore, is whether or not the contract in question comes within the rules above laid down. In my opinion it does not. The plaintiff company was formed for the purpose of carrying on business as electrical engineers and contractors and dealers in electrical goods and supplies. The alleged contract was for the releasing of premises which the company had only shortly before leased for the purpose of carrying on its own business as such electrical contractors and dealers. Such a contract, it seems to me, does not come within the purposes for which the plaintiff company was incorporated, or for any purpose incidental or ancillary thereto. In the cases of *South of Ireland Colliery Co.* v. *Waddle*, L.R. 3 C.P. 463, and *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.*, 14 O.L.R. 22, the subject-matter of the contracts in both cases were goods manufactured by the defendants in the usual course of their business. In the case at bar the subject-matter of the contract is something almost entirely foreign to the usual course of the company's business. I do not think the general rules laid down in the two cases above mentioned go to the extent of allowing a trading corporation to enter into an executory contract of this kind, except under its corporate seal. Certainly it could never have been contemplated by these rules even though the corporate seal is not necessary that an officer of a trading corporation could enter into such a contract and bind his company, without any authorization whatever from the board of directors. I have come to the conclusion, therefore, that the principle laid down in the case of the *Garland Mfg. Co.* v. *Northumberland Paper and Electric Co.*, 31 O.R. 40, is applicable to this case.

I will, therefore, order the defendants to deliver up possession of the premises in question to the plaintiff company or its authorized agent within ten days after service upon him of this order. The plaintiff will also have judgment against the defendant for use and occupation of the premises in question at $175 per month, together with the costs of this summons, to be taxed.

Judgment for plaintiff.

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BECK v. DUNCAN.

(Decision No. 2.)

Saskatchewan Supreme Court, Newlands, Lamont, Johnstone, and Brown, JJ. July 15, 1913.

1. HUSBAND AND WIFE (§ I C—40)—AGENCY OF HUSBAND—SCOPE—CONTRACT FOR SALE OF WIFE'S LAND.

A husband has no original or inherent power to act as his wife's agent; and, where he purports to sell his wife's lands without due authority, she is not bound unless she has ratified his act after obtaining full knowledge of the transaction.

[*Beck* v. *Duncan*, 8 D.L.R. 648, affirmed.]

Statement

APPEAL by the plaintiff from a judgment in favour of the defendant in *Beck* v. *Duncan*, 8 D.L.R. 648, for the specific performance of a contract for the sale of land.

The appeal was dismissed on an equal division of the Court.

H. Y. MacDonald, and *C. D. Livingstone*, for appellant.

P. H. Gordon, for respondent.

Newlands, J.

NEWLANDS, J., concurred with LAMONT, J.

Lamont, J.

LAMONT, J.:—This is an action for specific performance. The plaintiff claims to be entitled by virtue of a verbal contract made between the husband of the defendant Elizabeth Duncan and himself, by which he purchased a quarter section of land owned by Elizabeth Duncan and registered in her name. The learned Chief Justice found that the husband did enter into an agreement with the plaintiff for the sale of the land, and that certain sums were paid him in respect thereof; but he also found that the husband had no authority from his wife to sell the land. He, therefore, refused specific performance, but directed the defendant Elizabeth Duncan to pay to the plaintiff the sums which the plaintiff had paid her husband on account of the agreement. From the judgment refusing specific performance the plaintiff now appeals. The whole question is, had the husband authority from his wife to make a sale of the land? In her evidence Elizabeth Duncan says that her husband did her business for her, and that she was satisfied with what he did in reference to the farm, and that she relied on him, and that so far as she was concerned he dealt with the farm as his own. She, however, swears positively that she did not give her husband any authority to sell, but only to lease, the land, and that when she was asked to sell she refused. She says she knew the plaintiff was working the land, but she thought he was working it on shares, and that she was to get one-third of the crop. As has been pointed out by the Chief Justice, the broad expression used by Elizabeth Duncan, that she allowed her husband to deal with the farm as his own, must be taken in

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the light of her definite statement that she only authorized her husband to lease, and not to sell. The Chief Justice accepted her statement in this respect, and found that the husband had no authority to sell. In my opinion he was not only justified in so doing, but it was the proper conclusion to arrive at on the evidence. A husband has no original or inherent power to act as his wife's agent, and his authority only arises from her appointment: 21 Cyc. 1238. He can bind or estop his wife only as to matters within the scope of his agency, and where he acts without due authority she is not bound unless his acts are subsequently ratified by her with full knowledge of the transaction. As the learned Chief Justice has—in my opinion properly—found that the husband was not authorized to make a sale of his wife's land, and as there was no ratification by her of the transaction after she knew that a sale had been effected by him, the claim for specific performance was properly refused.

This appeal should be dismissed with costs.

JOHNSTONE, J., concurred with BROWN, J.

Johnstone, J.

BROWN, J.:—I find myself unable to concur in the view that no agency has been established between the respondent and her co-defendant in the sale of the land in question to the plaintiff. Both defendants have set up and contended that the plaintiff went into possession and remained there under a lease by which he was to give the respondent one-third of the crop as rental. The learned trial Judge heard the evidence of the male defendant at some length, and with good reason refused to believe him. He distinctly finds that a sale was made by the male defendant to the plaintiff as far as he had authority to make such sale, and that the plaintiff went into possession and worked the farm for some six years, and made payments from time to time, all by virtue of such sale.

Brown, J.

Although the respondent gave evidence on her own behalf at the trial, counsel on both sides were content with asking her very few questions. It is practically altogether from her examination for discovery that we get an opportunity of testing her veracity. Her conduct, in my judgment, is under the circumstances inconsistent with a tenancy such as the defendants say existed. From the year 1906, when the plaintiff went into possession, until 1912, when differences seem to have first arisen between the parties, neither of the defendants sought or obtained from the plaintiff an accounting of the crop, although he remained in possession and worked the farm each year; and, moreover, practically all this time all the parties were living in the same place and meeting each other continuously. I can understand a certain amount of indifference on the part of a vendor under a contract of sale where all matters are capable of being

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ascertained and put right and eventually it becomes simply a question of calculating interest on the unpaid portion of the purchase-price; but where there is a rental on a part crop basis, it is unnatural, and to me unbelievable, that a lessor would go along year after year without getting an accounting. The rental each year depends on the proceeds of the crop, and the lessor, it seems to me, would want to know each year what amount of crop was threshed, and what were the proceeds from the sale thereof. He would also want immediate payment of such proceeds. The respondent's explanations and excuses for her default in this respect are to me most unsatisfactory and unlikely.

Then, again, the plaintiff, with the knowledge of both defendants, made payments from time to time on the $1,500 mortgage which was against the property. This action on his part was in perfect harmony with a sale, because under its terms he was to assume the mortgage, but under the terms of tenancy as set up by the defendants there was no mention of a mortgage and no suggestion that the plaintiff should pay any part thereof. The evidence shews that the defendants not only knew that the plaintiff met these payments on the mortgage, but that they made it a point to see that the plaintiff did meet these payments when they fell due.

Besides, the two defendants were living together as man and wife, in the most friendly and confidential relationship, during all these years; and I find it difficult to understand how under such circumstances she was not only kept in absolute ignorance, but was deliberately misled, by her husband, and that without any apparent reason, as to the real nature of the transaction that took place between the plaintiff and her husband.

For these reasons I am in favour of enforcing the contract as against the respondent if capable of being enforced.

It is contended, however, on the part of the respondent that the contract is too indefinite in its terms to be capable of enforcement. The plaintiff's recollection as to when the contract was entered into and as to its terms is so faulty that it becomes difficult to ascertain what they were with certainty. According to his evidence, the contract was entered into in the fall or winter of 1905-6, but he did not seem to be able to get any nearer the date than that. The rate of interest was 7 or 7½ per cent., he did not remember which; and as to the other terms of the contract, I cannot do better than quote from his evidence:

Q. Then I understand, Mr. Beck, that you claim the agreement was $4,000 and you were to assume a mortgage of $1,500? A. Yes.

Q. Pay $1,000 when? A. As soon as I could.

Q. And the balance of $750 each when? A. A year from the time, I suppose, the first payment was made.

Q. And the other $750? A. Well, that would be two years.

Q. Two years from the time when the first payment was made? A. Yes.

Q. With interest?

HIS LORDSHIP:—The first payment of $750 was to be paid when? A. The cash payment as soon as I could pay it.

Mr. Parsons:—That was $1,000. With interest on the unpaid balance at what rate? A. I could not swear it, Mr. Parsons. It may have been 7½ per cent.

These uncertainties have to some extent been made certain by the defendants in their subsequent conduct. And in a case of this kind, where there has been possession under the contract for so many years, where improvements have been made to the property, and where the land has greatly increased in value, the Court should struggle against the objection of uncertainty. In Fry on Specific Performance, 5th ed., at p. 190, it is stated as follows:—

> Where the terms of the contract have been originally uncertain, but the contract has been acted on and a user and course of dealing have existed between the parties which gives certainty to what was originally uncertain, the Court has in same cases had regard to this as removing the original difficulty. Part performance will induce the Court to struggle against the objection of uncertainty.

In *Oxford* v. *Provand*, L.R. 2 P.C. 135, at 150, it is stated, having reference to that case:—

> The contract and the circumstances relevant thereto being as above explained, their Lordships do not stop to inquire whether a suit for specific performance of the stipulation for a "proper contract" could have been maintained at once; but having regard to that which had been done before the suit was commenced, they consider that there was not such uncertainty as to be a bar to this suit.

In *Hart* v. *Hart*, L.R. 18 Ch. D. 670, Kay, J., is reported at p. 685 as follows:—

> And I feel considerably impressed by the consideration which actuated the Court in *Milnes* v. *Grey*, 14 Ves. 408, and was expressed in very emphatic language by Lord Justice Turner in *Wilson* v. *West Hartlepool Railway Company*, 2 DeG. J. & S. 475, that when an agreement for valuable consideration between two parties has been partially performed, the Court ought to do its utmost to carry out that agreement by a decree for specific performance. I think, if I do not misquote the words, Lord Justice Turner went as far as this: It is the duty of the Court, as far as it is possible to do so, to ascertain the terms of the agreement, and to give effect to it. That is, as I understand, the rule of equity, that although there may be considerable vagueness in the terms, and although it may be such an agreement as the Court would hesitate to decree specific performance of, if there had not been part performance, yet when there has been part performance the Court is bound to struggle against the difficulty arising from the vagueness.

In *Wilson* v. *West Hartlepool R. Co.*, 2 DeG. J. & S., Turner, L.J., states, at p. 492:—

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The Court proceeds in such cases (of part performance) on the ground of fraud, and I cannot hold that acts which, if done by an individual, would amount to a fraud ought not to be so considered if done by a company, nor can I say that it is no prejudice to the plaintiff to have been permitted to take possession on the faith of an agreement, and afterwards to be held liable to be treated as a trespasser and turned out of possession on the ground that there was no agreement. There is authority for saying that in the eye of this Court it is a fraud to set up the absence of agreement when possession has been given upon the faith of it.

With the assistance of exhibit G, which was a memo. made by the male defendant, I find that the contract was to date from February 1, 1906; and with the further assistance of exhibit B, which is a cheque dated February 1, 1907, in favour of the male defendant for $187.50, I find that the rate of interest agreed upon was 7½ per cent., because 7½ per cent. on $2,500 for one year would be exactly $187.50. Again, the phrase, "as soon as I could," with reference to the first payment of $1,000 has been made definite by the actual payment and acceptance of the $1,000 on February 1, 1907, or, in other words, the parties have themselves by their conduct made definite what may have originally appeared as indefinite. There is nothing which can be gathered from the evidence that makes certain when the two subsequent payments of $750 each are to be made. The latter one is dependent upon the former for its due date, but as to the former, there is nothing more definite than the evidence of the plaintiff himself when he says, "I suppose" it was to be made in a year from the first payment, that is, the payment of the $1,000. The evidence may, under the circumstances, be sufficient to justify the Court in finding as a fact that these payments were to be made one and two years respectively from the date of payment of the $1,000. That seems to have been the conclusion of the learned trial Judge. But under the circumstances of this case the uncertainty with reference to these payments is, to my mind, not such an uncertainty as should stay the hand of the Court in granting the relief sought. I cannot see what difference it makes whether the first payment of these subsequent instalments was to be made in December, 1907, or February, 1908. In either case these amounts would bear interest from the date of the agreement, and the plaintiff is ready to pay the full amount of the unpaid principal with interest.

I can understand that the Court will refuse specific performance where there is any uncertainty as to what the decree of the Court should be, or where there is necessarily any uncertainty in the decree itself, but that is not the case here. If in this case the defendants had pleaded laches, and raised this at the trial, then the due dates of these instalments might become very material; but the defendants have not pleaded laches, and in my opinion they cannot now raise that question. Had they raised

it by their pleadings, it may be that the plaintiff would have had a good answer in estoppel. Again, if the interest was to be compounded, then the dates of payment of these instalments would be immaterial, but that was not a term of the contract here.

I cannot from any point of view see that certainty as to the due dates of these instalments makes a particle of difference; and, being immaterial, I am of opinion that the plaintiff should not for that reason be deprived of the relief sought. It may be that a more careful examination of the authorities bearing on this point than the time at my disposal affords, would lead me to a different opinion, but in view of the conclusions reached by other members of the Court it becomes immaterial.

I have not overlooked the fact that the plaintiff has been careless and not free from blame, but his carelessness seems to have been largely due to over-confidence in his one-time friend, the male defendant, and it is not such as would justify the Court in refusing him relief from an injustice.

In my opinion the appeal should be allowed and the plaintiff granted specific performance, with costs of trial and of appeal.

On equal division of Court appeal dismissed.

DORCHESTER ELECTRIC CO. (defendant, appellant) v. **ROY** (plaintiff, respondent and cross-appellant).

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Quebec King's Bench, Trenholme, Lavergne, Cross, Carroll and Gervais, JJ. April 5, 1913.

EMINENT DOMAIN (§ III C 1—144)—*Rights and remedies—Compensation for riparian rights—When common law remedy not superseded.*]—Appeal and cross-appeal in an action by Roy to recover damages for the flooding of a flour-mill and machinery by the electric company in carrying out the latter's statutory powers under R.S.Q. 1909, art. 7295.

THE COURT on the appeal held that as the electric company had not commenced proceedings for settling the amount of damages under art. 7296, R.S.Q. 1909, with the injured party before the latter had commenced his action, the latter on service of same gave the plaintiff an acquired right to proceed by common law action, so that it was too late thereafter for the defendant company to resort to expertise proceedings under the statute; and this notwithstanding that art. 7296 declares that "such damages shall be ascertained by experts to be appointed by the parties interested, in the ordinary manner."

CROSS, J.:—Art. 7295 renders lawful a thing, which but for that enactment, would be a tort, but, while that is done, the Act, at the same time, preserves, to the injured party, a recourse in damages, and art. 7296, in fact, contemplates the case of the works having been completed, and being made liable

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to demolition, if the indemnity be not paid within six months after the award or "report."

Speaking for myself only, I would say that it follows that the party exercising the statutory power may, in cases to which these articles apply, resort to the statutory expertise, even after construction of the works, if he does so in time sufficient. In such cases, it can be said, as was said in *Jones* v. *Stanstead R. Co.*, 8 Moore P.C.N.S. 312, that it is not a reasonable construction of the statute to imply, as a condition precedent, that compensation must be paid for such consequential injuries, before doing the work.

As opinion has been expressed, in general terms, to the effect that, when a mere right of servitude is to be exercised and no land is actually taken, there is not the same necessity for precedent notice and tender of compensation, Cripps Compensation, 5th ed., 87, I would say that the question in each case, would be one of statutory construction. Now the decisions cited for the plaintiff, and others which might have been cited to the same effect, are decisions in cases where the defendants sought to resist common law actions in damages, by merely citing the statute, and sometimes, as in *Gale* v. *Bureau*, 44 Can. S.C.R. 305, without even having pleaded it. In not one of them, so far as I have been able to ascertain, could the defendant plead or prove that, before action brought, he had commenced proceedings to have the amount of the damages ascertained by experts in the statutory mode. I, therefore, say nothing to question the accuracy of the conclusion arrived at in those cases, though some of the reasons which appear in the reports of them, may not be such as will stand scrutiny. In *Jones* v. *Fisher*, 17 Can. S.C.R. 515, it was said at 525: It must be understood that we express no opinion as to whether, in a proper case, the right of action is taken away, or not, by that statutory enactment.

In the view which I take of the matter, the question, thus left open, limits itself to the inquiry whether, or not, the common law right of action is superseded, or rather suspended, when the adverse party has, before being sued, commenced proceedings upon the expertise. I consider, speaking for myself, that in a case to which arts. 7295 and 7296 R.S.Q. apply, it is open to either party to commence proceedings to have the amount of the damages ascertained by experts. I consider that if either party has timeously commenced such proceedings it is not within the right of a law Court to deprive that party of the benefit or result of such proceedings, because of the other party having afterwards commenced an action in damages.

Taschereau & Co., for appellant.
Pelletier & Co., for respondent.

Re S. E. WALKER CO., Ltd.

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Alberta Supreme Court, Beck, J. August 1, 1913.

1. CORPORATIONS AND COMPANIES (§ VI F 2—357)—WINDING-UP—PREFERENCE—WAGES—SALESMAN ACTING AS SECRETARY.

A salesman for a company is entitled to a preference under sec. 10 of ch. 111 of the N.W.T. Ordinances (Alta. 1911), in a winding-up proceeding under that ordinance, notwithstanding he also acted as secretary of the company, where the greater portion of his services were performed in the former capacity.

2. CORPORATIONS AND COMPANIES (§ IV F 2—357)—WINDING-UP — PREFERENCES—SALARY—MANAGING DIRECTOR.

The managing director of a company who also acted as a salesman, is not entitled to a preference under sec. 10 of ch. 111 of N.W.T. Ordinances (Alta. 1911), in a winding-up proceeding, where it is impossible to determine what portion of his salary, which was entire, was for his services as salesman.

[*Re Newspaper Proprietary Syndicate Ltd.*, [1900] 2 Ch. 349, specially referred to.]

Statement

THIS is an application in a winding-up matter on originating summons to determine whether S. E. Walker and H. S. Moir or either of them are entitled, under sec. 10 of the Companies Winding-up Ordinance, 1903, [N.W.T. Ord. Alta. 1911, ch. 111] to have their claims for wages or salary for three months paid to them in priority to the general creditors.

Dickey, Wilson & Bury, for liquidator.

W. G. Harrison, for applicants.

Beck, J.

BECK, J.:—I must determine the facts on the affidavits. Moir was not a director. He acted as secretary. He was not formally or regularly, though probably effectively appointed. He was a salesman. It was in this latter capacity that the greater part of his services were rendered. His salary, $30 a week, equivalent to $1,560 a year, would seem to indicate this. Even as secretary, no doubt, his claim would be a preferred one. I allow his claim.

Walker was a director. He was also manager. That is, he was managing director. His salary was $2,000 a year. Though he was also a salesman, I do not think it possible to apportion his salary, which was an entire one, so as to allot a certain portion as compensation for his services as salesman. I think his salary must be looked upon as one for his position as managing director, and the work of making sales as a part of his duties as managing director. The case of *Re Newspaper Proprietary Syndicate Ltd.*, [1900] 2 Ch. 349, decides, I think rightly, that a managing director is not entitled to rank as a privileged creditor under the corresponding section of the English Bankruptcy Act. I therefore disallow his claim. The applicant, the liquidator, will have his costs out of the estate. So will Moir. There will be no costs to or against Walker.

Order accordingly.

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WILLIAMS v. BRITISH COLUMBIA ELECTRIC R. CO.

(Decision No. 3.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. CARRIERS (§ II G 2—131)—INJURY TO PASSENGER—RIDING ON STEP OF CAR—PERMISSION OF DEFENDANT—NEGLIGENT OPERATION OF CAR.

An intending passenger may recover for injuries sustained through the negligent operation of a crowded car, notwithstanding the fact that he was riding on the step of the car, where such was a practice commonly permitted by the company.

[*Williams* v. *British Columbia Electric R. Co.*, 7 D.L.R. 459, affirmed.]

Statement

THE plaintiff was injured while standing on the lower step of a crowded street car which collided with another car while backing up in response to a signal from the conductor. The defendant appealed from the judgment of Murphy, J., *Williams* v. *B.C. Electric R. Co.*, 7 D.L.R. 459, in favour of the plaintiff.

The appeal was dismissed.

L. G. McPhillips, K.C., and *Duncan*, for the defendant, appellant.

W. A. Macdonald, for the plaintiff, respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—There is evidence that the appellants habitually allowed persons to ride on the steps of their cars as passengers. The respondent was a passenger on the step of the car at the time of the accident. Both parties were breaking a city by-law, the one in riding there, the other in allowing him to do so. It was not a safe place to ride, and I think the respondent was negligent in so riding, but the ultimate negligence was that of the appellants' servants. Had they exercised reasonable care in the operation which they were performing in backing the car, the accident could not have happened. The facts of the case bring it within *Davies* v. *Mann*, 10 M. & W. 546.

I would dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—In this case I think there was evidence to support the finding of the jury that the plaintiff was a passenger. In my opinion the fact that the plaintiff got on the car while it was in motion does not prevent him from being a passenger, particularly in view of the fact that he held a commutation ticket. Having regard to the crowded state of the rear platform, a fact of which the conductor was fully aware, and also of the fact that the car was being backed on its wrong side, in my opinion the conductor might reasonably have anticipated harm arising from the over-crowded condition of the car unless he took steps to clear the platform, or clear the steps on the side of the platform upon which steps the plaintiff was standing.

I do not think we should interfere in this case.

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MARTIN, J.A.:—After carefully reading all the evidence in this case in addition to that which was cited to us, I have come to the conclusion that there is ample evidence to support the findings of the jury and that the answer to the fifth question, when read in relation to the facts, is sufficient to sustain the verdict, despite the finding of contributory negligence. As was remarked by Mr. Justice Garrow in *Dart* v. *Toronto R. Co.*, 8 D.L.R. 121, at 124:—

> Under the circumstances where so much depends upon the actual facts not much assistance can be got . . . from decided cases,

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and I shall content myself by saying that to back up the car in such a congested place of traffic, where there was admittedly (p. 38) "a continuous stream of cars on both the tracks" in question, was a highly dangerous thing to do, and, therefore, required a corresponding degree of care. But the conductor (who had gone on ahead to attend to the switch) admits (p. 78) that he did not even take the obvious precaution of taking one or two steps to the side of the car to inform himself as to passengers on the steps, who, in view of the long standing state of affairs, abundantly proved, must have been expected to be there at that time of day, but climbed into the car through the end window of the vestibule (owing to its congested condition) and thereupon in that state of almost wilful, and certainly reckless ignorance, gave the signal to back up. No more in my opinion need be said, except that the appeal should be dismissed.

GALLIHER, J.A. (dissenting):—I adhere to the opinion I expressed at the hearing of this case, and would allow the appeal.

Galliher, J.A. (dissenting)

The plaintiff jumped on the rear steps of the defendants' car which was crowded, not at any regular stopping place, but while the car was in motion and was there without the knowledge or consent of the defendants. Neither can it be said he got on at the invitation of the defendants, as his act in getting on the car was in violation of the rules of the company. It is true that passengers although not desired to do so, in fact requested not to do so, were allowed by the company to ride on the rear vestibule and steps of the car, and had this man got on while the car was stopped and while the conductor could have had an opportunity of putting him off, if the steps were too crowded, it may be he would be entitled to recover, but he jumped on these steps while the car was in motion between two points, and was there by his own wrongful act, without the knowledge of the defendants, and I do not think that what transpired later in shunting the car under the circumstances of this case gives him a right to recover.

Appeal dismissed, GALLIHER, J.A., *dissenting*.

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PERRAULT v. RUMELY PRODUCTS CO.

Alberta Supreme Court, Beck, J. July 28, 1913.

1. MORTGAGE (§ I D—15)—VALIDITY—STATUTE—MORTGAGE CONTEMPORANEOUS WITH BUT NOT PART OF CONTRACT FOR SALE OF MACHINERY.

A mortgage executed contemporaneously with but not contained in, endorsed on or annexed to an order for machinery, although given to secure the payment therefor, is not within ch. 5 of Alberta Acts of 1910, 2nd session, prohibiting charges on lands contained in certain instruments.

[*Nichols* v. *Skedanuk* (No. 2), 11 D.L.R. 199, distinguished.]

Statement

THIS is an application on originating summons by Perrault to set aside a caveat filed upon a mortgage made by him to the Rumely Products Co., Limited. Perrault signed an order for certain machinery dated May 16, 1913, the price of which was $500, for which a note was to be given payable—with certain interest—on November 1, 1913. The order retained the property in the machinery in the company until full payment of the purchase price. The order also contained an agreement on the part of Perrault to give a mortgage on certain land to secure the purchase price, $500, and the mortgage in question was given on the same occasion as the order. There is no specific reference in the order to the mortgage nor in the mortgage to the order.

The application was denied.

Macleod & Gray, for plaintiffs.

Clarke, McCarthy, Carson & Macleod, for defendants.

Beck, J.

BECK, J.:—The provision in the order for the giving of the mortgage is undoubtedly void under ch. 5 of 1910 (Alberta), 2nd sess., intituled An Act respecting charges upon land contained in certain instruments. The question is, whether the mortgage executed contemporaneously with it but not "contained in or endorsed upon or annexed to" the order is also void. I am of opinion that it is not so. The obvious purpose of the Act to my mind is to put a stop to what had by experience come to be common, namely, the procuring of signatures of persons who were more or less illiterate or uneducated or of little business capacity or careless in the scrutiny of what they signed to long and intricate orders for chattels containing provisions for charges upon the signatories' land by way of security for the purchase-price of the chattels because it was always difficult at least to establish what in many cases there seemed to be a strong suspicion was the truth that the signatory had not in fact given his voluntary and explicit consent to the provision for such security. The case is different where an entirely distinct and separate document of security is executed and I cannot see that the words of the Act cover such a case. Mr. Justice Stuart

in *Nichols* v. *Skedanuk* (No. 2), 11 D.L.R. 199, seems to have expressed a different opinion, but it does not appear to have been necessary for his decision which can very well be supported on other grounds. I must, therefore, in the present case refuse to grant the application to discharge the caveat and I must order the applicant to pay the costs of the application.

Application refused.

BOWLES v. CHATFIELD.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. July 17, 1913.

1. FRAUD AND DECEIT (§ I—1)—CONTRACT FOR THE SALE OF LAND—MISREPRESENTATIONS BY VENDOR'S AGENT—EFFECT.

One cannot be held liable on a contract for the sale of land which he was induced to enter into by the misrepresentations of the agent of the vendor that the latter intended erecting a pavilion and bath-house on lots reserved by him, and that other lots had been sold to one who intended building a large hotel on them.

2. FRAUD AND DECEIT (§ I—1)—CONTRACT INDUCED BY FRAUD—ELECTION TO AFFIRM.

In order to shew an affirmance of a contract obtained by false representations it must appear that the person deceived elected, after full knowledge of the falsity of the representations, to carry out the contract.

Statement

THE statement of claim sets up an agreement in writing dated November 9, 1910, by defendant to purchase from plaintiff certain lots in Little Lake Manitou sub-division on the south shore of Little Manitou Lake, Saskatchewan, and plaintiff asked for judgment for $1,965, the amount due on the agreement. The statement of defence set up, that the agreement was signed on account of the fraud and misrepresentation of the plaintiff and his agent and that but for such fraud and such misrepresentation the agreement would not have been signed by the defendant.

The plaintiff or his agent represented to the defendant that a company, for which plaintiff was agent, would within one year spend $20,000 in improvements on the property and that they had reserved a number of lots upon which to build a pavilion and bath-house; that upon a lot near to or adjoining the property sold to the defendant a hotel should be erected and operated; further, for the purpose of inducing defendant to sign the agreement plaintiff agreed that if defendant did not sell the lots plaintiff would re-purchase the same from defendant. The defence further set up that such representations made to the defendant were false to the knowledge of the plaintiff and his agent and but for such representation defendant would not have signed the agreement nor would he have entered into any negotitions for the property in question. The defendant set up that by reason of the fraud and misrepresentation of the plaintiff or

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his agent he was induced to pay to the plaintiff the sum of $300 and he counterclaimed for that amount.

Judgment was given the defendant on his counterclaim.

A. K. Dysart, for the plaintiff.

A. M. S. Ross, for the defendant.

MATHERS, C.J.K.B.:—I find as a fact that Thos. Black, the plaintiff's agent, represented to the defendant that the owner of the subdivision in question had reserved a number of lots, and that they proposed to erect thereon a pavilion and bath-houses.

I find that the said Black also at the same time represented to the defendant that the proprietor of the Queen's Hotel, Winnipeg, had bought 25 lots in this subdivision for the purpose of erecting a large hotel thereon.

I think these representations were calculated to increase substantially the apparent value of the property bought by the defendant. I find that these representations constituted a material inducement to the defendant to enter into the contract. I find that both representations were untrue.

Some evidence was introduced for the purpose of shewing that the defendant had elected to affirm the transaction; but it falls short of shewing that the acts of affirmation were done after he had a knowledge of the false representations, and, in any event, the plaintiff has not pleaded that the defendant, with a knowledge of the misrepresentations, elected to affirm the transaction.

There will be judgment dismissing the plaintiff's action with costs.

The defendant has counterclaimed for the sum of $300 paid, and he is entitled to be repaid this money.

There will be judgment for the defendant upon his counterclaim for $300 and costs of counterclaim.

Judgment for defendant.

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VELASKY v. WESTERN CANADA POWER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. April 22, 1913.

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

The owner of a line of poles, some of which were insecure, who employed an independent contractor to string wires on them, is liable for an injury sustained by one of the latter's servants by the falling of an insecure pole on which he was working, notwithstanding the contractor was paid to strengthen all of the insecure poles; since it was the defendant's duty to see that its poles were safely secured before permitting the plaintiff to work upon them.

[*Marney* v. *Scott*, [1899] 1 Q.B. 986; *Valiquette* v. *Fraser*, 39 Can. S.C.R. 1, and *Canada Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424, specially referred to.]

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APPEAL by the defendant from a judgment in favour of the plaintiff for injuries to a servant.

The appeal was dismissed on an equal division of the Court.

Sir Charles Hibbert Tupper, K.C., for appellant, defendant.

D. McDonald Mowat, for respondent, plaintiff.

MACDONALD, C.J.A.:—The facts of this case are very simple. The defendants had erected a line of poles upon which they intended to string their electric wires. Before the time arrived for stringing the wires some of the poles had become insecure by reason of the action of water or otherwise. They made a contract with one Lockwood to make these poles secure, and to string the wires. It was conceded by respondents' counsel that Lockwood was an independent contractor. The plaintiff was employed by Lockwood in stringing wires on said poles, and after climbing one of them it fell, causing the injuries for which this action was brought. This was one of the poles which should have been made secure by Lockwood before attempting to string the wires. Instead of suing his employer, Lockwood, the plaintiff brought this action against the defendant company, and the jury found a verdict in his favour. The evidence discloses the fact that Lockwood was an experienced and competent man in the work which the defendant contracted with him to do.

In these circumstances I am of opinion that the plaintiff had no cause of action against the defendants. The evolution of the law on the question of liability where a contractor is employed is traced by Mr. Beven in his work on Negligence, 3rd ed., pp. 597 to 607.

The respondents rely upon *Heaven* v. *Pender*, 11 Q.B.D. 503; *Marney* v. *Scott*, [1899] 1 Q.B. 986; and *Penny* v. *Wimbledon*, [1899] 2 Q.B. 72; but I think all these cases are distinguishable from the case at bar. Here the negligence was Lockwood's and unless the law is that the defendant owes a duty to Lockwood's employees to see that Lockwood does his duty towards them, then the plaintiff cannot succeed. The question may not be quite free from doubt, but I think I should be going beyond the authorities if I were to hold that, except where the duty is statutory or of the class specially owed to the public, or by occupiers of property to persons coming there by invitation, or on business, a corporation letting work of the nature in question to a competent contractor, had failed in its duty to the contractor's servants when having ascertained the defects it did no more than to employ that contractor to remedy them.

I would allow the appeal and dismiss the action.

IRVING, J.A.:—The plaintiff, who was in the employ of one Lockwood, sustained injuries when acting as an employee of

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Lockwood, brought this action against the Power Company, because he sustained the injuries in consequence of one of their poles—which he had ascended for the purpose of stringing wires thereon—falling with him.

Lockwood was an independent contractor employed by the defendants to erect, and strengthen a certain line of power poles, many of which were known to be undermined by water. He was also to string them with wires.

The operations were being carried on by Lockwood. The pole in question had not been strengthened by the erecting gang before the plaintiff ascended it for the purpose of attaching to its cross arms the wires.

Having regard to the circumstances of this accident, I do not think the plaintiff has a cause of action against the defendants. There was no contractual relation between him and them. They owed him no duty to warn him, or to see that the poles were firmly erected, before he ascended to string the wires.

There is a duty imposed by law on the occupiers of buildings and structures intended for human use or occupation, but the extent of that duty varies very much. It may vary with regard to the class of structure or with regard to the persons to whom it (the duty) is owed. In certain cases the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the selection of that contractor. To an action by a passerby—one of the public—who had sustained injuries by one of these poles falling upon him, it would be no answer to say: "I had selected a very careful competent contractor." *Kirk* v. *City of Toronto*, 8 O.L.R. 730, illustrates that line of law very well, but the plaintiff in this case was not a passerby. He was employed by Lockwood, who had contracted to erect and to wire the poles. As a general rule, the master's duty to his servant, which duty is independent of contract, is the same as that owed by an occupier of property towards any member of the public coming, by invitation on his premises on business of common interest, except in so far as the contract of hiring and service implies a special acceptance of risk. Fellow servants of his—possibly in a different department—had been guilty of negligence and he, therefore, could not succeed in an action against Lockwood his employer.

Mr. Mowat's contention is that there was an absolute duty on the defendants to the plaintiff. What duty? To warn him that the gang which ought to precede him and make the pole firm, had not done so: *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, is pressed too far. The duty is to warn against unusual danger, see the summing up of Erle, C.J., and observe that the

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measure of liability was discussed only incidentally. The chief point under discussion was as to the plaintiff being a licensee.

I have read all the cases to which Mr. Mowat has referred us. I cannot agree that there was any absolute duty on the defendants which would prevent the operation of the rule of common employment, if that rule were applicable. Most of the cases cited turn on the duty of the occupier of premises, or on nuisance to the public, but I do not think they are applicable to this case, because the persons in possession of this structure, if it can be regarded as a structure, were at the time of the accident not the defendants, but Lockwood, the contractor. The basis of the duty to take care is founded on the theory that there is an invitation, express or implied, or holding out that the place is safe. How can there be any such holding out to a workman in the employ of the contractor who had to make the place safe: or how can the workman who has received an express invitation from Lockwood attribute any representation to the defendants?

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The case of *Murray* v. *Currie* (1870), L.R. 6 C.P. 24, seems to me in point. There Kennedy had a special contract, employing plaintiff and one Davis and several other men, and doing the work of stevedoring for the defendant, but quite independently of the defendant. Davis was negligent, and in consequence plaintiff was injured. Plaintiff got a verdict, but was not allowed to hold it. Willes, J., at p. 27, said:—

> I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself (cf. *Lees* v. *Dunkerly Bros.*, [1911] A.C. at p. 8) or to the first person in the ascending line who is the employer and has control of the work. You cannot go further back and make the employer of that person liable.

I would allow the appeal.

MARTIN, J.A.:—A contractor erected for the defendant a line of poles on a rural highway, and a few months afterwards the same contractor agreed with the said defendant to string wires on the same poles to complete the line. Very shortly thereafter it was discovered by the defendant that some of the poles were in an unsteady and unsafe condition, so the contract was expanded and its price increased to include the strenthening of such poles, the work to be done concurrently—as the superintendent of the company puts it (p. 96):—

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> I instructed Lockwood (the contractor) to go out there and string the wires and while stringing the wires to put the poles in good shape. I also instructed Campsie (the line foreman) to make sure that the poles were in good shape.

This contract was made about a week before the accident, and Campsie pointed out to the contractor the poles that required strengthening. The plaintiff is a lineman, and suffered

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serious injury by one of said unsafe poles falling when he was on it engaged in stringing wires. There is no evidence of the steps, if any, taken by the contractor to make the poles safe, and the plaintiff swears positively that he got no such instructions. At the same time he admitted that if he thought a pole was unsafe it was always his duty to guy it before climbing it, but that he had no such suspicion in this instance; and the circumstances of the case were such on the evidence that the jury were fully entitled to find as they did that the plaintiff was not guilty of contributory negligence; the evidence of the witness Hogarth in particular as to the pole standing in a four foot crust of earth which, however, had become undermined by water, is in his favour. It is urged that as the defendant employed an independent contractor, admittedly competent, to make the poles safe as well as string the wires, it is relieved from liability. But after considering carefully many authorities, I am of the opinion that it cannot escape, and is liable on the principle laid down in *Marney* v. *Scott*, [1899] 1 Q.B.D. 986, which not only has never been questioned, but is cited with approval in *Valiquette* v. *Fraser* (1907), 39 Can. S.C.R. 1 at 3-4, and is the nearest English case to the one at bar that I have been able to find. It is said, pp. 989-90, by Bigham, J.:—

> I think that a man who intends that others shall come upon property of which he is the occupier for purposes of work or business in which he is interested, owes a duty to those who do so come to use reasonable care to see that the property and the appliances upon it which it is intended shall be used in the work are fit for the purpose to which they are to be put, and he does not discharge this duty by merely contracting with competent people to do the work for him. If the parties with whom he so contracts fail to use reasonable care and damage results, the occupier still remains liable. I think that this is the true effect of the cases which were cited to me in argument.

See also p. 992, for the adoption of the rule in Pollock on Torts, 5th ed., p. 477, also approved in *Valiquette* v. *Fraser*, p. 4. That was a case of the charterer of a ship being held responsible to one of the servants of a stevedore (the contractor to load the ship) who was injured by a defective ladder leading into the hold, and though there was no question of the employment of a competent person to inspect, yet the decision is apart from the line of cases relating to injuries caused to the public by the carrying out of works on a highway, wherein it is settled that the owner cannot escape liability by the employment of a competent contractor, such as *Tarry* v. *Ashton*, 1 Q.B.D. 314; *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335; *Penny* v. *Wimbledon Urban District Council*, [1899] 2 Q.B. 72; *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392; and *Kirk* v. *City of Toronto*, 8 O.L.R. 730. Here, the defendant's property—the

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pole line—was to its knowledge in a very dangerous state for anyone to string wires on, and it was its duty to see that no one was allowed to climb up on its poles for that purpose till the line had been made safe, and it is not a case where the liability could be avoided by attempting to delegate the duty to another however competent. In circumstances of this class the owner, if he lets a contract to make the premises safe, must also see that it is carried out. The cases of *Valiquette* v. *Fraser, supra,* and *Canada Woollen Mills* v. *Traplin* (1904), 35 Can. S.C.R. 424, directly support this view, particularly the latter at pp. 430-6 wherein the distinction that applies to defective premises is explained. And the same distinction is pointed out in *Ainslie Mining Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420, at 422-3.

With respect to the objection taken to the learned Judge's charge, it is sufficient to say that if I am right in the view I have taken it is substantially correct.

As to the fact that the jury did not answer the question on *volens,* the answer is that while the learned Judge did submit questions to them, he did so in such a way (very regrettably I think, with all respect, in view of the opinion expressed repeatedly by this Court as to his duty in negligence cases, the proper discharge of which is of great assistance to us in case of an appeal) and they consequently returned a general verdict (apart from answering five of his questions) as follows: "Verdict is declared in favour of the plaintiff for $3,200," which is sufficient on the evidence. I remark that the learned Judge was in error in saying, pp. 108-9, that the question be submitted thus: "Did the plaintiff voluntarily assume the risk?" was "the usual *volens* question" and "embodies the doctrine of *volens.*" The full and proper form of question on that point is to be found in *Wood* v. *Can. Pac. R. Co.* (1899), 6 B.C.R. 561, 30 Can. S.C.R. 110.

I refer to the similar case of *Slater* v. *Vancouver Power Co.,* in which we are delivering judgment to-day and the authorities there cited.

The appeal should, in my opinion, be dismissed.

GALLIHER, J.A.:—If the defendants are liable in law, I think the jury's finding of fact cannot be assailed. I think we must regard these poles upon which defendant's wires are to be strung as a structure. The defendants say: we are not liable because we employed or rather contracted with Lockwood, a competent man, for whom the plaintiff worked, to string the wires on the poles which included the one that fell with and injured the plaintiff. In going over the line with Lockwood previous to the stringing of wires, Campsie, a foreman of the defendants,

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says several of the poles which had been erected some time previous were not secure, and instead of fixing them himself, he made a verbal contract with Lockwood to do so. It does not appear from the evidence that these poles were fixed by Lockwood. It was the duty of the company in providing a structure upon which workmen would have to go, and which structure they themselves knew to be defective, to see that the structure was put in a fit and proper condition, and they cannot free themselves by delegating that duty to another. I regard the plaintiff as being there at the invitation of the defendants within the meaning of the decision in *Marney* v. *Scott*, [1899] 1 Q.B. 986. It is quite a different case from that where a company provides fit and proper plant and machinery and then employs competent foremen to run it. Here the plant or structure itself is defective.

I would dismiss the appeal.

Appeal dismissed on equal division of Court.

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REX v. PELKEY.

Alberta Supreme Court, Harvey, C.J. June 23, 1913.

1. PRIZE FIGHTING (§ I—2)—WHAT CONSTITUTES—PRIZE OR REWARD.

An encounter of the nature of a fight, with fists or hands, between two persons who have met for such purpose by previous arrangement is a "prize fight" under Cr. Code 1906, sec. 105, within the statutory definition of the phrase "prize fight" contained in Cr. Code 1906, sec. 2 (31), if the contest be one in which each strives to overcome or conquer the other, although there is no prize offered to the victor. (Dictum *per* Harvey, C.J.)

[*R.* v. *Wildfong*, 17 Can. Cr. Cas. 251; *R.* v. *Fitzgerald*, 19 Can. Cr. Cas. 145; and *Steele* v. *Maber*, 6 Can. Cr. Cas. 446, referred to.]

2. HOMICIDE (§ I—6) —WHILE ENGAGED IN UNLAWFUL ACT—PRIZE FIGHT OR BOXING CONTEST—DEATH OF CONTESTANT IN RING—CHARGE OF MANSLAUGHTER.

On a trial for manslaughter against one of the contestants in a so-called boxing contest in respect of the death of the other contestant in the ring following a knock-out blow, the jury in considering whether the contest was one prohibited by the provisions of the Criminal Code as to prize fights, may take into consideration the weight of the gloves as bearing on the intention that the fight should terminate by one or the other being incapacitated, although limited to ten rounds. (Dictum *per* Harvey, C.J.)

Statement

TRIAL for manslaughter.

James Short, K.C., for the Crown.

A. L. Smith, for Pelkey.

The following is a portion of the charge of the Chief Justice of Alberta, given to the jury on a trial for manslaughter on the death of the other contestant in a pre-arranged fight during the progress of the bout.

The respondent was found not guilty.

HARVEY, C.J.:—A prize fight is defined by the Criminal Code (sec. 2(31)) as "an encounter or fight with fists or hands between two persons who have met for such purpose by previous arrangement made by or for them."

It is somewhat singular that though this definition has been a part of our law since 1881 I have not been able to find any reported decision in which it has been considered by a Superior Court; the only reported cases of which I have found any record have occurred within the last 13 years and are decisions, one of a District Magistrate of Quebec (*Steele* v. *Maber*, 6 Can. Cr. Cas. 446) in which he found the act complained of a "prize fight" and the others of County Court Judges, of St. John, N.B. (*R.* v. *Littlejohn*, 8 Can. Cr. Cas. 212), Hamilton, Ont. (*R.* v. *Wildfong*, 17 Can. Cr. Cas. 251), and Toronto, Ont. (*R.* v. *Fitzgerald*, 19 Can. Cr. Cas. 145), in all of which convictions made by the police magistrates were set aside.

While I express no opinion as to the correctness of the decisions in any of these cases on the facts that existed, I am unable after the most careful consideration to accept all of the general propositions in these cases.

I agree with them that the presence or absence of a prize which is suggested by the name has no significance whatever. There is nothing suggesting a prize in the definition, and section 108 makes it abundantly clear that the absence of a prize cannot affect the character or legal consequences of the fight, unless it is accompanied by the fact that the fight is the result of a quarrel or dispute in which case it is none the less a prize fight and illegal, but the punishment may be made lighter or even dispensed with. Such a fight as suggested by section 108, viz.: one the result of a quarrel and which is not for a prize or money is not such a fight as we think of at all as included in the ordinary meaning of the term "prize fight," but as it is included under our Code, it is apparent that the definition of "prize fight" is intended to comprise more than is ordinarily understood by the term instead of less as apparently considered in the last reported case where the learned Judge in effect holds that our definition means that a prize fight is a prize fight as theretofore known subject to the limitation and qualification of the rest of the definition.

The definition of prize fighting at common law as given by the cases referred to appears to me to be more restricted than the authorities warrant. It appears to be taken from a case decided in 1878 in England (*R.* v. *Orton*, 14 Cox Cr. Cas. 226), in which a Court of Judges held that on the facts of that case the charge to the jury was correct in which the Judge said, that

> If it were a mere exhibition of skill in sparring it was lawful, but if the parties met intending to fight till one gave in from exhaustion or injury

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received, it was a breach of the law and a prize fight whether the combatants fought in gloves or not.

Now it seems apparent that was not intended as a comprehensive definition of a prize fight, but simply an indication of what, on the facts of that case, it was necessary for the jury to consider. It is quite apparent also from the fact that the two alternatives suggested do not cover the whole field.

In a later case in 1881, *R.* v. *Coney*, 15 Cox C.C. 46, 51 L.J. M.C. 66, the facts as stated in the report of the judgment which are, therefore, apparently all that were considered material were that two men at the close of the Ascot races engaged in a fight near the road, that a ring was formed with posts and ropes, that they took off their coats and waistcoats and went into the ring and fought for a considerable time in the presence of a considerable number of people.

The question for consideration there was whether three persons who were passing and, attracted by the crowd, had gone to see what was going on and were looking on were liable as participants. The eleven Judges by a majority of eight to three held that they were not necessarily liable, it being for the jury to say whether they were in fact aiding or abetting the fight, but it was necessary to determine first that the fight itself was illegal. With only one exception the Judges were agreed that this was a prize fight, though there is no suggestion that the fight was prearranged or that the participants had fought or intended to fight till one was exhausted. One of the Judges, the author of a standard treatise on the criminal law (Stephen, J., at p. 73) said:

> The injuries given and received in prize fights are injurious to the public both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize fights are disorderly exhibitions and mischievous on many obvious grounds.

Another Judge (Cane, J., p. 68) said:—

> The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport and not likely or intended to cause bodily harm is not an assault.

Russell in his comprehensive work on Crimes, says, 7th ed., p. 785:—

> Prize-fighting, public boxing matches or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, have been considered unlawful. For in these cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided that the promised reward of applause be obtained; and meetings of this kind have also a strong tendency to cause a breach of the peace. Therefore, where the prisoner had killed his opponent in a boxing match, it was held that he was guilty of manslaughter; though he had been challenged to fight

by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts; and the occasion was sudden.

Prize-fights are altogether illegal; as illegal as duels with deadly weapons, and it is not material which party strikes the first blow. . . . Such sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends without any intention to cause bodily harm, such as playing at cudgels, or foils, or sparring with gloves, wrestling by consent, or football are deemed lawful; and if either party happens accidentally to be killed in such sports, it is excusable homicide by misadventure.

Though it cannot be said that such sports are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard.

He notes that there are to be excepted sparring matches with proper gloves and fairly to be conducted.

The evidence in this case gives some indication of what is considered "sparring," for the witnesses speak of the opening of this contest as more like "sparring," or feinting than boxing, and the Century Dictionary defines the verb "spar" as meaning "to make the motions of attack and defence with the arms and closed fists; use the hands in or as if in boxing either with or without boxing gloves."

It is stated in the English Encyclopaedia of Law (vol. 2, p. 385), "That the line between unlawful and lawful contests of this kind is fine."

You will probably have gathered from what I have said that the English law on this point is to be ascertained from an examination of the cases, there being no statutory definitions. That was the state of our law when the statute was passed in 1881 defining prize fighting and fixing penalties in respect of it. The purpose of the definition was, of course, to make definite what was indefinite, which is another way of saying "to define." By the same Act provisions were made for preventing a contemplated prize fight. It seems apparent, therefore, that it must have been intended to render it possible to determine whether a proposed contest was to be a prize fight without the necessity of referring to the actual conduct of it.

The difficulty in construing the definition appears to be in the words "encounter or fight." I am of opinion that they do not mean "either an encounter or a fight," but rather "an encounter of the nature of a fight or that could be designated as a fight." I take it that the word fight is here used with its ordinary meaning, which is hard to define in simpler terms. You probably understand it quite as well as I do, or as I could explain it. It suggests to me a contest or struggle in which one strives to overcome or conquer the other. It is not an uncommon use of the word to speak of a fight between two boys to see which will be ahead of the other in his class. But in the present case, the

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only fight to be considered is one with the fists or hands. It will include what was theretofore known as a prize fight between pugilists, as also a fight arranged between persons who are not pugilists, but would not include boxing when it is carried on as an exemplification of what has been called the "manly art of self-defence," though it might, if the contest were typical of what might be designated as the brutal science of attack. It appears that if the purpose is an exhibition of sparring or boxing on its scientific side it is not within the definition and is unobjectionable, whereas if it is a contest in which one strives to conquer the other by blows and has the other accompaniments, it is a prize fight within the definition, and I am of opinion that under our definition there is nothing to warrant the conclusion that the contest must be of such duration as to shew that the intention is to exhaust or wear out one or both of the combatants.

Of course, every prize fight would be an exhibition of the science of boxing if between competent persons, but the exhibition feature would, as far as the contestants were concerned, be only an incident—the result of the contest being the important thing.

It is necessary then to apply the distinction to the facts of this case. We find that the accused and the deceased met by virtue of an arrangement previously made for them for a contest with their fists or hands, for the fact that gloves were worn as the cases point out does not prevent it from being a contest with the fists or hands.

The question then is, was it an "encounter or fight" as I have explained that term?

It is suggested that it was not because a part of the arrangement was that it should be for ten rounds only with no decision at the termination. The affair was advertised as a

> Boxing, Burns Arena, Calgary, Saturday, May 24; Second round of the Elimination Series for the World's Heavyweight Championship, Luther McCarty, the World's Heavyweight Champion vs. Arthur Pelkey, of Calgary, claimant of World's Championship; 10 rounds

indicating that the World's Championship was at stake. One of the contestants was described as the World's Heavyweight Champion, and the fair inference to be drawn from the notice is that the winner would carry that title. It was so well advertised that there were 3,000 people present and $8,400 was paid in admissions. The ring was prepared in the same manner and in other respects the contest was conducted, as far as it went, in the same way as many other contests in which the deceased had taken part with some possible slight modifications.

Except for the number of rounds the matter of decisions and the weight of the gloves the evidence seems to indicate that the contest was to be conducted according to the same rules as the

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fight between Johnson and Jeffries, which is stated to have been a prize fight and held in the only one of the United States which then permitted prize fights and in which, one of the questions and answers suggests, there was much brutality. The manager of the deceased seemed to consider that the only difference between such a contest as this and a prize fight was that there was no prize or money dependent upon the outcome of this. This, of course, is unimportant under our law. Mr. Smith, the referee, a recognized sporting authority, who states that he has acted as referee at more than 100 contests says he has been trying for 25 years to find out what the difference between a prize fight and a boxing match is.

They both appear to have in mind such a contest as took place here, and there seems little room for doubt that they know prize fights. Their evidence is, therefore, important in this connection to enable you to determine whether there is any essential difference between this contest and a prize fight, for, if there is not, it is a prize fight.

You are entitled to consider the weight of the gloves to determine what the intention of the parties was, but if you are satisfied on the evidence that the intention was to fight as I have explained, the size or weight of the gloves bears no significance. The fact that it was for 10 rounds only without a decision is also to be considered by you in considering whether it was a mere scientific exhibition, but you must take this in conjunction with the advertisements and other facts. The advertisement suggests that one of them will carry away the title of champion. Now, how was that to be accomplished on the part of the one who did not have it except by defeating the one who held it? The evidence shews that when the deceased fell, the referee counted 10 and then indicated that his opponent had become the winner by virtue of a rule which provided for just such a consequence.

It is suggested that a man would not become exhausted in 10 rounds and that, therefore, one of the elements necessary to make this a prize fight did not exist. As I have already indicated this is not a necessary element and, moreover, it is for you to consider whether the fact that one of the contestants could win from the other only by knocking him out, as the witnesses have phrased it, and that too within 10 rounds, might not itself conduce to greater severity and thus greater danger, than if the contest could be of longer duration, or if there could be a decision by the referee.

There are other facts for you to consider, such as that the contestants were professional pugilists, that the contest was a public one arranged apparently solely for business purposes and such things, also that one of the witnesses states that the contest had not yet become interesting or exciting, and that another

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states that in such contests he has seen men knocked out. All of the facts are to be considered both for and against. It is suggested that amateur competitions are conducted under the same rules and are as likely to result in injuries. There is this distinction, however, that school or Y.M.C.A. competitions or sports of such a character are usually open to all competitors and are, therefore, not contests previously arranged for between two persons and thus do not come within the definition. As indicated also by what I have read you from the cases and text-books the danger of injury is not the only reason in law for holding prize fights illegal, there being other objectionable features which would be absent from most amateur affairs. It has been shewn that this affair was orderly and that a police officer was there in the discharge of his duty which was to prevent it from becoming disorderly, but not to stop the contest which it would have been his duty to prevent if it had been a prize fight. I think little weight should be attached to this fact, for whether the police thought it illegal or not does not affect the question of whether it was in fact illegal, and, in view of the only decisions in the Canadian Courts it is not surprising that the police should have considered themselves not justified in interfering.

If you find that it was a prize fight you will do so upon the interpretation of the law which I have given you which, as I have shewn you, differs in some respects from former interpretations. The fact that many reputable citizens were present also is of no importance. Probably if they had not believed it legal many of them would not have been there, but their belief could in no way help to make it legal.

N.B.—The jury returned a verdict of not guilty and the defendant was discharged.

Annotation

Annotation—Prize fighting (§ I—2)—Definition—Cr. Code (1906), secs. 103-108.

The present sections of the Criminal Code of 1906, relating to "Prize fights" have their origin in the Statutes of Canada, 44 Vict. ch. 30, being "An Act respecting prize fights." This Act was consolidated in the Revised Statutes of Canada of 1886 as ch. 153 of same. A reference to the original statute may be of assistance in ascertaining the meaning of secs. 104 to 108 inclusive of the Criminal Code 1906, those being the sections bearing the sub-title "Prize fights." The case of *R.* v. *Pelkey*, above reported, contains a dictum *per* Harvey, C.J., that the presence or absence of a prize which is suggested by the name of the offence has no significance whatever and as there is nothing suggesting a prize in the statutory definition the offence may be complete as a "prize fight," although there be no prize or the handing over or transfer of money or property on the result. A similar dictum is contained in the case of *R.* v. *Wildfong*, 17 Can. Cr. Cas. 217, decided by Judge Snider, of Hamilton, in 1911. The point cannot be said to have been actually essential to the result in either of these two

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Annotation (*continued*)—Prize fighting (§ I—2) — Definition — Cr. Code (1906), secs. 105-108.

cases, and while the opinions expressed as to the effect on the offence where there is no prize, are of importance because of the high judicial standing of the two Judges named, they do not appear to be authoritative as precedents by reason of the fact that this question did not come up squarely for decision and both cases went off on other grounds.

In the "Act respecting prize fighting," R.S.C. 1886, ch. 153, the interpretation clause declared that, unless the context otherwise required, the expression "prize fight" means an encounter or fight with fists or hands between two persons who have met for such purpose by previous arrangement made by or for them. The Act provided the punishment for challenging to fight a prize fight, and such offence was declared to be a misdemeanour and punishable on summary conviction. Engaging as a principal in a "prize fight," or aiding or abetting a "prize fight," were likewise misdemeanours and were punishable on summary conviction. Special duties to prevent "prize fights" were imposed upon sheriffs and police officers in like manner as such duties are now stated in secs. 627 and 628 of the Criminal Code, 1906. Judges of the Superior and County Courts were given all the powers of justices of the peace as regards offences under the Prize Fighting Act, and such powers they still have by virtue of sec. 606 of the Criminal Code, 1906, which replaces in part sec. 10 of the original statute, 44 Vict. ch. 30. Section 9 of that Act which was the predecessor of the present sec. 108 of the Criminal Code, 1906, was as follows:—

"9. If, after hearing evidence of the circumstances connected with the origin of the fight or intended fight, the person before whom a complaint is made under this Act is satisfied that such fight or intended fight was *bonâ fide* the consequence or result of a quarrel or dispute between the principals engaged or intended to engage therein, and that the same was *not an encounter or fight for a prize* or on the result of which the handing over or transfer of money or property depends, such person may, in his discretion discharge the accused or impose upon him a penalty not exceeding fifty dollars."

This sec. 9 had a marginal note as follows: "If the fight was not a prize fight but an actual quarrel."

While section 108 was not directly invoked in the principal case above reported it is of importance for the interpretation of the term "prize fight" in the preceding secs. 104 to 107 inclusive, having regard to the statutory definition of "prize fight" as contained in sub-sec. 31 of sec. 2 of the Criminal Code, 1906. Sub-sec. 31 appears in the same terms as the definition in the original Act, when read with the limitation which is imposed by sec. 2 as regards all of the statutory definitions, namely, that the interpretation shall be as stated "unless the context otherwise requires."

With reference to the meaning of statutory interpretation clauses generally, the following extract from Beal's Cardinal Rules of Legal Interpretation, 2nd ed., 299, is of interest: "An interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain. An interpretation clause should be taken as declaring what may be comprehended within the term where the subject matter and circumstances require that it should be so comprehended."

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Annotation (*continued*)—Prize fighting (§ I—2) — Definition — Cr. Code (1906), secs. 105-108.

In support of these propositions the following authorities are referred to:—

"An interpretation clause is . . . not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term, where the circumstances require that they should": *Reg.* v. *Cambridgeshire* (1838), 7 A. & E. 480, at 491, Lord Denman, C.J.

"With regard to all these interpretation clauses, I understand them to define the meaning, supposing there is nothing else in the Act which is opposed to the particular interpretation. When a concise term is used, which is to include many other subjects besides the actual thing designated by the word, it must always be used with due regard to the true, proper and legitimate construction of the Act": *Midland R. Co.* v. *Ambergate, Nottingham and Boston and Eastern Junction R. Co.* (1853), 10 Hare 359, at 369, Turner, V.-C.

With regard to the statutory definition it is submitted that, notwithstanding its terms, a prize is still essential to the offence of engaging or participating in a prize fight; and that this interpretation is assisted by the wording of sec. 108 of the Criminal Code, 1906, and the marginal note to same which reads as follows: "When fight is not a prize fight."

That the statutory definition does not cover all of the ingredients of the offence is shewn by the principal case in which Harvey, C.J., reviews the authorities on the point and concludes that the encounter or fight aimed at by the statute must necessarily be an encounter by way of fight in which each strives to overcome or conquer the other; in other words, that the fight must be one in which each of the parties is to fight until he can no longer stand up to continue the combat. It will be noted that in sec. 108 the term used is "fight," not "prize fight," and that the marginal note emphasizes this by its wording, "when fight is not a prize fight." Reading sec. 108 along with the other sections it is submitted that the offence for which sec. 108 provides is not any of the offences specified in secs. 104 to 107 inclusive, but a lesser offence in which there is no prize, either to the successful contestant or to any one else; in other words, that the fight was not for a prize or to influence the depending result in which the handing over or transfer of money or property was at stake.

This lesser offence would in most cases be developed upon a prosecution for the greater offence of "prize fighting." If there need be no prize or handing over of money or money's worth to constitute a prize fight, and if sec. 108 be read as applicable to the same offence as that to which the preceding sections relate, how is it to appear that the fight was not for a prize? If the question of prize or no prize has been eliminated from the offence of prize fighting by virtue of the statutory definition in Code sec. 2, sub-sec. 31, there would be no need for the prosecution to shew either that there was a prize or that there was not. Can it be that the onus of proving that there was no prize is upon the accused? And is it to be left to the accused in the event of there being no prize to also shew that the fight was *bonâ fide* the result of a quarrel or dispute? While evidence as to the latter might not be essential to the principal or greater offence

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Annotation (*continued*)—Prize fighting (§ I—2) — Definition — Cr. Code (1906), secs. 105-108.

of prize fighting, it is probably admissible in mitigation; but different considerations as to the admissibility of evidence would apply as to proving that the fight was not for a prize, if a prize be not requisite to the offence of participating in a prize fight. It does not seem reasonable that the accused should be forced to give that evidence in order to get the benefit of sec. 108. Clear words should appear where it is intended by a statute to make it an offence to fight to a finish without a prize, where prior to the statute the striving for a prize was an essential; and it might also be expected that more precise terms than are to be found in sec. 108 would be necessary to displace the onus of proof ordinarily laid upon the prosecution.

Reading together all of the sections above referred to it seems more probable that sec. 105 requires that the "prize fight" engaged in must be a fight in which (1) each strives to overcome or conquer the other, (2) there was a prize, which might consist of a reward to one or both contestants or might consist of what is termed the "gate receipts" or a prize in the sense that the transfer of money or property depended on the result of the fight undertaken with such transfer in view by the contestant who is charged, and (3) that the fight was pre-arranged.

It is submitted further that the offence under sec. 108 is a lesser offence in which there are the same elements as the offence of "prize fighting" except that the prize is lacking, and that in default of satisfactory proof by the prosecution that there was a prize in the sense above indicated, the prosecution has the alternative of offering evidence that the fight or intended fight was *bonâ fide* the consequence or result of a quarrel or dispute between the principals, and the magistrate may thereupon impose the lesser penalty of a fine not exceeding $50, or may in his discretion discharge the accused. Then, if there were no prize and no quarrel or dispute there would be no offence and the accused would have to be discharged unless the fighting were in public so as to cause public alarm and so constitute an affray, as to which see sec. 100 of the Criminal Code, 1906.

If one consents to be beaten, the person who inflicts the battery is not ordinarily chargeable with an offence; the limit to this doctrine being, that the beating must be one to which the party has the right to consent: *Pillow* v. *Bushnell*, 5 Barb. 156. No concurrence of wills can justify a public tumult and alarm; and so persons who voluntarily engage in a prize fight, and their abettors, are all guilty of an assault: *Rex* v. *Perkins*, 4 Car. & P. 537. And see *Rex* v. *Billingham*, 2 Car. & P. 234; *Reg.* v. *Brown*, Car. & M. 314. But see *Duncan* v. *Commonwealth*, 6 Dana 295.

Sparring with gloves is not dangerous or likely to kill, and a death caused by such sparring is not manslaughter, unless continued to such an extent that the parties are exhausted so that a dangerous fall, causing death, is likely to result from its continuance: *R.* v. *Young*, 10 Cox C.C. 371. And the question whether such a contest is merely a sparring exhibition or a prize fight, within the meaning of statutes condemning prize fights as misdemeanours, is one of fact for the jury in a prosecution for a resulting homicide: *People* v. *Fitzsimmons*, 69 N.Y.S.R. 191, 34 N.Y. Supp. 1102.

In *R.* v. *Coney*, 8 Q.B.D. 534, two men fought with each other in a ring formed by ropes supported by posts and in the presence of a large crowd. Amongst the crowd were the prisoners, who were not proved to have taken

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Annotation (*continued*)—Prize fighting (§ I—2) — Definition — Cr. Code (1906), secs. 105-108.

any active part in the management of the fight, or to have said or done anything. They were tried and convicted of aiding and abetting an assault. Upon a case reserved the conviction was quashed by eight Judges against three, the majority holding that mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of aiding and abetting an assault, although the mere presence unexplained may, it would seem, afford some evidence for the consideration of a jury: *R.* v. *Coney*, 8 Q.B.D. 534, *per* Denman, J., Huddlestone, B., Manisty, Hawkins, Lopes, Stephen, Cave and North, JJ. (Coleridge, C.J., Pollock, B., and Mathew, J., *diss.*). This decision appears to overrule *R.* v. *Murphy*, 6 C. & P. 103; *R.* v. *Perkins*, 4 C. & P. 537; and *R.* v. *Billingham*, 2 C. & P. 234, if and so far as they decided that mere presence at a prize fight is encouragement. Cf. *R.* v. *Young*, 8 C. & P. 644, where mere presence at a duel was held not enough to warrant conviction for aiding and abetting in the murder of one of the combatants.

In *R.* v. *Young*, 10 Cox 371, seven men were indicted for manslaughter. They had been sparring with gloves on, and the deceased was with them. After several rounds the deceased fell and struck his head against a post, whilst he was sparring with the prisoner. The men were all friendly, but as the deceased and the prisoner came up to the last round they were "all in a stumble together." The medical testimony was to the effect that sparring might be dangerous, but that death would be unlikely to result from such blows as had been given. The danger would be where a person was able to strike a straight blow, but the danger would be lessened as the combatants got weakened. Bramwell, B., said, the difficulty was to see what there was unlawful in this matter. It took place in a private room; there was no breach of the peace. No doubt if death ensued from a fight, independently of its taking place for money, it would be manslaughter; because a fight was a dangerous thing and likely to kill; but the medical witness here had stated, that this sparring with the gloves was not dangerous, and not a likely thing to kill. After consulting Byles, J., Bramwell, B., said, that he retained the opinion he had previously expressed. It had, however, occurred to him that supposing there was no danger in the original encounter, the men fought on until they were in such a state of exhaustion that it was probable they would fall, and fall dangerously, and if death ensued from that, it might amount to manslaughter, and he proposed, therefore, so to leave the case to the jury and reserve the point if necessary. The prisoners were acquitted.

In *R.* v. *Orton*, 14 Cox 226 (C.C.R.), it was held upon a case reserved that if persons meet to fight intending to continue till they give in from injury or exhaustion, the fight is unlawful whether gloves are or are not used.

An exhibition of fighting with fists or hands, to witness which an admission fee is charged to the public and at which it is announced that the stake money will go to the contestant who knocks out his opponent in a stipulated number of rounds is a "prize fight" within the Criminal Code: *Steele* v. *Maber*, 6 Can. Cr. Cas. 446.

But a sparring match with gloves under Queensbury or similar rules given merely as an exhibition of skill and without any intention to fight

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Annotation (*continued*)—**Prize fighting** (§ I—2) — **Definition** — **Cr. Code (1906), secs. 105-108.**

until one is incapacitated by injury or exhaustion, is not a "prize fight": *The King* v. *Littlejohn*, 8 Can. Cr. Cas. 212.

A sparring or boxing match for a given number of rounds which would not ordinarily exhaust either participant, is not a "prize fight," although the boxers were paid fixed sums, not depending upon the result, for giving the exhibition: *The King* v. *Fitzgerald*, 19 Can. Cr. Cas. 145.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. February 10, 1913.

1. MASTER AND SERVANT (§ II A—35)—LIABILITY FOR INJURY TO SERVANT —NEGLIGENCE—DISCHARGE OF MASTER'S DUTY—COMMON LAW LIABILITY.

An employer who provides a safe place for his servants to work, and equips it with modern tools and appliances, employs a competent foreman, and promulgates rules for the safety of his employees, is not liable at common law for an injury to a servant due to the violation of such rules by a fellow-servant.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed; *Choate* v. *Ontario Rolling Mill Co.*, 27 A.R. (Ont.) 155, referred to.]

2. MASTER AND SERVANT (§ II E 5—256)—LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE OF FOREMAN.

An employer is not liable at common law for an injury to a servant caused by the carelessness of a competent sub-foreman in the employ of the master.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed.]

3. EVIDENCE (§ II H 1—255)—RES IPSA LOQUITUR—INJURY TO SERVANT—ACCIDENT NOT IN ORDINARY COURSE OF EVENTS.

The happening of an accident out of the ordinary course of events casts upon an employer the onus of explaining it and exonerating himself from liability for a resulting injury to an employee.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed.]

4. TRIAL (§ V C—280)—FINDING OF JURY—SUFFICIENCY—INCONSISTENCY.

Inconsistencies in the finding of a jury are not fatal unless so self-destructive that none of the effective findings can stand.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed.]

5. MASTER AND SERVANT (§ II—30)—LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT — SUFFICIENCY OF FINDING OF JURY.

Liability under the Ontario Workmen's Compensation Act, R.S.O. 1897, ch. 160, may be based on a finding of the jury that an employer did not take proper precautions to safeguard his employees from the negligence of fellow-servants, by not furnishing a safe place for the plaintiff to work by reason of permitting an accumulation of material near a steel girder being used in the construction on which the plaintiff was working, which was not properly braced, and which was thrown on the plaintiff as the result of the negligent operation of a hoisting apparatus by another workman, the rules regarding the use of which were not strictly enforced by the employer.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed.]

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6. MASTER AND SERVANT (§ II—30)—LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—CHAIN OF NEGLIGENT ACTS.

A chain of negligent acts resulting in an injury to an employee, is sufficient to predicate a liability under the Ontario Workmen's Compensation Act, R.S.O. 1897, ch. 160.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed; *Thompson* v. *Ontario Sewer Pipe Co.*, 40 Can. S.C.R. 396, distinguished.]

7. MASTER AND SERVANT (§ II—30)—LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—WHO HAS CHARGE OR CONTROL OF MACHINERY WITHIN MEANING OF ACT.

A workman using a movable hoisting apparatus is in charge or control of it within the meaning of the Ontario Workmen's Compensation Act, R.S.O. 1897, ch. 160, R.S.O. 1914, ch. 146, where he had to propel it to the place where it was to be used and lower and raise it.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed; *Cox* v. *Great Western R. Co.*, 9 Q.B.D. 106, 109; *McCord* v. *Cammell & Co.*, [1896] A.C. 57; and *Martin* v. *Grand Trunk R. Co.*, 8 D.L.R. 590, 27 O.L.R. 165, specially referred to.]

8. MASTER AND SERVANT (§ II 3—143)—LIABILITY FOR INJURY TO SERVANT—WHAT MACHINERY WITHIN WORKMEN'S COMPENSATION ACT—HOISTING APPARATUS.

A hoist running on wheels along elevated rails from which depended a cylinder operated by compressed air for lifting and carrying heavy weights is a machine within the meaning of the Ontario Workmen's Compensation Act, R.S.O. 1897, ch. 160; R.S.O. 1914, ch. 146.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed; *McLaughlin* v. *Ontario Iron and Steel Co.*, 20 O.L.R. 335, and *Taylor* v. *Goodwin* (1879), 4 Q.B.D. 228, referred to.]

9. TRIAL (§ II C 8—145)—QUESTIONS OF LAW—WHAT IS A "MACHINE"—WORKMEN'S COMPENSATION ACT (ONT.).

It is for the trial judge, upon the evidence, to define what is meant by the word "machine" as used in the Ontario Workmen's Compensation Act, R.S.O. 1897, ch. 160; R.S.O. 1914, ch. 146.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed; *Gibbs* v. *Great Western R. Co.*, 12 Q.B.D. 208 at 212, referred to.]

10. TRIAL (§ II C 8—145)—QUESTIONS OF LAW—WORKMEN'S COMPENSATION ACT—WHO HAS CHARGE OR CONTROL OF MACHINERY.

The interpretation of the words "in charge or control" of a machine, as used in the Ontario Workmen's Compensation Act, R.S.O. 1897, ch. 160, is for the trial judge, although what the workman alleged to have been in control did and how he did it are questions of fact for the jury where there are conflicting facts or circumstances.

[*Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791, affirmed.]

Statement

APPEAL by defendants in an action brought by James Dunlop, an infant, by his next friend, to recover damages for injuries sustained by the plaintiff while a workman in the employment of the Canada Foundry Company, Limited, the defendants.

The appeal was dismissed.

The judgment at trial in favour of plaintiff delivered by Teetzel, J., is reported, *Dunlop* v. *Canada Foundry Co.*, 2 D.L.R. 887, 4 O.W.N. 791.

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Statement

The statement of claim was as follows:—

1. The plaintiff was, on the 11th August, 1911, employed with others in the foundry of the defendants in constructing a steel girder.

2. The girder was, at the time of the accident hereinafter mentioned, set up on edge on a bench, and the plaintiff was engaged in putting stiffeners in the girder.

3. The bench was so worn and out of repair that the girder, which was three and one-half feet high, would not rest evenly on the bench, and the girder was not supported in any way, as it should have been to prevent it from falling.

4. While the plaintiff was so engaged, a travelling crane in the foundry was set in motion, and from the arm of the crane was suspended a chain, to which hooks were attached, and the chain was hung so low that, in passing over the girder on which the plaintiff was working, the hooks caught the girder and pulled it over, and the girder fell on the plaintiff, and the plaintiff was severely injured.

5. Near where the plaintiff was working was a heap of angle-irons, which prevented the plaintiff from escaping the danger in which he was placed when the girder was pulled over.

6. The bones of one of the plaintiff's legs were crushed and broken, by reason of which the injured leg is much shorter than the other, and the plaintiff was otherwise bruised and injured, and has been permanently injured, and has not been able to do any work or earn any income since the accident, and will not be able to do any work for some time to come, and will never be able to take up the work in which he was engaged at the time of the accident.

7. The plaintiff was for a long period of time in a hospital, and has incurred expenses for medical attendance, nursing, and surgical appliances, and has been put to other expenses.

8. The plaintiff says that the accident happened through the negligence of the defendants, or of those acting on behalf of the defendants, exercising superintendence and control over the work and over the plaintiff; and that such negligence consisted, among other things, in not having proper appliances to carry on the work, in using a bench which was out of repair and defective to support the girder, and in not supporting and propping the girder in some efficient way, and in setting in motion the travelling crane with the hooks on the chain hanging so that, in passing over the girder, the hooks caught the girder, causing it to fall, and also in permitting the heap of angle-irons to remain so close to where the plaintiff was working as to prevent him from escaping the danger he was in.

The statement of defence was as follows:—

1. The defendants deny all the allegations in the plaintiff's statement of claim, and put the plaintiff to the proof thereof.

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2. The defendants deny that they were guilty of any negligence causing any accident to the plaintiff, and submit that this action should be dismissed with costs.

3. The defendants say that the injury to the plaintiff was occasioned by his own carelessness, and that he might, by the exercise of reasonable care, have avoided the accident.

4. In the alternative, the defendants say that the injury to the plaintiff was the result of mere mischance or unavoidable accident, for which the defendants are in no way to blame.

5. The defendants further say that they were not served with any notice of injury, or any sufficient notice, as required by the provisions of the Workmen's Compensation for Injuries Act.

Questions were left to the jury, which, with their answers, were as follows:—

1. Was the defendant company guilty of any negligence which caused the plaintiff's injury? A. Yes.

2. If your answer is "yes", state fully in what such negligence consisted? A. By not using proper precautions to safeguard their employees so that the carelessness of other workmen may cause injury to such employee.

3. Was the falling of the girder upon the plaintiff due to any negligence of the defendant company? A. Yes.

4. If your answer is "yes," state fully in what such negligence consisted? A. (1) In not bracing or securely fastening the girder. (2) By not strictly enforcing the rules in regard to the hoist.

5. Was the plaintiff's injury caused by the negligence of any person in the service of the defendant, who had charge or control of the hoist? A. Yes.

6. If your answer is "yes," who was that person, and what were the particular acts of negligence? A. (1) Some workman unknown. (2) In moving the hoist across the girder without raising the chain and removing the hooks.

7. Did the defendant, under the circumstance, afford or supply a proper and safe place for the plaintiff to work in? A. No.

8. If your answer to No. 7 is "no," state fully in what particulars the defendant failed to supply such proper and safe place? A. (1) In not using braces so that it would be impossible for the girder to fall. (2) By allowing angle-irons to be placed too near the work.

9. Was the sub-foreman Gracie, or the foreman Keller, guilty of any negligence which caused the plaintiff injury? If so, state which of them? A. Yes. Mr. Gracie.

10. If your answer is "yes," state fully in what such negligence consisted? A. (1) In not seeing that the girder was

braced before leaving. (2) By allowing material to be placed too near the workman.

11. Was the plaintiff himself guilty of any negligence without which the accident would not have happened? A. No.

12. If your answer is "yes," in what did such negligence consist? No answer.

13. At what sum do you assess the plaintiff's damages, if the defendant is liable: (a) at common law; (b) under the Workmen's Compensation Act? A. (a) $1,700; (b) $1,500.

Statement

The defendants appealed to the Court of Appeal from the judgment of Teetzel, J.

The appeal had not been heard when the Law Reform Act, 1909, was brought into force; and came, therefore, before the Appellate Division of the Supreme Court of Ontario.

Argument

G. H. Watson, K.C., and *B. H. Ardagh*, for the defendants. We object to the charge of the learned trial Judge. We submit that he misdirected the jury in instructing them that the hoist used in the defendants' shops was a machine or engine and was operated on a tramway or railway, and that the unknown workman who moved it was entitled to be and was in charge or control of a machine or engine: *Davis* v. *Badger Mines Limited* (1911), 2 O.W.N. 559; *Allan* v. *Grand Trunk R.W. Co.* (1912), 8 D.L.R. 697, 4 O.W.N. 325, *Murphy* v. *Wilson and Son* (1883), 48 L.T.R. 788; *Doughty* v. *Fairbank* (1883), 10 Q.B.D. 358; *Gibbs* v. *Great Western R.W. Co.* (1884), 12 Q.B.D. 208; *McCord* v. *Cammell and Co.*, [1896] A.C. 57, at p. 65; *Cox* v. *Great Western R.W. Co.* (1882), 9 Q.B.D. 106; and that they could consider three acts operating together as negligence resulting in the plaintiff's injury: *Thompson* v. *Ontario Sewer Pipe Co.* (1908), 40 S.C.R. 396; *Lafvendal* v. *Northern Foundry and Machine Co.* (1911), 19 W.L.R. 350.* These acts were: neglect to brace; allowing angle-irons to be placed too close to the girder; and allowing the hooks upon the hoist to hang down far enough to catch the girder. We also say that the findings of the jury were inconsistent. Also, there was no evidence to support any claim that the machinery provided by the defendants for carrying on their business was in any sense inadequate or insufficient.

I. F. Hellmuth, K.C., and *D. Urquhart*, for the plaintiff. The judgment of the learned trial Judge should be affirmed. It is clear, on the answers of the jury, which are amply supported by the evidence, that there was negligence entitling the plaintiff to succeed: *Scott* v. *London and St. Katherine Docks Co.*

Lafvendal v. *Northern Foundry and Machine Co.*, 19 W.L.R. 350, decided by Mathers, C.J.K.B. (Manitoba), was reversed by the Manitoba Court of Appeal, *Lafvendal* v. *Northern Foundry Co.*, 2 D.L.R. 155, 22 Man. L.R. 207.

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(1865), 3 H. & C. 596. Among other grounds of negligence, there were: absence of braces or supports for the girder: *Bisnaw* v. *Shields* (1903), 7 O.L.R. 210; permitting the angle-irons not in use to be placed so close to the girder that they formed a trap, and, in the event of the girder falling, made it impossible for the plaintiff to escape; negligence of some person, whose name is unknown, in the operation of the hoist, by reason of which the hooks on the chain caught on the girder and pulled it over on the plaintiff; permitting a system under which any person, whether skilled or otherwise, could use the hoist: *Plocks* v. *Canadian Northern Coal and Ore Docks Co.* (1911), 3 O.W.N. 381; failure of the defendants to provide some skilled person to operate the hoist: *Magnussen* v. *L'Abbé* (1911), 4 D.L.R. 857, 3 O.W.N. 301, 864; *Melynk* v. *Canadian Northern Coal and Ore Dock Co.* (1911), 3 O.W.N. 371; permitting the bench on which the girder rested to become bent and worn and out of repair. The man operating the hoist had the charge or control of it, within the meaning of the Workmen's Compensation for Injuries Act; and the track on which the hoist was moved is a railway, and the hoist an engine or machine, within the meaning of the Act: *McLaughlin* v. *Ontario Iron and Steel Co.*, 20 O.L.R. 335; Standard Dictionary, tit. "Railway."

Watson, in reply.

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February 10, 1913. The judgment of the Court was delivered by HODGINS, J.A.:—The learned trial Judge has held that there is no common law liability established. This seems to be so.

The system and the place where the operations were conducted were usual and modern. While the operation of that system imposed on the foreman, and those in charge, the duty of guarding against the result of carelessness in its working, neglect of that duty, if the foreman were competent, would not render the appellants liable at common law. It was not argued that the foreman was incompetent. The appellants' rules or directions as to the use of the hoist were proved, and there was no such general disregard of them as to suggest that breaches were "winked at:" *Robertson* v. *Allan Brothers & Co. Limited* (1908), 77 L.J.K.B. 1072. The rules were enforced to the best of the appellants' power; and they are not responsible if one of their servants by a breach of them caused damage: *Choate* v. *Ontario Rolling Mill Co.* (1900), 27 A.R. (Ont.) 155. I cannot find any evidence proper to be submitted to the jury on which could be rested the finding that the appellants did not strictly enforce the rules about the hoist.

No other negligence of a fellow-workman, except that mentioned in questions 5 and 6, was suggested as to which any safeguard was required. The providing of a proper and safe place

is denied by answer 7, but answers 8 and 9 attribute this to Gracie, the sub-foreman, whose general competence is not attacked. The findings of the jury numbered 2 and 4 cannot, therefore, be supported as a basis for common law liability.

But this is a case well within the rule stated by MacMahon, J., in *McDonell* v. *Alexander Fleck Limited* (1908), 12 O.W.R. 84 at 88: "There is no doubt that for the happening of an accident out of the ordinary course of things, there is cast upon the defendants the onus of explaining and discharging themselves. It is a case of *res ipsa loquitur*."

Objection was taken to the charge of the learned trial Judge, upon the ground that he had misdirected the jury upon three points. These were, that he had instructed them as a matter of law: (1) that the hoist used in the appellants' shop was a machine or engine and was operated upon a tramway or railway; (2) that the unknown workman who moved it was entitled to be and was in charge or control of a machine or engine; and (3) that they could consider three acts operating together as negligence resulting in the respondent's injury. A further objection was made that the findings of the jury were inconsistent.

Taking the last objection first, I am unable to see any such inconsistency in the findings as would make them self-destructive. Mere inconsistency would not be fatal unless that inconsistency were such that none of the effective findings could stand. Reading them in the light of the Judge's repeated statement that he was asking several questions which might involve repetition in the answers, I think their purport and bearing can be readily understood. Paraphrasing the answers of the jury, they result in this. The appellants were negligent: (1) in that they did not take proper precaution for safeguarding their employees from the negligence of other workmen; (2) and that they did not brace the girder; (3) and that they did not strictly enforce the rules about the hoist; (4) and that the respondent's injury was in consequence of the negligence of an unknown workman, who had charge of the hoist; (5) which negligence consisted in moving the hoist across the girder without raising the chain and removing the hooks; (6) that the appellants did not supply a proper and safe place for the respondent to work in; (7) because the girder, when in place, should have been safely braced, and the angle-irons should have been differently placed; (8) and that the failure to provide a proper and safe place in those respects was due to the appellants' sub-foreman, Gracie (9 and 10).

I think that the answers of the jury may fairly be taken as consistent and as capable of standing together, and afford cause for finding the appellants liable under the Workmen's Compensation for Injuries Act, unless they are entitled to escape by reason of the other questions raised by them.

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The next objection was, that the learned trial Judge told the jury that the three acts above referred to, viz., neglect to brace, allowing angle-irons to be placed too close to the girder, and allowing the hooks upon the hoist to hang down far enough to catch the girder, in combination, if proved to their satisfaction, shewed sufficient negligence to warrant a verdict for the respondent.

Under the Workmen's Compensation for Injuries Act, liability may well attach if acts of negligence form a chain resulting in damage to the injured workman, just as well as if it was due to one specific act. I should take it that, if negligence can be imputed to the appellants as a corporation, by the actions of their servants, it makes no difference whether only one of them does the injurious acts, or whether they are done by several, provided they form co-operating causes of the negligence producing the injury. If the sub-foreman had placed upon a tramcar a bar of steel, projecting so far that, if the car moved on the track, the bar must come in contact with a workman, and another workman, whose duty it was to set the car in motion, then did so, the appellants would be liable for the injury, though neither of the separate acts without the other would have caused damage. Here the want of bracing is directly attributable to Gracie, the sub-foreman, and the collision with the unbraced girder to a workman whose right is was to move and operate the hoist. The injury was due to his carelessness in moving it without raising the piston and chain or removing the grips, contrary to his duty, established by the directions given to all the workmen for operating the hoist. The case of *Thompson* v. *Ontario Sewer Pipe Co.*, 40 S.C.R. 396, would be in point if none of the three acts was an efficient cause of the injury. I do not think there was much evidence to support the jury's finding as to the placing of the angle-irons; but there was some, and the finding must stand: *Ainslie Mining and R.W. Co.* v. *McDougall* (1909), 42 S.C.R. 420.

The charge of the learned trial Judge upon the other points was undoubtedly in the nature of an instruction to the jury as to the law. The answers to 5 and 6 must be so read; and, unless they can be supported in law, there must be a new trial, for the jury have not found a fact simply, but based their conclusion upon a proposition of law. Leaving aside for the moment the question of whether the hoist was a machine upon a railway or tramway, I think the learned trial Judge was quite right on the question of charge or control. The hoist was movable, and was intended to be moved by the men. It could be run along for 100 feet. The workman using it had to run the chain up or down to take up what material he wanted, and then to propel the hoist to the place to which he desired to transport it. This

involved charge of the hoist, and, while he used it, control of it as well. Sandusky, the superintendent of a structural shop, called by the defendants for his expert knowledge of hoists, etc., says, in answer to the plaintiff's counsel:—

"Q. Who does in fact govern the machine, the workman? A. Yes.

"Q. Who controls or moves the piston, or any part of the machine? A. The working man.

"Q. Who pulls it along or pushes it? A. The working man.

"Q. The workman who wants it at the time? A. Yes.

"Q. And he is entitled to do that without interference from any one? A. He is.

"Q. So that who else is in charge of the machine at the time that he is moving the hoist? A. Sometimes there are two men or so.

"Q. If he is alone? A. If he is alone, he is in charge. He secures the machine."

The evidence of Keller, foreman of the appellant company's structural shop, where these hoists are, is as follows (examination in chief):—

"Q. Now then, what is the regular course pursued in the business in regard to the use of the hoists? A. Well, any one that wants to use the hoist, any man that has use for any hoist, it is there for him to use.

"Q. That is for raising or lowering material? A. Yes.

"Q. Or moving it? A. Yes."

And on cross-examination:—

"Q. And no objection has been taken by yourself or the superintendent, or anybody that you know of in the shop, to that practice of the use of the hoist? A. Not to my knowledge, no.

"Q. That has prevailed since you have been in the shop; whatever workman wanted to make use of that hoist would go and get it? A. Yes.

"Q. And move it ten feet or a hundred feet, as the case might be? A. Yes."

This hoist is spoken of as being "the life of the shop," "a very necessary and important machine in the shop," "one of the most important machines in the shop," and one that should be handled and controlled with care and judgment in its operation. In face of this evidence, given by the appellants, it would seem to me quite proper for the learned Judge to direct the jury that, in law as well as in fact, the workman using the hoist was in charge or control of it.

Applied to something admittedly an engine or machine, the fact that a workman could and did use it, and when using it raised and lowered it, moved it and stopped it, would shew that he controlled it, and the fact that he alone decided whether he

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wanted to use it and how he did use it, would amount to control. This was the view taken by Mathew, J., in *Cox* v. *Great Western R.W. Co.*, 9 Q.B.D. 106 (at p. 109): "He was the person who was working the capstan and who alone could put the train of trucks in motion."

If the state of affairs thus set out comes within the legal meaning of the phrase "charge or control," then the direction is unexceptionable. The case of *McCord* v. *Cammell and Co.*, [1896] A.C. 57, seems in point. Lord Watson there says, at pp. 65, 66: "It has been suggested . . . that the duty having been committed to a great many persons, any one of whom might have performed it, therefore the person actually performing it was not 'in charge.' To my mind these considerations are very immaterial. I think the statute points directly to the person having 'the charge or control of the train' as being the person who, at the time when the negligent act is committed, has the duty laid upon him of performing that act with reasonable care."

In *Martin* v. *Grand Trunk R. Co.*, 8 D.L.R. 590, 27 O.L.R. 165, the workman who was held to be in charge or control was one ordered by the yard foreman, to whom he was helper, to place a car at the south side of the yard. He went off to comply with this order, and was held to be, at the moment, the person in charge or control of the points or switch which he actually operated.

The next question is, was the hoist an engine or machine upon a railway or tramway?

Descriptions of it are given by men called by the appellants, viz., Garrigan,superintendent of the appellants' bridgeworks, Gracie, assistant foreman, Keller, foreman of the structural shop, Sandusky, superintendent of McGregor & McIntyre's structural shop. From their statements the hoist may be thus described. There are rails or girders about twenty feet from the floor, running east and west, on which four wheels 8" dia. x 2" thick, run. These wheels run on the two channels or flanges that form the beams, and cannot run off. From the axles of these wheels depends a compressed air cylinder with a piston from which hangs a chain ending in a hook, to which a chain is attached on which grips can be put. The hoist is called by Sandusky a "trolley runway with steel beams," the trolley being the four wheels which run on the steel beams, which serve the purpose of the rails for the wheels. A chain which hangs down is pulled to lower and raise the cylinder. When the grips are attached to a heavy object and the cylinder raised, the object is lifted, and the hoist moved with its burden to the railroad which runs through the shop, or elsewhere as desired.

The respondent described it as suspended from a rail on the roof on which its four wheels run.

It is a machine for lifting and carrying heavy weights, and it runs on rails when it and the object lifted are moved about. It can only run in the direction in which the rails extend. While a car is ordinarily above the rails, this hoist is hung to and depends from wheels which run on the rails, and is, therefore, below them. But its mechanical construction and operation is that of a machine, and it is run on rails which form a tramway or trolley runway. It is built to move and to move on rails, and its utilisation of otherwise waste space above the working floor, as well as its extreme convenience for lifting and transporting heavy weights, causes it to be in almost universal use.

I do not think, therefore, that the learned trial Judge erred in law in his direction. It was his province to construe the statute, and to rule whether, upon the facts as presented, the workman was in charge or control, and whether the hoist was an engine or machine upon a tramway or railway. It is true that what the workman did, and under what circumstances he did it, are questions of fact; but whether what he did, and the circumstances under which he did it, gave him charge or control, is a matter of law.

If there are conflicting facts or circumstances, then, upon any question of fact relating to any of these subjects, the trial Judge is bound to ask the assistance of the jury. But, when the facts as to which the trial Judge is in doubt are found by the jury, or where these are clearly established on the evidence to the satisfaction of the trial Judge, the rule is the same. It cannot be left to the jury to construe the statute and to define "charge or control," "engine," "machine," "tramway," or "railway." The Judge must do so upon the evidence, just as he has to construe the words of any other statute; and none of these words are so ambiguous in the present day as to require expert evidence. If expert evidence is not necessary, then the interposition of a jury is equally unnecessary.

Brett, M.R., in *Gibbs* v. *Great Western R.W. Co.*, 12 Q.B.D. 208, at p. 212, puts it thus: "The plaintiffs were bound to shew by evidence what were the duties of this man, when it would be for the Court to say whether, having such duties, he was a person who had the charge of the points as intended by the statute."

The trial Judge is bound to rule upon the meaning of the statute, and he must determine what "charge or control" means or indicates, and whether the facts bring the case presented within the meaning of that phrase, as established by law or by his own view of it; and equally so whether the hoist is an engine or machine meant by the statute, and whether the way on which it runs is a railway or tramway.

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in the English language, or if any are used technically or scientifically, to *inform his own mind* by evidence, and then to determine the meaning?" *Hills* v. *London Gaslight Co.* (1857), 27 L.J. Ex. 60, at p. 63, per Martin, B. See *Haddock* v. *Humphrey*, [1900] 1 Q.B. 609; *Rex* v. *Hall* (1822), 1 B. & C. 123 at 136; *Elliott* v. *South Devon R.W. Co.* (1848), 2 Ex. 725; *Lyle* v. *Richards* (1866), L.R. 1 H.L. 222, 241.

But it is, on this appeal, quite open for the defendants to dispute the correctness of the law as applied.

I cannot see how any other direction could have been given regarding charge or control, nor have I any serious doubt as to the hoist being a machine or engine, and the rails upon which it ran being a tramway. I think that a reference to any ordinary dictionary — *vide* Standard Dictionary, Century Dictionary and Cyclopædia—and to the decided cases, supports this view: *McLaughlin* v. *Ontario Iron and Steel Co.*, 20 O.L.R. 335. See also *Taylor* v. *Goodwin* (1879), 4 Q.B.D. 228.

I think that the defendants are liable, and that the appeal should be dismissed.

Appeal dismissed with costs.

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LUCAS v. NORTH VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. June 30, 1913.

1. TRUSTS (§ I A—1)—WHO MAY CREATE—MUNICIPAL CORPORATION.

A municipality which acquires company shares under the provisions of the British Columbia Municipal Amendment of 1913, ch. 47, may transfer them to trustees to be held in trust for the city. (*Per* Irving, and Galliher, J.A.)

2. CORPORATIONS AND COMPANIES (§ IV G 1—105)—DIRECTORS — QUALIFICATIONS—SHARES HELD IN TRUST.

Sec. 112 of ch. 37 of the Canada Railway Act, R.S.C. 1906, prevents one holding shares of a company organized under such Act, merely as a trustee, without any beneficial interest in them, becoming a director of the company. (*Per* Macdonald, C.J.A., and Galliher, J.A.)

[*Pulbrook* v. *Richmond Consolidated Mining Co.*, 9 Ch. D. 610, considered.]

Statement

APPEAL by the defendant from a judgment enjoining a municipality from transferring shares of a company held by it under the British Columbia Municipal Amendment Act of 1913, ch. 47, to various persons in order to qualify them for election as directors of the company.

The appeal was allowed; although the right of such persons to act as directors under sec. 112 of the Canada Railway Act, R.S.C. 1906, ch. 37, was denied.

W. E. Burns, for appellant.

F. G. T. Lucas, for respondent.

MACDONALD, C.J.A.:—With the latter part of the judgment of my brother Galliher, I agree; that is to say, I think the construction which we ought to put upon the words of our Act, which are different from the words used in the English Act and construed in the cases referred to by my brother Galliher, ought to be that the qualification is more than a mere holding as a trustee. The object is perfectly plain. A director is to have twenty shares to qualify him for directorship. It seems to me that the object of the statute was that he should have some substantial interest in the company to qualify him, and to hold otherwise is a construction which is not in accordance with what I would regard, at all events, as the intention of the Legislature. The English Courts felt themselves bound to follow the late Master of the Rolls in expressing his opinion, but they expressed and repeatedly expressed their disapproval of that decision. They say that the decision acted upon was wrong, but I think it is pointed out that where the words are different, and those are different from the English Act, the Court may not feel itself bound to follow, that is to say, in our own Courts, turning upon the wording of our own statutes, and I think it would be a mistake to disturb what is regarded to be in order.

On the other points, as I intimated in the opening of the matter, I disagree with my learned brothers, and I think that the municipal corporation had no authority to do what they attempted to do here. The statute, it is true, gives the corporation power to subscribe for and obtain shares in a company of the class of this company, and it provides for the representation of the municipality upon the board of directors; the reeve or mayor is to be *ex officio* a member of that board. I do not think we can infer any intention to bestow upon this statutory body, which has no powers except those expressly given to it, or as this Act has given it express power; I do not think we can infer that the municipality has power to transfer its shares to third persons, because these councillors are nothing more than third persons, for the purpose of qualifying those third persons as directors on the board of directors.

I have not been able to find a word in the United States statutes, where, perhaps, the statutes are more like our own than the English, in which the question has been considered.

I would dismiss the appeal.

IRVING, J.A.:—The plaintiff, a ratepayer, having come to the conclusion that a scheme or plan, devised by the council for the advantage of the corporation, was unworkable, and being thoroughly satisfied with the correctness of the opinion that he has formed, has applied for and obtained an injunction restraining the council from carrying out their scheme. The

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council now appeals, and asks in effect that their management of the corporation's affairs be not interfered with. Unless their action is *ultra vires*, or is not *bonâ fide*, their request seems to me a reasonable one and should be acceded to. When a case such as this is brought before the Courts, one asks oneself at the outset for what purpose is a council elected? And when and under what circumstances can a ratepayer wrest from the elected of the people the power which has been committed to the council to manage?

The general rule as laid down by Brice on Ultra Vires is that whatever (that is, not being *ultra*) concerns "a corporation" can be dealt with by the majority of the corporators, or the governing body, if they have vested in them the capacity to exercise the powers of the corporation. It seems to me undesirable that there should be any departure from so sensible a rule.

Turning to this particular case, it would appear that the defendants, the municipality of North Vancouver, acting under the powers conferred by the British Columbia Municipal Amendment Act of 1913, ch. 47, subscribed for 2,500 shares in the capital stock of the Burrard Inlet Tunnel & Bridge Company, a company incorporated by the Dominion statute, 9-10 Edw. VII. ch. 74, to which company the Railway Act of Canada, R.S.C. 1906, ch. 37, applies. The shares were duly issued to the defendant municipality, and the consequence was that, by sec. 111, the reeve of North Vancouver became a director. The council then thinking the voting power, and consequently the influence of the municipality in the promotion of the objects of the company, could be increased by causing to be elected on the board of directors certain persons well disposed towards the municipality of North Vancouver, determined to place in the names of four gentlemen (the defendants) Messrs. Bridgman, Loutet, McLurg and Farner, shares sufficient to qualify them for election as directors of the company, and the intention was to have them elected as directors. This scheme was being carried out, when the plaintiff arrived at the conclusion that the appointment of these four gentlemen holding qualification shares from the defendant municipality in the manner I have mentioned, would render any action by the directorate of the Tunnel Company nugatory, and that thereby the objects which he and the defendant municipality desired to see accomplished, namely, the completion of the undertaking for which the defendant company had been organized, would be delayed and possibly prevented. Under these circumstances he felt himself compelled to leap into the gulf and obtain an injunction restraining the defendant municipality from transferring to the four named

gentlemen the shares, the four named gentlemen from receiving the shares or applying to register the same, and the company from recognizing the transferring of the said shares.

In the first place, I think the plaintiff, if entitled at all to maintain the position he has assumed, could have obtained all the relief that was necessary, viz.: a prohibition against the transfer of the shares to the four gentlemen, by a motion to quash under sec. 208. Because he thinks fit to add the other (and unnecessary) parties, who can only be reached by injunction, he is not at liberty to escape the consequences of sec. 208. On the main point, in my opinion, the plaintiff's position is quite wrong. The defendant municipality are by statute authorized to "alienate" their personal property. The four gentlemen were trustees for the municipality. There is no suggestion of bad faith in transferring to them the shares. I can see nothing *ultra vires* in a municipal corporation appointing a person a trustee and conveying to him property to be held in trust.

In England, prior to the passage of the Municipal Corporation Act (1835), 5 & 6 Wm. IV. ch. 76, it was competent for municipal corporations to alienate their property, and as a consequence vest it in a trustee. *Colchester* v. *Lowten* (1813), 1 V. & B. 226, a decision by Lord Eldon, and so far as personal property is concerned that power remains with a British Columbia corporation. Real property in this province, as in England, by statute, stands on a different footing.

The contention advanced in support of the plaintiff's view, viz., that the proceedings of the board of which these four gentlemen were members, would be invalid, is that, by sec. 112 of the Railway Act, it is provided that no person shall be a director unless he is a shareholder owning 20 shares of stock. This, he contends, means that he shall own these twenty shares as a beneficial owner, and not as holding shares given to him to qualify, as in the present case. The decision, or rather dictum, in *Pulbrook* v. *Richmond Consolidated Co.*, 9 Ch.D. 610, was, with reference to the language, used in the English Act. Looking at our sec. 112 of the Railway Act, R.S.C. 1906, ch. 37, I can see no reason for saying that a person is not qualified if the twenty shares held by him are held in trust. If we turn to the Dominion Companies Act, ch. 79, R.S.C. 1906, we see that Parliament has made it clear in that case that a director must own the shares absolutely in his own right. Why there should be a difference I cannot say, but the contrast between the two Acts is significant.

The legislature, having authorized the municipality to embark in commercial pursuits by acquiring shares in a railway company, I can see no reason why the municipality should not

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exercise all the rights that any individual shareholder might properly exercise. That the corporation should be a shareholder and yet not enjoy all the advantages of its position seems to me to be irreconcilable with the trend of modern legislation and decisions relating to municipal government.

GALLIHER, J.A.:—I agree that the corporation of North Vancouver have power to transfer the shares in question to the respective members of the council to be held in trust for the corporation. That is what has been done here, the purpose sought being to qualify them to act as directors on the board of the Burrard Inlet Tunnel and Bridge Company.

There is, however, a further question which, perhaps, does not arise directly under the injunction as it is worded, but which counsel argued before us, and upon which the corporation are desirous of having the opinion of the Court. That is as to whether a bare trustee can, under the Act, qualify as a director. While, generally, I disapprove of the Court dealing with matters where it is sought to obtain an expression of opinion on a question, which, though incident to, is not, strictly speaking, before us as an issue, yet, considering all the circumstances of this case, and that it has been argued before us, and as it is of great importance considering the English decisions upon the point, I think we should deal with it. This company is incorporated by Dominion Act. Sec. 112 of the Railway Act, ch. 37, R.S.C. 1906, in so far as it affects this question is as follows:—

> No person shall be a director unless he is a shareholder owning twenty shares of stock, etc.

It is admitted that the councillors to whom the corporation transferred certain of the stock, held by the corporation in the Bridge Company, merely hold it in trust for the corporation, and have no beneficial interest therein, the object being as before stated. The words in the Imperial Act upon which the English cases relied on by the corporation here were decided, are "is to hold as registered member in his own right." The first case cited is *Pulbrook* v. *Richmond Consolidated Mining Company*, 9 Ch.D. 610, wherein Jessel, M.R., expressed the view that, under these words, beneficial ownership was not necessary for a qualification. This case was decided in 1878, and has been followed in England since. In *Bainbridge* v. *Smith* (1889), 41 Ch. D. 462, Cotton, L.J., distinctly dissents from this view, and in *Cooper* v. *Griffin* (1892), 1 Q.B. 740, in the Court of Appeal, Lord Coleridge, C.J., says that, even if the *Pulbrook* case were in point, he would have difficulty in deciding according to Sir George Jessel's views, and goes on to say that the decision has given rise to a practice which there would be great difficulty in

overruling, where the words are the same, but it is a very different matter where the governing words are different; and again, in *Howard* v. *Sadler* (1893), 1 Q.B. 1, Lord Coleridge, C.J., and Willes, J., comment upon the decision in the *Pulbrook* case, and it would appear that a practice had grown up under the decision in that case which the Courts in subsequent cases were loath to disturb. The only Canadian case to which we were referred was *Ritchie* v. *Vermilion Mining Co.*, 4 O.L.R. 588. At page 597 Maclennan, J.A., says:—

> If the shares held by the directors or any of them were actually held in trust and not beneficially, I do not think having regard to the discussion of the subject in the English cases, *Pulbrook* v. *Richmond Consolidated Mining Company*, 9 Ch. D. 610; *Cooper* v. *Griffin*, [1892] 1 Q.B. 740, and *Howard* v. *Sadler*, [1893] 1 Q.B. 1, we could hold them qualified,

and goes on to say that the Ontario Act is stronger than the English Act by reason of the word "absolutely."

To my mind, the words in the English Act are just as wide as in our Act, and had it not been for the discussion of the *Pulbrook* case in the later English cases referred to, I should have felt bound by the opinion of so eminent a jurist as the Master of the Rolls, Sir George Jessel. We have not been referred to any cases in the Canadian Courts where this view has been followed, and after a consideration of the cases, I feel at liberty to express my opinion that the parties whom it is sought to register here could not qualify as directors.

Appeal allowed.

Re FORT GEORGE LUMBER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Gallihier, JJ.A. May 12, 1913.

1. CORPORATIONS AND COMPANIES (§ VI C—330)—WINDING-UP—EFFECT ON PROPERTY RIGHTS—SALE OF MORTGAGED VESSEL BY LIQUIDATOR—PROCEEDS—RIGHTS OF MORTGAGEE AND SEAMEN ENTITLED TO LIEN ON BOAT.

Where under an order of court a liquidator sold a mortgaged vessel free from liens, the mortgagee, and the seamen entitled to a maritime lien on the vessel for wages, have the same right against the fund realized from the sale as they had against the boat.

[*Re Australian Direct Steam Navigation Co.*, L.R. 20 Eq. 325; and *Re Rio Grande Do Sul Steamship Co.*, 5 Ch. D. 282, referred to.]

Statement

APPEAL from a judgment declaring the rights of (*a*) a ship mortgagee and (*b*) certain seamen lienors for wages, as contesting claimants, to a fund in the hands of a liquidator in a winding-up proceeding.

The appeal was dismissed.

W. B. A. Ritchie, K.C., for appellant (Traders Bank).

Wintermute, for wage-earners.

Robinson, for liquidator.

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RE FORT GEORGE LUMBER CO.

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MACDONALD, C.J.A.:—On January 4, 1911, the company was ordered to be wound up under ch. 144, R.S.C. 1906, about the 5th March of the same year the liquidator was authorized by the Court to sell all the assets of the company including the steamship Chileo for $67,500, of which $5,000 was for the Chileo. The Traders Bank of Canada held a mortgage upon this ship, and there were wages due to seamen for which they were entitled to maritime liens. There is no pretence that the ship was sold as between vendor and purchaser subject either to the mortgage or to the liens. Sometime after the sale and delivery to the purchaser the ship was destroyed. The contest now is for the purchase money of $5,000. After the sale the bank valued its security at $5,000 and claims that the sum above mentioned received for the ship belongs to it. The seamen contend that the liens against the ship were a first charge upon the said sum. It is not contended by the appellant that the liens would not be payable in priority had it been sought to enforce them against the ship itself; but they contend that the proceeds of the sale did not stand in the place of the ship, that the sale did not affect the seamen's liens or their remedy against the ship, and did not as it were work a transfer of the liens from the ship to the proceeds of its sale. In the case of an ordinary sale of a ship subject to maritime liens, the liens are not affected, nor would they in this case unless the seamen assented either before or after the sale. But this was a sale by a liquidator acting for all the creditors and under the instructions of the Court. The ship having been sold free from all encumbrances, the liquidator was, in the circumstances, bound to protect the purchaser by satisfying the encumbrancers, and the proper fund was the proceeds of the sale. I think both the bank and the lienholders have the same rights in the fund as they had in the ship. Neither party could take proceedings against the ship after the winding up without the consent of the Court. The lienholders might have applied in the liquidation proceedings to have their liens satisfied, or to be otherwise secured: see *Re Australian Direct Steam Navigation Co.*, L.R. 20 Eq. 325; *Re Rio Grande Do Sul Steamship Co.*, 5 Ch. D. 282.

I would, therefore, dismiss the appeal.

Irving, J.A. (dissenting)

IRVING, J.A.:—In my opinion the appeal should be allowed. The seamen's lien was not destroyed by the sale of the ship by the liquidator. See the case of the "Fairport," 8 P.D. 48; where the ship was sold in October, 1881, by Roy & Sons; a month later the former master of the ship began an action *in rem* to recover a sum of money for which he, in order to provide necessaries for the vessel, had become liable whilst he was master.

The defence (or one of them) was that if there was a maritime lien, the plaintiff was precluded by his own laches from

enforcing it against a *bonâ fide* purchaser for value. Sir R. Philimore in giving judgment said, in effect, that although a maritime lien is not indelible, where reasonable diligence is used, *i.e.*, by those claiming it, and the proceedings are had in good faith, the lien travels with the thing in whosoever possession it may come.

The seamen's lien in this case was not in my opinion released by the sale. On the other hand the mortgagees intended to release their mortgage and accept the $5,000 in lien thereof. The loss of the ship in the hands of the purchaser may prevent the seamen deriving any advantage from their lien, yet that loss does not give them a right to the money which the liquidator should pay to the bank on the realization by him of their security under sec. 77 of the Winding-up Act.

The liquidator under sec. 82 is only required to procure the authority of the Court where he proposes to consent to the creditor retaining the security. If he intends to require from the creditor an assignment and delivery of the security no application to the Court is necessary. The men must look to sec. 70 of the Act for their relief. I cannot see that they have any claim on the proceeds of the security.

GALLIHER, J.A., concurred with MACDONALD, C.J.A. Galliher, J.A.

Appeal dismissed.

Re McKINNON.

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Prince Edward Island Supreme Court, Sullivan, C.J., Fitzgerald and Haszard, JJ. February 24, 1913.

1. JUDGES (§ III—23)—STIPENDIARY MAGISTRATE—DISQUALIFICATION — BIAS—MAGISTRATE ATTORNEY FOR DEFENDANT IN ACTION IN WHICH ACCUSED IS PLAINTIFF.

A stipendiary magistrate is not disqualified from entertaining an information against a person, by reason of the fact that the former is attorney of record for the defendant in a pending action in another court in which the accused is plaintiff.

[*Allinson* v. *General Council of Medical Education*, [1894] 1 Q.B. 750, 758, 759, referred to.]

2. JUDGES (§ III—23)—STIPENDIARY MAGISTRATE—DISQUALIFICATION—INTEREST IN RESULT OF ACTION.

A person who has any monetary interest, however small, in the result of judicial proceedings should not take part in them as a judge.

MOTION to make absolute a rule calling upon Mr. D. E. Shaw, a stipendiary magistrate for Queen's county, to shew cause why a writ of prohibition should not issue, to restrain him from hearing and determining an information, charging the applicant, McKin- Statement

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non, with having sold intoxicating liquors in contravention of the Prohibition Act, 1900.

The motion was denied.

J.J. Johnston, K.C., for applicant

C. R. Smallwood, for the magistrate.

Sullivan, C.J.

SULLIVAN, C.J.:—The grounds on which the application are based are twofold. First, it is said that Mr. Shaw is "likely to be biassed" against the applicant, because he is the attorney on the record for the defendant in a suit in this Court in which the applicant is plaintiff, which suit, although twice tried with a jury, is still undetermined, an application for a new trial being now pending therein; and further, because at one of the jury trials a counsel, associated with Mr. Shaw's law partner in the conduct of the defence in Court, and who is also counsel for the prosecution in the action for the alleged breach of the Prohibition Act, asked McKinnon, in cross-examination, a question or questions respecting the prosecution against him.

Secondly, it is alleged that Mr. Shaw would have a pecuniary interest in the result of the prosecution, inasmuch as it would be to his advantage to impose a fine upon the applicant, which fine he might be enabled to utilize in order to secure the payment of his costs in the suit in which he is the defendant's attorney, in the event of its terminating adversely to the plaintiff.

With regard to the first ground of objection—that of bias, caused by an alleged motive to convict the applicant—the governing rule is laid down by Lord Esher, M.R., in *Allinson* v. *General Council of Medical Education*, [1894] 1 Q.B. 750, at 758, 759, which is the leading case on this point, as follows:—

> In the administration of justice, whether by a recognised legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biassed. To use the language of Mellor, J., in *Reg.* v. *Allen*, 4 B. & S. 915, at p. 926: "It is highly desirable that justice should be administered by persons who cannot be suspected of improper motives."

After thus stating the rule Lord Esher slightly qualifies the language of Mellor, J., in *Reg.* v. *Allen*, by saying:—

> I think if you take that phase literally it is somewhat too large, because I know of no case in which a man cannot be suspected. There are some people whose minds are so perverse that they will suspect without any ground whatever. The question of incapacity is to be one of "substance and fact," and therefore, it seems to me that the man's position must be such as that in substance and fact it cannot be suspected. Not that any perversely minded person cannot suspect him, but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biassed. I think, for the sake of the character of the administration of justice, we ought to go as far as that, but I think we ought not to go any further.

Whether Mr. Shaw can be reasonably suspected of bias in the case depends upon his relation to the matter upon which he is to adjudicate. The suit in which his name appears on the record as defendant's attorney has no connection whatever with the prosecution under the Prohibition Act.

That suit was commenced some months before the prosecution, which is at the instance of a public prosecutor, was instituted, and although Mr. Shaw is the attorney in the case, there is no evidence to shew that he, in any respect, conducted himself in regard to it otherwise than as a reputable attorney ought to have done. Under these circumstances, it seems to me impossible that any reasonable person should think that he would be biassed, or that in substance and in fact he could be liable to be even suspected of bias. There is nothing upon which to found a suspicion. The first objection, therefore, falls to the ground.

Respecting the second objection—that of pecuniary interest, alleged to be occasioned by a desire to secure payment of his costs in another suit—it is well settled law that a person who has any monetary interest, however small, in the result of judicial proceedings should not take part in them as a Judge. In such a case, the Court will inquire no further, but will say at once that he is disqualified. But the pecuniary interest alleged in this case is of too speculative a character to be taken into account, in fact it appears to me to be wholly imaginary.

So far from the finding of the applicant enabling the attorney to secure the payment of his costs it would probably have an opposite effect, because the enforcement of a fine would render him less able to pay such costs. The occult procedure by which the imposition of a fine on the applicant could be made to inure to the pecuniary benefit of the magistrate was not made clear in course of the argument at the bar, and I must say, that it does not, in any perceptible degree, reveal itself to my mind. The evidence contained in the applicant's affidavit does not, nor do the circumstances of the case, in fact or in substance, shew bias or reasonable probability of bias, so as to disqualify the stipendiary magistrate from hearing and determining the complaint in question. The rule will, therefore, be discharged.

FITZGERALD and HASZARD, JJ., concurred.

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Rule discharged.

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KENNEDY v. GORMAN.

New Brunswick Supreme Court (King's Bench Division), Barry, J. February 20, 1913.

1. PLEADING (§ III A—303)—STATEMENT OF DEFENCE—SPECIFIC DENIALS AND TRAVERSES.

The party pleading under the New Brunswick Practice Rules must make it quite clear how much of his opponent's case is disputed, and under the rule (Order 19, rule 13) as to specific denials a conjunctive denial of several items of alleged trespass means only that defendant denies committing *all* of them; if he intended to deny committing *any* of them his traverse of the several items charged as trespass should be a denial of each item with the word "or" separating each denial so as to make the denial disjunctive.

[See Annotation on pleadings and specific denials, 10 D.L.R. 503-510; and *Kennerley* v. *Hextall* (No. 2), 10 D.L.R. 501.]

2. JUDGMENT (§ I B—5)—PRO CONFESSO—INSUFFICIENCY OF PLEA—SPECIFIC DENIALS AND TRAVERSES.

If the defendant does not, by his plea, deny specifically or by necessary implication the allegations of fact stated in the plaintiff's claim, or state that defendant does not admit the truth of such allegations, he will be taken to have admitted them under New Brunswick Order 19, rule 13, notwithstanding general words of denial in the plea; and he is liable to have judgment moved against him upon the admissions so implied.

[*Rutter* v. *Tregent*, 12 Ch.D. 758, applied.]

Statement

MOTION for judgment under Order 32, rule 6, of the N.B. Judicature Act, 1909.

P. J. Hughes, for plaintiff.

P. A. Guthrie, for defendants.

Barry, J.

BARRY, J.:—On the first of February instant, application was made to me on the part of the plaintiff for an order for interlocutory judgment upon the admissions of fact in this case. The application is based upon O. 32, r. 6, which provides that any party may at any stage of a cause or matter where admissions of fact have been made, either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order, as upon such admissions he may be entitled to, without waiting for the determination of any other question between the same parties.

In the fifth paragraph of the plaintiff's statement of claim, which I think is the only paragraph of the statement to be considered, the plaintiff puts forward at least seven distinct allegations of fact or grounds upon which he bases his right to recover, namely:—

(1) That the defendants with their servants and agents broke and entered the lands of the plaintiff; (2) that the defendants cut the grass and hay then standing and growing thereon; (3) carried away the said grass and hay; (4) with horses and vehicles tore up the soil of the said land; (5) ploughed the same; (6) threw down the fences; and (7) carried away and destroyed the fences.

The three defendants have pleaded separately, but their separate statements of defence to this paragraph are substantially the same, namely:—

The said defendant denies the allegations of the 5th paragraph of the statement of claim, and says that neither he nor his servants or agents broke and entered the lands of the plaintiff described in the statement of claim, and cut the grass and hay then standing and growing on same, and carried away said grass and hay, and with horses and vehicles tore up the soil of the said land and ploughed the same and threw down the fences on the said land, and carried away and destroyed the same.

Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against infants, lunaties or persons of unsound mind, O. 19, r. 13.

It is not sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, but he must deal specifically with each allegation of which he does not admit the truth, except damages, O. 19, r. 17; and when a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances, O. 19, r. 19.

The point raised here by the plaintiff is that inasmuch as the defendant's statement of defence is at most a general denial of it and does not either deny specifically or by necessary implication the allegations of fact stated in the plaintiff's statement of claim, or state it does not admit the truth of any such allegations, therefore under O. 19, r. 13, these allegations of fact must be taken to be admitted, and being admitted, there is nothing at issue and the plaintiff is entitled to his judgment upon the admissions.

The question, therefore, to be determined is whether the statement of defence is open to the objections raised against it. If it is then, as has been determined under the English Rules in like circumstances, the plaintiff is entitled to succeed: *Symonds* v. *Jenkins*, 34 L.T. 277; *Barnard* v. *Wieland*, 30 W.R. 947; *Rutter* v. *Tregent*, 12 Ch. D. 758, 41 L.T. 16, 48 L.J. Ch. 791.

The defence here may be divided into two parts, first the general denial of all the allegations in the fifth paragraph of the statement of claim. Then this is followed by a denial that the defendant broke and entered the lands of the plaintiff and cut the grass and hay standing and growing on same and carried away the grass and hay, and with horses and cattle tore up the soil, and ploughed the same, and threw down the fences, and carried away and destroyed the fences.

The first part of the statement of defence is bad as being a

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direct contradiction of the provisions of O. 19, r. 17. It seems to me that it would be a waste of time to enter upon a demonstration of a proposition that seems so clear. It is a general denial of seven distinct allegations, which by the rule should have been dealt with specifically.

Then this general statement is followed by another which seems to me is also general in its terms; that is, it is a conjunctive denial, each item of alleged trespass being joined by "and," and not a disjunctive denial of each item, as it would have been had "or" instead of "and" been used. Thus, as it is, the defendant denies he committed *all* of the alleged trespasses. He may have committed *some* of them but not *all*. The party pleading must make it quite clear how much of his opponent's case is disputed.

In Odgers on Pleading, 2nd ed., 160, it is said:—

If your opponent's allegation be in the *conjunctive*, you must plead to it in the *disjunctive;* otherwise your traverse may be too large; for it is seldom, if ever, necessary for your opponent to prove at the trial the whole of his allegation precisely as he has pleaded it. In other words, when traversing, remember, always to turn "and" into "or," and "all" into "any."

The following is given for illustration:—

Claim: The defendants broke and entered the plaintiff's close and depastured the same with sheep and cattle. The proper traverse is: "*Neither* defendant broke *or* entered the plaintiff's close *or* depastured the same with *any* sheep or cattle," and as further illustration of the rule just quoted, Odgers, citing *Gorman and Sweeting*, 2 Wms. Saund. 205, says: "In an action on a policy of insurance the plaintiff averred 'that the ship insured did not arrive in safety; but that the said ship, tackle, apparel, ordnance, artillery, boat and other furniture were sunk and destroyed, in the said voyage.' The defendant pleaded, denying 'that the said ship, tackle, apparel, ordnance, artillery, boat and other furniture were sunk and destroyed in the voyage in manner and form as alleged.' This was held a bad traverse; the defendant ought to have pleaded disjunctively, denying that the ship *or* tackle, *or* apparel, etc., was sunk and destroyed; because the plaintiff was entitled to recover compensation for anything that was insured, and had been lost; whereas (it was said), if issue had been taken on the plea as pleaded in the conjunctive form, 'and that the defendant should prove that only a cable or anchor arrived in safety, he would be acquitted of the whole.'"

In order that the plaintiff should succeed it would not be at all necessary, I apprehend, that he should recover upon all of the seven distinct allegations set out in his statement of claim, because each of these allegations of itself constitutes, if proved, a good cause of action. The statement of defence alleges that the defendants did not commit all of the trespasses complained of, but the question is, did they commit any of them. For if they did, the plaintiff would be entitled to recover. And if issue were joined upon the statement of defence as at present

framed, the plaintiff, in order to succeed, upon the trial, would be driven to prove the seven distinct allegations in his statement of claim, whereas the action being one for damages and according to the injury the plaintiff has sustained, he ought to recover if he succeeded upon any one of them.

It seems to me therefore that the allegations of fact in the plaintiff's statement of claim being neither denied specifically or by necessary implication, nor stated to be not admitted, must, as against the defendants, be taken to have been admitted, and that the plaintiff is entitled to judgment upon such admissions.

Counsel for defendants having asked for leave to amend, such leave will be granted; the defendants to have ten days after the service of order, in which to amend. Under the practice this leave is usually only granted upon payment of costs, so the defendants must pay the costs of this application.

Leave to amend.

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Saskatchewan Supreme Court, Newlands, J. July 24, 1913.

1. MASTER AND SERVANT (§ II A 4—65)—LIABILITY FOR INJURY TO SERVANT —SAFE PLACE—EXCAVATION—FAILURE TO BRACE SIDES.

Failure to brace the sides of a sewer will not render a master liable for the death of a servant as the result of a cave-in, where, to have done so at the time the accident occurred, would have interfered with the work of excavation.

ACTION under Lord Campbell's Act for the death of a servant as the result of the caving-in of the side of a sewer trench in which he was working. Statement

Judgment was given for the defendant.

F. L. Bastedo, for plaintiff.

W. M. Martin, for defendant.

NEWLANDS, J.:—This is an action under ch. 135, R.S.S. 1909, commonly known as Lord Campbell's Act, for damages on behalf of the father, stepmother and four brothers of Nikolaus Gavora, who was killed by an accident while in the employment of the defendant company. The plaintiff company, who are the administrators of the estate of the deceased, allege the following negligence on the part of the defendants:— Newlands, J.

8. The plaintiff further says that it was gross negligence on the part of the defendant company, knowing that the wall of the sewer had caved in on the evening of September 26, or thereabouts, and again on the morning of the following day to order the said Nikolaus Gavora (and his fellow workmen) to clear out the caved-in earth without first warning them that an operation more dangerous than usual was to be conducted, and with-

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out first bracing the intact side of the sewer, and without first seeing that both sides of the sewer were properly braced as the excavation deepened, and without furnishing its workmen, and the deceased in particular, with sufficient and adequate lumber and materials for bracing, and with means, resources and instructions suitable to accomplish the work under the existing conditions.

9. The plaintiff further says that the death of the said Nikolaus Gavora was caused by the improper and defective system adopted by the defendant company in constructing said sewer, it being essential for the safe construction thereof that the earth on each side of the excavation should be protected by supports or braces as the work of digging progressed, particularly as the soil near the power house was soft and dangerous to the knowledge of the defendant company; and by the failure of the defendant company to properly brace the said sewer; and by failure of the defendant company to brace the intact side of said sewer before ordering the deceased and others to dig out the earth which had fallen in from the other side; and by failure of the defendant company to select proper and competent persons to superintend and direct the construction of the said sewer, and by its failure to furnish its workmen, and the deceased in particular, with adequate instructions, materials and resources for such work; and by other acts of negligence of the defendant company referred to in the preceding paragraphs hereof.

The facts are that the defendant company were digging a sewer in Weyburn. This work was done by a ditching machine which dug down to the depth of about nine and one-half feet. The defendants' employees followed after the machine and after bracing the sides of the trench dug it by hand to a further depth. On the evening of September 26, one of the walls of the sewer after it had been braced caved in carrying with it the braces which required both sides of the trench to hold them up, and filled up the trench to within a few feet of the top. The defendants' employees commenced to clear this earth out by hand the next morning, and at about noon the defendants' foreman hired the deceased who went to work by direction at the top of the bank, but subsequently went to work at the bottom of the sewer where defendants' foreman saw him and allowed him to continue working.

When the trench was cleared out nearly to the bottom another cave-in occurred on the side opposite to that on which the cave-in occurred the night previous and Nikolaus Gavora was killed. No bracing had been put in at the time this last accident had occurred although it could have been put in by straightening up the side on which the first cave-in had occurred. There was evidence that the defendants' employees warned the defendants' foreman of the danger of working in the ditch and asked for bracing, but I did not believe this evidence because the men who gave it said they could not speak English and had to give their evidence through an interpreter, and as the accident took

place some two years previous and the defendants' foreman could only speak English they were either saying what was false when they said they could not speak English at the trial or that they did speak English some two years previously. The defendants' foreman swore that he was around the work all the afternoon and that there was plenty of material to brace the sides of the ditch if the men wanted it and that it was their business to do so. The deceased had only worked in this ditch a few hours before the accident at which he was killed, but he had worked previously for the defendants at the same kind of work and I am of opinion that he knew the risk of the work as well as the defendant company or their foreman. This foreman was an experienced man and took what he thought was the proper course as he did not want the trench to cave in because a cave-in caused more work and expense to his company and was a thing he wished to avoid. The cave-in, however, did occur in which the said Nikolaus Gavora was killed, and I am of the opinion that the danger of a cave-in would have been lessened if the sides of the ditch had been braced before the accident, and I think they could have been so braced at least a short time before the accident, but I am unable to say that if they had been so braced that that would have prevented the accident as the former cave-in occurred while the sides of the ditch were so braced.

As to who should have done this work, the evidence I think shewed that the men working in the ditch should have done it, though of course it would be the duty of the foreman to see that it was done.

Is the defendant company under these circumstances liable for the death of said Nikolaus Gavora? I do not think so, because in order to make the defendant company liable there must be negligence on their part and I cannot see that they were negligent in any way. The only negligence that could be imputed to the defendants is that their foreman did not require the men to put in braces before the accident happened and I am not satisfied that the time had come when these braces could have been put in without interfering with the work.

There will, therefore, be judgment for defendants with costs.

Judgment for defendant.

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Re CUMBERLAND ELECTION.

Saskatchewan Supreme Court, Newlands, J. May 26, 1913.

1. ELECTIONS (§ II C—71)—RESULT — DECLARATION — REQUIREMENT AS TO, DIRECTORY ONLY.

The requirement of sec. 35 of R.S.S. 1909, ch. 4, that the deputy returning officer shall immediately after the close of the poll and the summing up of the votes, make the written declaration required by such section, is merely directory.

2. ELECTIONS (§ II C—68)—RESULT — RETURNING CANDIDATE—FAILURE OF DEPUTY RETURNING OFFICER TO COMPLY WITH LAW—NEGLECT TO ENTER VOTE IN POLL BOOK.

A returning officer will not be required by mandamus to return a person as the candidate elected, where certificates of election in none of the polls were signed by the election officials as required by sec. 35 of R.S.S. 1909, ch. 4, nor the votes recorded in the poll books as required by sec. 33 of the statute, except in one poll where the opposing candidate received a majority of the votes cast.

Statement

APPLICATION for writ of mandamus to compel the returning officer to return William Charles McKay as the member elected to the Assembly for the electoral district of Cumberland.

The application was dismissed.

J. F. L. Embury, for applicant.

Newlands, J.

NEWLANDS, J.:—Mr. Embury has applied for a writ of mandamus to compel the returning officer to return William Charles McKay as a member of the Assembly for the Cumberland Electoral District.

The returning officer at the election which was held on September 21, 1912, made the following return only:—

Declare election void.

(1) In all polls no certificate received signed by Deputy and Poll Clerk, section 35.

(2) In all polls but Lac la Ronge section 33 has not been carried out.

I can only order the issue of a writ of mandamus to the returning officer to compel him to return William Charles McKay as the member elected to the assembly at said election if the said William Charles McKay has been duly elected according to the Athabaska or Cumberland Election Act and the Saskatchewan Election Act.

The returning officer states in his return:—

(1) That section 35 of the Athabaska and Cumberland Act, R.S.S. 1909, ch. 4, as amended by statutes of 1912, ch. 4, has not been complied with.

This section is as follows:—

At five o'clock on polling day the deputy returning officer shall declare the poll closed and immediately thereafter he and the poll clerk shall in the presence of the candidates or their agents sum up the votes given to

each candidate and shall enter in the poll book immediately below the last name recorded and sign a certificate in the following form:—

We, the undersigned deputy returning officer and poll clerk for the polling place at (here insert description of the polling place) of the electoral division of Athabaska, solemnly declare that to the best of our knowledge and belief this (or the) poll book for the said polling place contains a true and exact record of the votes polled at the above-mentioned polling place; that we have faithfully counted the votes given for each candidate and that the number recorded for (here insert the name of one candidate) was (and so for each of the candidates).

In witness whereof we hereunto set our hands this day of A.D. 19 .

(Signature) A. B.,
Deputy Returning Officer.
C. D.,
Poll Clerk.

In polling division number 2 the above declaration appears immediately after the name of the last voter signed by Nathan Setter as acting deputy returning officer and poll clerk, but such declaration has not been made by either the deputy returning officer or poll clerk in any of the other electoral districts. There appears to be no provision in the above recited Act to cover such a case, but I see no reason why the returning officer could not require the deputy returning officers and poll clerks to make the required declarations. It is true the Act requires this declaration to be made immediately after the close of the poll and the summing up of the votes, but such a provision can only be directory and it could be got over if the election had otherwise been conducted according to law.

The election, however, was not so conducted. The second objection of the returning officer is that section 33 was not complied with, excepting in the poll held at Lac la Ronge. This section is as follows:—

The poll clerk shall write in the poll book the full name, the occupation and the residence of each voter, *and each voter shall, opposite thereto mark the figure* (1) *accompanied by his signature or his mark in the column for the candidate in whose favour the vote of such voter is given.*

This objection is to the effect that only in one polling district did the electors poll their votes in the manner required by the Act. Now, if the vote is not recorded in the manner provided by the Act, I do not see how the returning officer could count such vote. Therefore, if section 35 had been complied with, he would have had to throw out all the votes excepting those polled in the electoral division of Lac la Ronge, and as these votes gave a majority for Thomas J. Agnew, he could not, in that case, have returned William Charles McKay as the member elected for the district.

As this is not an application for a recount, but an applica-

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tion to compel the returning officer to do his duty as provided by the Act, and as the returning officer can only proceed as directed by such Act, I cannot see that he could do otherwise than he did; he found no votes that he could legally count, and I have no power to compel him to proceed contrary to the Act and count votes that were not polled in accordance with the provisions of the Athabaska and Cumberland Election Act any more than if the election had been under the Saskatchewan Election Act and the votes had been recorded by open voting instead of by ballot. To do otherwise would be to alter the provisions of the Act which the Legislature only can do. The application will be dismissed.

Mandamus refused.

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PIPER v. STEVENSON.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 19, 1913.

1. ADVERSE POSSESSION (§ I J—50)—CLAIM — HOSTILITY — FENCING LAND —RESIDENCE ON.

Where one who, before receiving a conveyance, enclosed with a fence not only the land bargained for but also lots to which he had no claim, and plowed and cropped them for more than ten years, although he did not erect buildings or reside on the land until five years after the enclosure, his possession of the two lots was open, obvious, exclusive and continuous so as to come within the Limitations Act, 10 Edw. VII. (Ont.) ch. 34 [R.S.O. 1914, ch. 75].

2. ADVERSE POSSESSION (§ II—61)—TIME REQUIRED—INTERRUPTION OF STATUTE OF LIMITATIONS—ABSENCE FROM LAND DURING WINTER.

The fact that, for a portion of the time, one claiming land by adverse possession, did not reside thereon during the winter months does not amount to an interruption of the running of the Limitations Act, 10 Edw. VII. (Ont.) ch. 34, R.S.O. 1914, ch. 75, where, for more than ten years, he plowed and cropped the land and kept it enclosed with fences since his possession was open, obvious, exclusive and continuous.

[*Coffin* v. *North American Land Co.*, 21 O.R. 80, considered; *McIntyre* v. *Thompson*, 1 O.L.R. 163; *Seddon* v. *Smith*, 36 L.T.R. 168, and *Harris* v. *Mudie*, 7 A.R. 414, specially referred to.]

3. ADVERSE POSSESSION (§ II—61)—CONTINUITY OF POSSESSION — NON-RESIDENCE—FENCING—INFERENCE OF ABANDONMENT.

The fact that one claiming land by adverse possession did not reside on it continuously does not shew an intention to abandon it, where, during all of the time, he kept the land completely enclosed with fences, and plowed and cropped it from year to year.

[*Worssam* v. *Vanderbrande* (1868), 17 W.R. 53, specially referred to.]

Statement

APPEAL by the defendant from the judgment of Meredith, C.J.C.P., of the 21st January, 1913, in favour of the plaintiff in an action for trespass to land; the plaintiff asserting title by virtue of the Limitations Act.

The appeal was dismissed.

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Argument

E. D. Armour, K.C., for the defendant, argued that in the judgment appealed from the distinction between trespass on land and occupation of it had not been observed. The mere putting of a fence round land, and getting a servant to spread manure upon it, does not constitute occupation: *Coffin* v. *North American Land Co.* (1891), 21 O.R. 80; *McConaghy* v. *Denmark* (1880), 4 S.C.R. 609. The occupation necessary to bar the title of the true owner must be actual and visible, by some individual whom one can see, not by an inanimate object such as a fence, or a load of manure, of which no questions can be asked. The doctrine of constructive possession cannot be invoked on behalf of a trespasser: *Glynn* v. *Howell*, [1909] 1 Ch. 666, *per* Eve, J., at pp. 677, 678; *Trustees Executors and Agency Co.* v. *Short* (1888), 13 App. Cas. 793; *Robinson* v. *Osborne* (1912), 27 O.L.R. 248; *Bentley* v. *Peppard* (1903), 33 S.C.R. 444; *McIntyre* v. *Thompson* (1901), 1 O.L.R. 163, *per* Osler, J.A., at pp. 166, 167; *Harris* v. *Mudie* (1882), 7 A.R. 414; *Campeau* v. *May* (1911), 2 O.W.N. 1420; *Wright* v. *Olmstead* (1911), 3 O.W.N. 434; *Fox* v. *Ross* (1912), 3 D.L.R. 878, 3 O.W.N. 1347. The plaintiff has failed in her proof, and the evidence does not disclose when the alleged adverse possession began.

Edward Gillis, for the plaintiff, argued that, under the circumstances of the present case, the acts relied upon by the plaintiff were sufficient to constitute such a possession as would ripen into an absolute title after the period of limitation had expired. He referred to the following authorities: *Lord Advocate* v. *Young* (1887), 12 App. Cas. 544; *Seddon* v. *Smith* (1877), 36 L.T.R. 168; *Coverdale* v. *Charlton* (1878), 4 Q.B.D. 104; *Searby* v. *Tottenham R.W. Co.* (1868), L.R. 5 Eq. 409; *Norton* v. *London and North Western R.W. Co.* (1879), 13 Ch. D. 268.

Armour, in reply.

Clute, J.

March 19. The judgment of the Court was delivered by CLUTE, J.:—The plaintiff claims as owner and occupier of lots 28 and 29, block "A," Marmot street, North Toronto, registered plan No. 722, and asks an injunction restraining the defendant from trespass and for damages for former trespass and forcible entry. The defendant denies that the plaintiff is the owner of the lots in question, and says that he purchased the same from the registered owner thereof, and thereupon entered into possession of the same and built a fence thereon and planted a crop, which are the trespasses complained of.*

In March, 1901, the plaintiff bargained for the adjoining lots with one Whaley, and in May or June delivered to Whaley a

*The conveyance to the defendant was in October, 1911; the defendant alleged that he made an entry in November, 1911; the trespasses of which the plaintiff complained were in June, 1912, shortly before the action was begun.

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buggy in part payment. In September the plaintiff enclosed the Whaley lots and the lots in question by a fence, but did not receive the deeds of the Whaley lots until the 4th February, 1902, when three of them were conveyed to the plaintiff, and the 4th July, when the remaining three were conveyed to the plaintiff. In the fall, probably in October, after the fencing took place, the plaintiff had manure drawn upon the lands in question; and the evidence shews that they have been cultivated and cropped by the plaintiff ever since.

The plaintiff did not reside upon the land in question, nor upon the lots purchased from Whaley, until 1905 or 1906, but lived at a short distance therefrom, upon a rented farm, from which she could walk to the lots in about fifteen minutes, or drive in five minutes. The Whaley lots, and the lots in question, formed a block, and were wholly enclosed from September, 1901, until action brought on the 21st June, 1912.

The learned trial Judge finds that the lands in question "were fenced in with her own as one lot" in September, "and all the lots thus enclosed were together ploughed as one lot, and during the following winter manure was drawn out and placed upon the land. Everything was done to it that an owner intending to possess and cultivate it would have done. In the following spring it was cropped, and from that time on it was cultivated until the crop was taken off, when fall ploughing and manuring were again done. And this has gone on continuously ever since. In the years 1905 and 1906, buildings were erected, and in the latter year the plaintiff went to live and has ever since lived there. Her possession has been all along open, obvious, exclusive, and continuous. Until 1906, everything was done upon the land that an owner could do in reaping the full benefit of it; and, since the spring of that year, everything that an owner in actual, constant occupation would do. All this is well proved by the witnesses Doughty, Whaley, and Newman as well as by the plaintiff and her husband."

I think that this is a fair statement as a result of the evidence. The learned trial Judge then proceeds: "I cannot think that the logical result of the reasoning in any of the decided cases can be that there can be no possession which would ripen into a right to the land unless the possessor also lives upon it; and, if it were, I would be quite unable to follow it to that extent in this case. Here there was the plainest evidence of wrongful possession, in the fencing in of the land in question as part and parcel of the plaintiff's land alone, calling for action on the owner's part if he desired to save his rights—action in removing the fences or in the Courts of justice; and, in addition to that, there was the continuous use by the plaintiff for her own benefit, for upwards of ten years before any such action was taken; and so the rights of the owner became barred by statute."

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Mr. Armour strongly urged that what was done by or on behalf of the plaintiff in respect of fencing and occupation of the lots did not bring the case within the purview of the statute so as to give her a title, because the work was done by her servant, and she did not personally reside upon the land until some five or six years after the property was fenced. He further urged that the deeds to the plaintiff of the adjoining lots not having been given until February, 1902, the possession of the adjoining lots was in the owner of them, and the lot in question could not be considered as enclosed with the plaintiff's until she received the deed; and that the entry by the defendant after he had received his deed, he then having the paper title, vested the property in him, the statute not having run a sufficient length of time from the date of the deed of the adjoining lots to the plaintiff and the entry by the defendant.

The plain answer to that, I think, is this: it is wholly immaterial whether the plaintiff had received a deed of the adjoining lots or not; she had bargained for them, and fenced them in, in September, 1901; and her possession of them and of the land in question was continuous and exclusive from the date of fencing.

As to the entry, such as it was, under the law as it now stands, it could have no effect. Since the Act, sec. 8, no person shall be deemed to have been in possession of any land within the meaning of the Act merely by reason of having made an entry thereon.* "Under the old law a merely formal entry by the person entitled was sufficient to vest the possession in him: Co. Litt. 253b; though under 4 & 5 Anne ch. 16, sec. 16, such an entry or claim was not effectual to avoid the statute 21 Jac. I. ch. 16, unless an action was commenced within a year and prosecuted with effect . . . The result is that an entry, to vest the possession in the person entering and prevent the bar of the statute, must be effective as opposed to merely formal. 'The making an entry amounts to nothing unless something is done to divest the possession out of the tenant, and revest it in fact in the lord: *Doe* v. *Coombes* (1850), 9 C.B. 714, at p. 718. And it must be made *animo possidendi*: *Solling* v. *Broughton*, [1863] A.C. 556." In the *Coombes* case, after the encroachment, the lord of the manor, accompanied by the steward, entered. The lord stated that he took possession, and directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. This was held no more than a mere entry, and not sufficient to vest the possession in the lord. See Lightwood's Time Limit on Actions, pp. 11, 12.

It is said in *Worssam* v. *Vandenbrande* (1868), 17 W.R. 53,

*The Real Property Limitation Act [10 Edw. VII. (Ont.) ch. 34, sec. 9, R.S.O. 1914, ch. 75].

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that slighter acts will be sufficient if no person is actually on the land at the time of re-entry, although the possession may not be vacant. In that case the predecessors in title went to the land, broke down the fence, and erected a post with the announcement that applications for a lease of the land were to be made to them. They remained on the land three-quarters of an hour. Three days later, the post was gone, but there was no evidence to shew who had removed it. For the next five years no one, so far as appeared, did anything on the land, and then the defendant re-entered and built upon it. It was held that the plaintiffs' predecessors had effectually resumed possession.

The present case differs from that quoted in several particulars. The land has been continuously used and occupied down to the present time by the plaintiff. The plaintiff was in fact residing upon the land at the time the alleged entry was made, that is, upon the block of which the lands in question form a part, being one enclosure for the whole. Also here the ten years had elapsed after the enclosure and before the entry; and the entry was such as, I think, expressly falls within sec. 8 of the Act.

There remains, therefore, for consideration, only the question as to whether or not a piece of land entirely enclosed with other lands by the plaintiff, used and occupied by her continuously for over ten years, her possession all along being "open, obvious, exclusive, and continuous," does not come within the statute, simply because in the earlier four or five years she did not live upon the land; that is, was personally absent during the winter, although the land remained still enclosed by the fence and was used and occupied as an owner would use and occupy in such a case.

The authority chiefly relied on by Mr. Armour was *Coffin* v. *North American Land Co.*, 21 O.R. 80. In several respects the facts in that case are similar to the facts in the present case, but in others they widely differ. In that case, during the statutory period, the true owners entered upon the land, pulled down the old and built a new fence. Here, as already pointed out, entry was not made until after ten years had elapsed from the time the lots were enclosed, in September, 1901. Further, the plaintiff in the *Coffin* case entered into an agreement, after a threat that he would be evicted unless he acknowledged himself to be a tenant, and promised to give up possession when required, and he did give up possession, and, although living on the adjoining land, he made no claim of any kind until five years after he had given up possession.

The points of difference are sufficient, I think, to distinguish the *Coffin* case from the present. But I desire to refer to some observations made in the judgment of the *Cown* case to which I

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cannot accede. It is said there (p. 87): "The plaintiff here cropped the land in question during the summer; during the winter he did nothing to it but draw some loads of manure upon it . . . During the summer months and during the months when he was sowing the land and reaping his crop, his possession was clearly sufficient beyond question, but during the rest of the year his possession was not actual, nor constant, nor visible. During each winter he says that he drew some manure upon the place and in the spring he spread. Excepting for this he withdrew absolutely to his own lot, which adjoined but was separated by a fence from that of which he claims the possession"—Differing in this respect also from the present. "The winter months must be separated from the summer and we must look at the acts of possession done during those winter months by themselves. Doing this, I think the acts done in the winter did not constitute an occupation of the property to the exclusion of the right of the true owner, but were mere acts of trespass, covering necessarily but a very short portion of the winter, and that 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 in the spring again by the plaintiff:" citing *Trustees Executors and Agency Co.* v. *Short*, 13 App. Cas. 793.

To this proposition of the law I cannot assent. In the case cited, the trial Judge had charged the jury that when any person went into possession of another person's land, and exercised dominion over it with the intention of claiming it, and the Statute of Limitations thereupon began to run as against the owner of the land, such running was never stopped, notwithstanding that the intruder entirely abandoned the land long before the expiration of twenty years from his first entry, and no other person took possession of such land, and that the right of the true owner of the land would not again arise without an entry by such true owner with the intention of repossessing himself of such land. The jury were also told that, at the expiration of twenty years after such taking possession of the land as against the true owner, his right of action was defeated, notwithstanding that there may not have been twenty years' possession as against him. Lord Macnaghten, who delivered the judgment of the Privy Council, after referring to the charge and to the origin of the doctrine, said: "Their Lordships are unable to concur in this view. They are of the opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the

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same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant."

This final statement of the law was applicable to the *Coffin* case, on the finding that there was there an abandonment of the premises for some four or five years. In the present case there was no abandonment, unless, as Street, J., argues in the *Coffin* case, "the fact that the land lay idle during the winter."

It is impossible, I think, to treat what took place in the present case as abandonment. The land was entirely enclosed. It was cultivated and cropped every year. It is begging the question to say that, because the land was not used in the winter time, when it could not be used for any useful purpose, therefore there was an abandonment. Surely abandonment is a matter of intention, and the cultivating and cropping from year to year shews that there never was any intention of abandonment; and the case cited with respect to that point had, I think, no application.

In *McIntyre* v. *Thompson*, 1 O.L.R. 163, referred to by Mr. Armour, the land was not wholly enclosed, one end being bounded by a marsh, and through this marsh cattle could and did stray into it. Osler, J.A., refers to this fact at p. 167, and, as I read the case, it formed an important part of the evidence upon which the Court agreed that "the learned trial Judge was right in holding that at the date of the commencement of the former action the defendant had not been in open, visible, actual, and continued possession of the plaintiff's land for the period necessary to give him a possessory title."

In the case of *Seddon* v. *Smith*, 36 L.T.R. 168, the defendant, who shared with others a right of way over a piece of land, the property in which was in the lord of the manor, used a portion of the same, amounting to about three-quarters of the whole, in all respects as if it were properly part of his farm, ploughing it from time to time and raising produce thereon. Such user was uninterrupted, and was continued for twenty years or more. As to the remaining quarter, which was not in any way fenced off from the above, it remained in its original condition, and was used for the purposes and in the manner that the whole was origin-

ally intended to be used. As to three-quarters, it was held that the defendant had acquired a good title by possession, but not as to the one-quarter. Cockburn, C.J., says, in part: "I care not what he grew, he used it in all respects as if it were his own; and such a user, I am of opinion, would at last give a title, because the lord of the manor had many ways of putting an end to it had he chosen to do so instead of standing by, as he did, and doing nothing. To my mind it makes no difference whether there be enclosure or not. *Enclosure is the strongest possible evidence of adverse possession*, but it is not indispensable."

Burton, J.A., in *Harris* v. *Mudie*, 7 A.R. 414, while pointing out that constructive possession is in the person having the legal title, says (p. 420): "The original taking of possession being wrongful and without colour of right, how can the plaintiff be deprived of more than the defendants have actually cultivated or enclosed?" He makes this observation, treating enclosure as evidence of possession, having present to his mind, as there stated, that the Statute of Limitations should be strictly construed. On p. 421, referring to the suggestion that the only way to make a claim for wild land was by clearing it and using it, he says: "The statement is not accurate, as it is quite possible to enclose wild land." He also refers to *Jackson ex dem. Hardenberg* v. *Schoonmaker* (1807), 2 Johns. (N.Y.) 230, where that eminent jurist, Kent, C.J., delivering the judgment of the Court, said: "There must be a real and substantial enclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defence, and is to countervail a legal title." On examining the case, it will be found that the fence referred to was a brush fence, "which was made by trees felled and lapping one upon another." It was necessary to go back to this possession fence of 1774 in order to support the possessory title. At this time, it would appear that the lands were not cleared—that "the father-in-law of the defendant cleared the premises in question, in 1786, and the fences remain as they were placed at that time." Kent, C.J., points out that, "if this possession be laid out of view, the possession of 1785, or 1786, was not a possession of twenty years, before the commencement of the suit."

Burton, J.A., in *Harris* v. *Mudie*, refers to other cases, American and Canadian, varying upon the question of possession, and points out that "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."

I am unable to gather from the *Harris* v. *Mudie* case that the facts were precisely similar to the present. Other questions

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were involved, and I rather infer that there was actual occupancy, as well as enclosure of a certain portion; and—while the language used in the judgment would cover the present case—having regard to the facts there, it may be limited to the concurring incidents of enclosure and occupation.

In *Worssam* v. *Vandenbrande*, 17 W.R. 53, the paper title of the plaintiffs was not disputed, but the continuous *possession* of the defendant for twenty years was denied by the plaintiffs. The interruption on which they relied took place between nineteen and twenty years before writ. Upon that occasion the plaintiffs' predecessors went to the land, and with implements which they had brought broke down the fence which enclosed the land, and erected a post on the close, to which they affixed a board, on which was painted a statement that any one who desired to take a lease of the land should apply to those on whose behalf the entrance had thus been made. At the time this was done, the close was undoubtedly in the possession of those under whom the defendant claimed; but that possession was evinced solely by the fence. The plaintiffs' party remained on the land three-quarters of an hour. Three days after this, the post and board were gone, but there was no evidence to shew who had removed them, nor was there evidence of any subsequent dealing with the land by act thereupon, by any one, for the next five years. After that period the possession of the defendant was evinced by the acts of the most unequivocal kind—namely, by the erection of buildings. The sole question raised was, whether the entry just described was a mere entry, or was such a dealing with the land as amounted to taking possession so as to interrupt the adverse possession of the defendants." Bovill, C.J., said: "The verdict must stand. The commencement of the defendant's title was in 1845. A fence is put up. This is the sole thing done on the land then. *If this had continued, the title of the defendant would have been good.* In 1848 the fence is destroyed by the true owner, partially, as some say, wholly, as others say. *But now we must hold that it was wholly destroyed*, for there was evidence to go to the jury that it was wholly destroyed. The post and board are erected. Now is this taking possession or is it a mere entry? There had been no adverse possession but the fence. When that was pulled down I cannot see that anything remained to make the possession of the defendant. The case of the plaintiffs does not rest wholly on the pulling down the fence, and then erecting the post, but also on this, that there is no evidence from 1848 to 1853 of any act on the land hostile to the title of the true owner." Byles, Keating, and Brett, JJ., concurred.

This case is, I think, in point. The Court, on the finding of the jury, regarded the fence as wholly destroyed, and declared,

in so many words, that, if this had continued, the title of the defendant would have been good. In the present case, not only did the fence continue, but the land was cultivated each year.

I cannot assent to the general statement of Street, J., in the *Coffin* case that the winter months must be separated from the summer months, and that we must look at the acts of possession during those months by themselves, nor to the view there expressed that the acts done in the winter months did not constitute an occupation of the property to the exclusion of the right of the true owner, nor that the property thus became vacant during the winter, and that the right of the true owner would attach, and that the operation of the Statute of Limitations would cease until actual possession was taken in the following spring. No doubt, the statute ceases to run if the adverse possessor quits the land and leaves the possession vacant, as there is no person in whose favour it can run: Lightwood's Time Limit on Actions, p. 12.

But, where the property is entirely enclosed by the person claiming by possession, his mere absence does not, in my opinion, amount to abandonment or make the premises vacant. It may still be considered under his control, inasmuch as it excludes all others therefrom by his enclosure. If the owner himself claimed before the statute had barred him, he could not reach his land without doing some act. He could not make an entry without at least breaking down, if not destroying, the fence. It is a notice to all the world that the property is claimed by some one and that all others are excluded, and unless there is some act on the part of the true owner to create a new starting-point, and the intruder retains possession by the enclosure, and uses and cultivates the land as his own, either by himself or his servants, although not actually present, in person or by his servants, during portions of the year, the owner is excluded and his title barred after the statutory period.

Aside from the authorities, it seems to me plain that in the present case the owner's right of action first accrued when the lands in question were enclosed, thereby excluding him. "No person shall make an entry or distress, or bring any action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims . . .:" sec. 4 of the Real Property Limitation Act, R.S.O. 1897, ch. 133. "Where the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession . . . and has . . . been dispossessed . . . then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession . . .:" ib., sec. 5, clause 1.

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It seems to me impossible to say, without disregarding the fair meaning of the word, that an owner of land is not dispossessed when another has enclosed his property without leave or colour of right and uses it as his own. By sec. 15, at the end of the period of limitation the right of the party out of possession is extinguished. Here I cannot doubt upon the facts, as found by the trial Judge, fully supported by the evidence, that, during the period required by the statute, the true owner was excluded from possession by the act of the plaintiff, who never abandoned the premises, but, on the contrary, "her possession has been all along, open, obvious, exclusive, and continuous. Until 1906, everything was done upon the land that an owner not residing upon it would do in reaping the full benefit of it, and since the spring of that year everything that an owner in actual, constant occupation would do."

This is sufficient under the Act, in my judgment, to exclude any right or title of the former owner.

As pointed out in Halsbury's Laws of England, vol. 19, p. 110, sec. 203: "The true test whether a rightful owner has been dispossessed or not is whether ejectment will lie at his suit against some other person. The rightful owner is not dispossessed, so long as he has all the enjoyment of the property that is possible; and where land is not capable of use and enjoyment, there can be no dispossession by mere absence of use and enjoyment. To constitute dispossession acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it. Mere going out of possession is not enough; in order that the statute may operate there must be not only going out of possession on the part of the former owner, but also actual exclusive possession for the statutory period by some one else to be protected. If a person enters on the land of another and, before he has acquired a title under the statute, abandons possession, no one else then taking possession, the rightful owner is in the same position as if no intrusion had taken place."

What constitutes possession is stated in sec. 208 (p. 113): "An owner who actually occupies land is in possession of it. If he does not actually occupy it, but puts some one else in to occupy it for him without creating any kind of tenancy, then the owner is equally in possession; and he is also in possession and in receipt of the profits of the land, if he farms it by a bailiff."

Numerous authorities are quoted to support the views here stated, which seem to me a clear exposition of the law.

Reference is made, among other authorities, to Sugden on the Statutes relating to Real Property, 2nd ed. p. 47, where the question of the effect of the "receipt of the profits of such land" is dealt with, referring to *Grant* v. *Ellis* (1841), 9 M. & W. 113,

128. After commenting upon this case, the learned author (Sugden) proceeds. "It is clear, therefore, that the expression, 'in receipt of the profits of any land,' is used in the Act, in conjunction with the words 'in possession of the land,' to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land; and they were no doubt introduced to prevent any question arising where the owner, although he received the proceeds, did not actually occupy the land."

While the Court in *Grant* v. *Ellis*, although clearly pointing out that the language used was not the ordinary mode of speaking of a person in actual possession of land, or in receipt of the rents received on leases for years, did not rely very much on this argument, but thought the circumstances worth adverting to, the learned author, in referring to this, says (at p. 46): "It appears, however, to be a circumstance entitled to great attention. The frame of the Act fully justifies the opinion of the Court."

The judgment in the *Coffin* case may be supported by the facts which I have pointed out; but, in so far as it purports to be applicable to a case like the present, and to declare that the winter months must be separated from the summer months, and that we must look at the acts of possession done during those months by themselves, I cannot agree. And to that extent, and in so far as it is inconsistent with the view herein expressed, that case is overruled.

Appeal dismissed with costs.

Re DION.

Manitoba King's Bench, Macdonald, J. June 21, 1913.

1. TRUSTS (§ II C—59)—MOTION UNDER TRUSTEE ACT—CONSTRUCTION OF WILL.

The provisions of a will cannot be construed on a motion under the Trustee Act, R.S.M. 1902, ch. 170.

2. MOTIONS AND ORDERS (§ I—1)—ORIGINATING NOTICE—SCOPE—CONSTRUING WILL.

The construction of a will may be determined on an originating notice issued under Manitoba King's Bench rule 994.

[*Re Lacasse*, 9 D.L.R. 831; *Re Sherlock*, 18 P.R. 6; *Re Whitty*, 30 O.R. 300; *Re Rally*, 25 O.L.R. 112; and *Kerr* v. *Baroness Clinton*, L.R. 8 Eq. Cas. 462, referred to.]

3. WILLS (§ III E—111)—WHAT PROPERTY PASSES—SPECIFIC DEVISE OF LAND—EFFECT OF SUBSEQUENT GIFT OF ALL OF TESTATOR'S REAL ESTATE.

A specific devise of land is not affected by a subsequent clause of a will giving to another all the real estate to which the testator might be entitled at his death, since the latter clause is to be regarded as a residuary bequest relating only to property not otherwise disposed of by the testator.

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MOTION under R.S.M. 1902, ch. 170, on behalf of the executor of the estate of the late Charles Dion, deceased, under originating notice under rule 994 added to the King's Bench Act, by 3 Geo. V. ch. 12, sec. 10, for an order determining a question arising upon the construction of the will and for the opinion, advice or direction of the Court upon questions arising on the said will.

H. P. Blackwood, for executor.

Macdonald, J.

MACDONALD, J. :—Prior to the passing of rule 994 applications were made by petition under the Trustee Act, R.S.M. 170. By numerous authorities it has been held, both in Ontario and England, under Acts similar to our own that this legislation does not give the Court power to determine the rights of the parties or any party under a will upon petition, or to give its opinion for the guidance of trustees. The object of the Act was to assist as to little matters of discretion, etc. See cases collected in 17 C.L.T. 287.

Under rule 994 it seems settled, under the interpretation of a similar rule both in England and Ontario, that the construction of a will may be determined: *Re Sherlock*, 18 P.R. 6; *Re Whitty*, 30 O.R. 300; *Re Lacasse*, 9 D.L.R. 831; *Re Rally*, 25 O.L.R. 112; *Kerr* v. *Baroness Clinton*, L.R. 8 Eq. Cas. 462.

Charles Dion (Young) departed this life having first made his last will. The question for the determination and advice of the Court arises under clauses 3 and 5 of his will.

Clause 3 reads as follows:—

I do hereby give and bequeath unto my niece Mrs. Ovila Dabelle (born Emma Bellemore) the following property: lots twenty-five and twenty-six, which lots are shewn on a plan of survey of St. Jean Baptiste in Manitoba, registered in the Winnipeg land titles office as No. 714, and all personal estate in the buildings thereon.

Clause 5 reads as follows:—

I also give and bequeath on to my dear brother Philias Dion (Young) all the real and personal property or estate to which I shall be entitled at the time of my decease, namely, . . . also a certain sum of ready money deposited in the Bank of Ottawa at Winnipeg, Manitoba.

The following are the questions upon which the advice of the Court is desired:—

1. Whether under clause 3 of the said will Mrs. Ovila Labelle therein named takes an estate in fee simple, and if not, what estate, in the lands and tenements therein described.

2. Whether clause 5 of the said will cuts down or reduced the estate devised to the said Mrs. Ovila Labelle by said will.

3. Whether under the provisions of the said will the estate devised to Mrs. Ovila Labelle is restricted or not.

4. Whether clauses 3 and 5 of the said will are contradictory or repugnant and, if so, what is the effect of clause 5 construed with reference to the rest of the said will and particularly clause 3 thereof.

5. Whether Mrs. Ovila Labelle and Philias Dion (Young) take concurrently in said lands described in clause 3 of the said will.

6. Whether gift under clause 3 is annulled by gift under clause 5.

7. Whether gift under clause 3 is qualified by subsequent gift.

8. Whether gift under clause 3 being a distinct gift is controlled by gift under clause 5 being in general terms.

9. Whether particular devise under clause 3 is controlled by general devise under clause 5.

10. Whether gift in clause 5 described in a general way by residue included property effectively disposed of by prior clauses.

11. Whether the testator having shewn an intention in clause 3 with regard to the property therein described inconsistent with its ever falling into the residue, effect must not be given to that intention.

And also for an order generally declaring the rights of Mrs. Ovila Labelle and Philias Dion (Young) under said will and the estate that Mrs. Labelle and Philias Dion (Young) obtained under said will.

The rule is that the latter part of a will shall prevail against inconsistent expressions in the prior part of it; but it is also a settled and invariable rule not to disturb the prior devise farther than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition: Jarman on Wills, 6th ed., 569.

A gift of property in a will described in a general manner by way of residue will include all property within the general description which is not otherwise effectually disposed of by the will: Underhill and Strahan on Interpretation, 2nd ed., art. 27, p. 151.

If there is an express contradiction between two clauses in a will it is settled by law that the second part of the will must take effect over the first part, but is there in the will under consideration any contradiction or repugnancy in clauses 3 and 5? I am of the opinion that there is not any contradiction or repugnancy.

The testator specifically devises certain lands under paragraph 3 and the subsequent residuary devise can only be interpreted to mean his estate not effectually disposed of by the will.

If we were driven to construe the intention of the testator it is made plainly manifest by par. 4 of his will, whereby he specifically devises to his brother Philias Dion (Young) the lands therein described, shewing to my mind clearly his intention by the residuary clause by which he gives to this brother all the estate to which he would be entitled at the time of his death, being that the residue applies only to such as has not been specifically disposed of.

I therefore make the declaration that Mrs. Ovila Labelle takes the property described in clause 3 of the testator's will absolutely and that the same is not in any manner affected by clause 5 of the said will.

Costs out of the estate.

Order accordingly.

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HARVEY v. PARTON.

Alberta Supreme Court, Walsh, J. May 8, 1913.

1. ESTOPPEL (§ III B—52)—OF MARRIED WOMAN—AS TO SEPARATE ESTATE—PERMITTING EXPENDITURES—SUPPOSED OWNERSHIP OF HUSBAND.

A married woman is estopped from setting up her title to land as against the claim for expenditure in developing the land under an agreement with her husband by one whom she encouraged to make expenditures thereon, knowing that he supposed the property to belong to the husband.

Statement

APPLICATION by the plaintiff, an execution creditor of the defendant, for an order for the sale of the defendant's interest in certain lands.

The application was granted.

G. G. Lafferty, for the plaintiff.

A. L. Smith, for Mrs. Parton.

Walsh, J.

WALSH, J.:—The plaintiff being an execution creditor of the defendant, applies for an order for sale under his execution of the interest of the defendant in certain lands which he holds under agreement of sale from the Hudson's Bay Company. Upon the return of the summons, the defendant's wife appeared and claimed the land as hers. By agreement I am to dispose of this claim of the wife on the material filed.

The defendant is named as the purchaser in this agreement, but he and his wife swear that he purchased it under her instructions, with her money, and as her agent, and that he holds as trustee for her. Cheques issued by her for several of the payments to the company are produced, and payments of other sums of money connected in some way with this purchase, or arising out of it are evidenced in the same way. Man and wife say under oath that the various sums thus withdrawn from the bank account were of her own money.

The plaintiff's judgment is for money expended by him in opening up and developing the coal seams on this land. He did this under an agreement with the defendant that he was to have a half interest in the same. This interest was later surrendered to the defendant by agreement between them, under which he was to repay to the plaintiff the amount for which judgment has been recovered. The plaintiff swears, and it is not denied, that upon the making of the original agreement the defendant produced to him this agreement with the Hudson's Bay Co., and informed the plaintiff that he was the purchaser of the lands, and that at no time was any mention made of Mrs. Parton, as being the owner of or in any way interested in the same. He also swears that she was cognizant of the original agreement, and that they frequently discussed it, and that she never made any claim to any interest in these lands. This is not denied.

Mrs. Parton swears that all of the profits made in connection with the operation of these lands belonged to her. That, if true, means, of course, that she has profited by the expenditure of the plaintiff's money, for which his judgment has been recovered. She also swears that if an interest in the lands was contracted for by the plaintiff (of which there is no denial, either from her or her husband) it was so contracted for with the defendant as her agent, and not on his own account. This would seem to indicate that, if the facts had been known to the plaintiff in time he could have held her personally liable for this indebtedness. She further swears to a payment of $200 of her money to the plaintiff for freight and duty. Her affidavit does not connect this payment with the agreement under which the plaintiff took an interest in these lands, but the plain inference is that it is so connected, and this affords corroboration of the plaintiff's story as to her familiarity with and approval of the arrangement made between him and the defendant.

The facts, as I find them from my reading of the material, may be summarized as follows: The plaintiff, to the knowledge and with the approval of the defendant's wife, negotiated with the defendant for the purchase of an interest in these lands which stood in the defendant's name, of which he represents himself to be the equitable owner, and to which no claim was at any time made by his wife. Upon the strength of this agreement he expended money in the development of the property, which money it was afterwards agreed should be repaid to him for a surrender of his interest in the land, and for this amount he now has a judgment of this Court.

Upon these findings it should not be necessary for me to determine the ownership of this property as between the defendant and his wife, for I think that she is clearly estopped from asserting her title to it as against the plaintiff's execution. She stood by and not only allowed, but deliberately encouraged the plaintiff to the expenditure upon this property of the money which he is now trying to get back, an expenditure which he made in the belief that the property belonged to the defendant, as he expressly, and his wife tacitly, represented to be the case. She is practically asking the Court to aid her in the carrying out of a fraudulent scheme to defeat the just claim of the plaintiff, and this I must decline to do.

In any event, I could not, on the material before me, find as against the written evidence of the defendant's ownership that the land is his wife's. While it is true that payments of large sums of the purchase money by her cheques are evidenced here, I am by no means satisfied that this money was really hers. He and she swear in general terms to the statement that it was her money, but they do not attempt to shew where she got it, or

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to account in any way for the agreement being in his name. I cannot accept, unreservedly, the evidence of people who are in the plight of these deponents before this Court with respect to this transaction. Upon the plaintiff's uncontradicted testimony, and the admissions of the defendant and his wife, either he was guilty of a fraud upon the plaintiff in his dealings with him over this property, or he is now attempting to perpetrate one upon him, and in either fraud he then was, or now is, being abetted by his wife. I would require much more satisfactory proof of Mrs. Parton's ownership of the money that stood in her name in the bank, before I could give effect to her claim.

The order will go barring the wife's claim to the land, and declaring it subject to the plaintiff's execution and for the sale of the defendant's interest in it, with costs. She cannot complain of this order, for on her own statements she could have been made legally liable for this debt, and her moral liability for it cannot be questioned.

Application granted.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

WILDMAN v. WILDMAN.

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Alberta Supreme Court. Trial before Simmons, J. July 19, 1913.

WILLS (§ I D—35)—*Competency to make.*]—Action to establish a will.

J. H. Charman, for the plaintiff.

T. M. Tweedie, for the defendants.

SIMMONS, J.:—The subject-matter of this action is the estate of Moses Wildman deceased, of near Innisfail, Alberta, who died on or about October 3rd, 1911, leaving a widow and one son, Duke Wildman, and two daughters, Mrs. Scarlett and Mrs. Tester. The plaintiff Duke Wildman claims the estate under a will which is dated the 22nd of February, 1908, and witnessed by Christopher Savage and William Robinson.

The defendants, Anne Wildman, widow of the deceased, and Estelle Anne Scarlett, daughter of deceased, allege that the said will was obtained by undue influence of the plaintiff Duke Wildman and others acting with him. Mary Hannah Tester, daughter of the deceased, does not contest the said will. For about 3 years preceding the death of Moses Wildman he was an invalid. His wife lived with him and he was cared for by Christopher Savage, a young man employed by Duke Wildman for this purpose. In November, 1907, the deceased had a paralytic stroke which deprived him of the use of one arm and one leg and also affected his organs of articulation to some extent. Savage and his daughter Mrs. Tester allege that this affection was quite mild and lasted only part of an afternoon and that there was little impairment of speech and very little mental impairment and this was only of a temporary nature and duration.

Scarlett and Mrs. Scarlett and Anne Wildman allege that the paralysis was of a very serious character and that while there was a partial mental and physical recovery, yet that the deceased never regained his mental control sufficient to comprehend the effect of his actions.

It was quite apparent at the trial that the witnesses who

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were members of the family as well as the son-in-law Scarlett were imbued with a feeling of bitterness and antagonism and gave their evidence in such a manner that it was obvious that their statements of the facts revealed a bias in accordance with their mental attitude. I am of the opinion that the evidence of such independent witnesses as Henry Barrs and William Robinson is of much greater value. There is absolutely no suggestion of Barrs having any interest or prejudice one way or the other. Robinson, although a brother-in-law of the plaintiff, seemed to be a very honest and candid witness. Savage says that at the suggestion of the deceased he interviewed Mr. Oldham, barrister of Innisfail, who drafted the will in accordance with the instructions of Savage, who took the draft will home and read it to deceased, and Savage repeated to deceased the instructions of Oldham as to execution, and the necessity of having two witnesses. When Robinson visited the deceased on an errand to purchase some oats the deceased asked him to witness the will and he was quite sure the deceased knew what he was doing. Subsequently the deceased transacted business with Mr. Barrs and was apparently quite capable of doing so. Savage is corroborated by Mr. Oldham in regard to the drafting of the will. He however contradicts Savage as to the will having been submitted to him after execution and as to the conversation between them when the draft will was drawn. None of the contradictions go to the main question at issue further than affecting the credibility of Savage. I am convinced, quite independently of the evidence of Savage, that the deceased quite fully comprehended the meaning and effect of the instrument in question when executed, and that the same is his own instrument and executed according to law.

There will, therefore, be judgment for the plaintiff Duke Wildman with costs against all the defendants except Mrs. Tester.

Judgment for plaintiff.

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Re PIGOTT AND KERN.

Ontario Supreme Court, Falconbridge, C.J.K.B. July 2, 1913.

VENDOR AND PURCHASER (§ I C—10)—*Defective Title — Registered Agreement—Probability of Litigation—Doubtful Title.*]—Motion by Pigott, the vendor, under the Vendors and Purchasers Act, for an order declaring that the purchasers' objection to the vendor's title had been satisfactorily answered, and that a certain registered agreement did not form a cloud upon the title. The Chief Justice said that counsel for the vendor put the case ingeniously and ably as to the agreement of the 9th Janu-

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ary, 1909, being spent or effete so as to preclude the possibility of trouble arising therefrom to purchasers. But, in view of the declared attitude of Mrs. Bell and the vis inertiæ of the Bank of Hamilton, and the possible assertion of right of purchasers from the Cumberland Land Company, he was obliged to hold that there is a reasonable probability of litigation to which the purchasers might be exposed; and that the title must, for this reason only, be classed as doubtful: Armour on Titles, 3rd ed., pp. 280-1; *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, at p. 319; *Re Nichols and Van Joel*, [1910] 1 Ch. 43. No costs. C. A. Moss and F. Morison, for the vendor. W. S. McBrayne, for the purchasers.

JEWELL v. DORAN.

Ontario Supreme Court. Trial before Britton, J. July 4, 1913.

TROVER (§ II—25)—*Conversion of Chattels—Return or Payment of Value — Reference — Effect of Recovery.*]—Action by the executor of Melvin J. Clark, deceased, who was the owner of the Windsor Hotel at Sault Ste. Marie and of the furniture and furnishings therein, to recover from the defendants the value of a part of the furniture and furnishings said to have been converted by the defendants. The learned Judge, in a written opinion, summarised the facts, made certain findings thereon in favour of the plaintiff, and directed that judgment should be entered for the plaintiff for the return to him by the defendants of the furniture, furnishings, and chattels belonging to the plaintiff, in the possession of the defendants, or for payment of their value; and for a reference to the Local Master at Sault Ste. Marie to inquire, ascertain, and report what furniture, furnishings, and chattels belonging to the plaintiff were taken possession of by the defendants, or any of them, and what of said property is now in the possession of the defendants, or any of them; and what is the present value of all such property of the plaintiff as is in possession of the defendants or any of them; and also the amount of loss, if any, to the plaintiff by reason of any of the property being lost, damaged, or destroyed while in the possession of the defendants, where such loss has not been occasioned by ordinary wear and tear. Further directions and costs reserved. P. T. Rowland, for the plaintiff. V. McNamara, for the defendants.

CRUCIBLE STEEL CO. v. FFOLKES.

Ontario Supreme Court, Lennox, J., in Chambers, July 10, 1913.

EXECUTION (§ II—20)—*Judgment Debtor—Examination of Transferees—Con. Rule 903—Action Pending to Set aside Trans-*

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fers.]—Appeal by the plaintiffs, judgment creditors, from the order of the Master in Chambers, *Crucible Steel Co.* v. *Ffolkes*, 4 O.W.N. 1561. LENNOX, J., dismissed the appeal with costs. Harcourt Ferguson, for the plaintiffs. J. A. Worrell, K.C., for the transferees.

ST. CLAIR v. STAIR.

Ontario Supreme Court, Falconbridge, C.J.K.B. July 4, 1913.

DISCOVERY AND INSPECTION (§ I—1)—*Affidavit on Production—Claim of Privilege for Reports—Identification—Sufficiency—Documents Obtained for Information of Solicitor—"Solely."*]—Appeal by the defendants the "Jack Canuck" Company from the order of the Master in Chambers, *St. Clair* v. *Stair*, 11 D. L.R. 862, 4 O.W.N. 1437, directing the appellants to file a better affidavit on production. The Chief Justice said that the learned Master did not have the opportunity of considering *Swaisland* v. *Grand Trunk R. Co.*, 3 O.W.N. 960, in the light of certain English cases, for the simple reason that they were not cited to him: *Taylor* v. *Batten* (1878), 4 Q.B.D. 85 (C.A.); *Bewicke* v. *Graham* (1881), 7 Q.B.D. 400 (C.A.); *Budden* v. *Wilkinson*, [1893] 2 Q.B. 432 (C.A.); in accordance with which the reports in question were sufficiently identified. As the Master said, the rule requiring the use of the word "solely" was not of universal application. There would be no question if the documents were title deeds, etc. The learned Chief Justice with some diffidence, expressed the opinion that it was not necessary here. Appeal allowed and order of the Master reversed. Costs here and below to the appellants in any event. R. McKay, K.C., for the appellants. W. E. Raney, K.C., for the plaintiff.

CANADA CARRIAGE CO. v. LEA.

Ontario Supreme Court, Lennox, J., in Chambers. July 17, 1913.

SOLICITORS (§ II C 2—35)—*Lien on Fund in Court for Professional Services — Payment out.*]—Motion by solicitors for an order for payment out of the moneys in Court to the credit of the Durant Dort Carriage Company. LENNOX, J., said that it appeared that the moneys in Court to the credit of the company were the fruit and result of professional services rendered by Messrs. Cahill & Soule and Carscallen & Cahill; that their bill of costs had been taxed and allowed at $855.84; and that the moneys in Court did not amount to so much as was owing to the solicitors, the applicants. Notice of the application had been duly served; and the company had not appeared. Order made in the terms of the notice of motion. T. H. Peine, for the applicants.

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LAIDLAW LUMBER CO. v. CAWSON.

Ontario Supreme Court, Lennox, J., in Chambers, July 17, 1913.

INTERPLEADER (§ I—10)—*By Sheriff — Order Directing Issue — Parties — Who should be Plaintiff.*] — Appeal by the claimant from an order of the Master in Chambers directing that she should be plaintiff in an interpleader issue. LENNOX, J., said that it would, perhaps, prejudice the trial of the interpleader issue were he to go minutely into his reasons for thinking that the learned Master in Chambers was not wrong in making the claimant plaintiff in the proceedings. The way in which the property was acquired, was dealt with, and was found, to say nothing of the circumstances of a lady, in the claimant's position, investing in two automobiles, quite justified the order made. C. M. Hertzlich, for the claimant. G. F. McFarland, for the execution creditors. R. J. Maclennan, for the Sheriff of Toronto.

EMPIRE LIMESTONE CO. v. CARROLL.

Ontario Supreme Court, Appeal before Lennox, J. July 2, 1913.

APPEAL (§ VII L 4—510)—*Master's Report — Findings of Fact — Conduct — Admission of Evidence — Materiality — Costs.*]—Appeal by the defendants from the report of the Local Master at Welland upon a reference to determine a question of boundaries. The defendants complained that the Master's findings were contrary to the evidence; that evidence was improperly admitted and refused; that the defendants' counsel was treated unfairly; and that the defendants had no notice of the settling of the report. The learned Judge thought that the Master erred in his rulings as to both the admission and rejection of evidence on several occasions, and that counsel for the defendants had some ground for complaint as to interruptions and statements by the Local Master during the hearing; but was not able to come to the conclusion that anything was done or omitted which prevented the fair trial of the matters referred, or that the conclusions reached and reported by the Local Master were erroneous. Appeal dismissed; but, as there was ground for complaint, without costs. H. D. Gamble, K.C., for the defendants. W. M. German, K.C., for the plaintiffs.

CITY OF TORONTO v. FORD.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 7, 1913.

BUILDINGS (§ I A—7)—*Permits for erecting—Apartment houses.*]—Appeal by the defendant from the judgment of MERE-

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DITH, C.J.C.P., of the 27th March, 1913, in favour of the plaintiffs, in an action to restrain the defendant from locating or proceeding with the location and erection of an apartment house on Laburnam avenue, in the city of Toronto.

W. C. Chisholm, K.C., for the defendant.

Irving S. Fairty, for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellant is not entitled to succeed if *City of Toronto* v. *Williams*, 8 D.L.R. 299, 27 O.L.R. 186, was well decided; and we are asked to overrule it.

In our opinion, the Court in that case came to the right conclusion, and we agree with it, as well as with the reasoning on which it is based, and with the reasoning of the learned trial Judge, to which we cannot usefully add anything.

The appeal is dismissed with costs.

Appeal dismissed.

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HARKNESS v. PLEASANCE.

British Columbia Supreme Court, Trial before Clement, J. May 17, 1913.

CONTRACTS (§ I D 2—54)—*Acceptance — Definiteness—Delay for Consent of Third Party.*]

TRIAL of action for specific performance of an agreement for the sale of a lease and house contents. The defendant had gone into possession pending the deposit of the bill of sale and assignment of lease with the solicitors for delivery, on obtaining the consent of a third party having an interest in the lands. Such consent was obtained within a month of the transaction, but meanwhile the purchaser repudiated, claiming that there was no contract prior to the consent being obtained. The vendor sued for specific performance.

W. P. Ogilvie, for plaintiff.

F. M. McLeod, for defendant.

CLEMENT, J., held that the contract was effective as of its date, subject to the consent being obtained, and that there was no right to withdraw, pending the reasonable delay for obtaining such consent as arranged between the parties.

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SIMONSON v. CANADIAN NORTHERN R. CO.

Manitoba King's Bench, George Patterson, K.C., Referee. June 19, 1913.

JURY (§ I D—31)—*Jury Notice—Motion to Strike Out.*]—Defendants moved to set aside the notice of trial in this case

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which had been given by plaintiff for the summer assizes. At such assizes only jury cases were to be tried. The ground taken was that the action was not one which could be tried by a jury without a Judge's order, and no such order had been obtained.

C. W. Jackson, for the defendants.

D. A. Stacpoole, for the plaintiff.

PATTERSON, Referee:—This is an action against the defendant railway company in respect of an injury which occurred in the Province of Saskatchewan, and the statement of claim is based upon the legislation in that Province analogous to the Workmen's Compensation for Injuries Act, R.S.M. 1902, ch. 178. The plaintiff's solicitor had given notice of the trial of the action before a Judge and jury for the assizes commencing on the 24th June instant.

The action is not one of those which, under sec. 59 of the King's Bench Act, must be tried by a jury "unless the parties in person, or by their solicitors, expressly waive such trial." I think that the expression, "The Workmen's Compensation for Injuries Act" has reference only to the statute so intituled, namely, R.S.M. 1902, ch. 178.

At the time of the service of the notice of trial, no order for the trial of the action by jury had been made, as provided for in clause (*b*) of sec. 59; and I think it is not competent for the plaintiff to serve a notice for trial of such an action by a jury, unless he has obtained an order for a trial by jury. A defendant, in my opinion, is entitled to know absolutely if the case will come on for trial at the time specified in the notice, and this would not be possible in a case where he is uncertain whether the plaintiff could procure such an order.

The plaintiff did procure an order for the trial of the action by jury, but only to-day; and, in my opinion, it is too late to support the notice of trial previously served.

The order, therefore, will be that the notice of trial will be set aside, with costs in the cause to the defendants in any event.

FARROW v. GARDNER.

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Yale County Court, British Columbia, Judge Swanson. July 9, 1913.

MASTER AND SERVANT (§ I C—13)—*Wages—Servant leaving before contract performed.*]—

TRIAL of an action to recover $170 under a verbal contract of service made April 22, 1912, whereby plaintiff agreed to work for defendant for one year as a farm labourer on defendant's farm at Salmon Arm for $450, defendant agreeing to furnish plaintiff

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with a dwelling-house for himself and family to live in during the continuance of the said employment.

The action was dismissed.

J. W. P. Ritchie, for the plaintiff.

A. F. Crosman, for the defendant.

JUDGE SWANSON:—The defendant failed to supply the plaintiff with the dwelling-house, and also failed to pay more than one month of the agreed wages during the first three months of service. Plaintiff thereupon without previous notice to the defendant, as I find, left the service of the defendant (who desired plaintiff to continue in his service) on July 23, in the middle of the busy haying season. The plaintiff could have terminated this contract of service by giving defendant one month's notice. He now claims he was justified in quitting without notice on the ground that the defendant committed a breach of the agreement by not paying the wages as agreed and not supplying the house for plaintiff to live in, and that he is entitled to consider the contract as rescinded. He says it is impossible for him to live and support his family unless payment of wages is punctually made as agreed. In my opinion he was not justified in treating this contract as rescinded, and having omitted to give the usual month's notice of his intention to leave to his master he must fail entirely in his action.

In general a contract cannot be rescinded except by consent of both parties: *Llanelly Railway Co.* v. *London & N.W. R. Co.* (1875), L.R. 7 H.L. 550.

The defendant was desirous of having the plaintiff continue in his service and promised to make up his arrears of wages in a few days. The general principles to be applied in this case are, I think, those followed by the House of Lords in *The Mersey Steel & Iron Co.* v. *Naylor* (1884), 53 L.J.Q.B. 497. In that case Naylor failed to pay for an instalment of steel to be delivered by monthly instalments under an impression that there was no one to whom payment could safely be made at the time the instalment fell due, the steel company having gone into liquidation. Thereupon the steel company claimed the right to rescind the contract and sued for the price of the steel delivered. It was held that the seller was not entitled to repudiate the contract by reason of the default, the payment of one instalment not being a condition precedent to the delivery of the rest.

Mr. Ritchie argues in the case at bar that the payment of wages is a condition precedent to the right to call for the services of the plaintiff under the contract, as without his wages plaintiff cannot live and support his family. A similar argument was pressed in *The Mersey Steel Co.* v. *Naylor*, 53 L.J.Q.B. 497, by Cohen, Q.C., with whom was associated Russell, Q.C., afterwards

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Lord Russell, C.J. Mr. Cohen's argument was that such contracts are based on punctual payments to put the manufacturer in funds to enable him to continue manufacturing for future deliveries, payment for one parcel being condition precedent to the right to call for delivery of the next. The House of Lords refused to accede to this argument. Lord Selborne, L.C., at page 499, says:—

> You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.

And farther on at same page he adds:—

> It is perfectly clear that no particular payment can be a condition precedent to the entire contract because the delivery under the contract was most certainly to precede payment; and that being so I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract by the delivery of the undelivered steel.

Lord Blackburn, at page 502, says:—

> I repeatedly asked Mr. Cohen whether or not he could find any case of authority, which justified him in saying that every breach of a contract, or even a breach which involved in it the nonpayment of money, which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority.

It cannot be said, therefore, that in the case at bar the defendant having required the plaintiff to continue on in his service has practically repudiated the contract by omitting to pay the wages at the times agreed and to furnish the plaintiff with a house for himself and his family. The contract of service was, therefore, in my opinion, a continuing contract when the plaintiff, wrongfully as I find, left the defendant's service, and having committed a breach of the contract of service by so doing the plaintiff can have no rights to enforce under such a contract and cannot recover his wages for the time he has actually served: Smith, Master and Servant, 5th ed., p. 651.

There will be judgment accordingly for the defendant dismissing this action with costs.

Action dismissed.

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Re MODERN HOUSE MANUFACTURING CO. DOUGHERTY AND GOUDY'S CASE.

(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. July 2, 1913.

CORPORATIONS AND COMPANIES (§ V F 4—276)—*Liability of Shareholders as Contributors.*]—Appeal by the liquidator of the company from the decision of Middleton, J., 12 D.L.R. 217, 28 O.L.R. 237, 4 O.W.N. 861.

G. F. Shepley, K.C., for the appellant.

W. M. Douglas, K.C., and *S. W. McKeown*, for the respondents.

THE COURT, being equally divided in opinion, dismissed the appeal with costs.

BLAISDELL v. RAYCROFT.
RAYCROFT v. COOK.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. July 2, 1913.

WILLS (§ III G—145)—*Devise to Executors to Sell.*]—Appeals in the first case by the plaintiffs and in the second case by the defendant from the judgments of Boyd, C., 6 D.L.R. 907, 4 O.W.N. 297, in the two actions.

G. F. Shepley, K.C., for the appellants in the first case.

F. J. French, K.C., for the appellant in the second case.

J. A. Hutcheson, K.C., and *P. K. Halpin*, for the respondent, Raycroft.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—Although the finding of the Chancellor in favour of the reality of the sale to Mrs. Farlinger of the testator's farm was vigorously attacked by counsel for the appellants, we see no reason for doubting the correctness of the finding, which is amply supported by the evidence.

It is beyond doubt that the purchase-price ($4,800) was the full value of the farm, and that, but for the decision of the Grand Trunk Railway Company of Canada to remove its terminals from Brockville to Prescott, it would not be saleable for more at the present time.

The appellants joined in the conveyance to Mrs. Farlinger, and each of them testified that she understood that the purchaser was the executrix, Jane Raycroft, and was willing that she should become the purchaser.

If a finding upon the point were necessary to the determination of the case, I think that the proper conclusion upon the evi-

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dence is, that each of them knew that the conveyance was being made to Mrs. Farlinger, but it may be that they understood that she was buying for her mother, Jane Rayeroft.

In truth, though the real purchaser was Mrs. Farlinger, she bought upon the understanding that $4,000 of the purchase-money was to be provided by her mother, and, in consideration of this, the mother was to be maintained on the farm during her lifetime by Mrs. Farlinger, who, it was intended, should remove with her husband from the United States, where they resided, to the farm, and that they and Mrs. Rayeroft should live together upon it.

This feature of the transaction was not explained to the appellants, and it was urged that the sale could not, therefore, stand.

But the appellants in the first case, who are the only persons interested in having the transaction set aside, admitted on cross-examination that they were quite willing that Mrs. Rayeroft should buy the farm for $4,800; and it is clear that, accepting their statements that when they executed the conveyance they thought it was she who was buying, they assented to the sale being made to her.

If they were willing that she should become the purchaser, I am unable to see how it can be open to them, because Mrs. Rayeroft was willing to give $4,000 of her own money to Mrs. Farlinger, to enable her to buy, stipulating that in return for it she should be maintained on the farm during her lifetime, to attack the transaction as a breach of trust.

For the reasons given at length by the Chancellor and for the reasons I have mentioned, and especially having regard to the long delay in attacking the transaction and the considerable expenditure that has been made by Mrs. Rayeroft in improving the property on the faith of her being the owner of it, I am of opinion that the appellants' case failed and that their action was rightly dismissed.

In the second case, I am of opinion that judgment should be affirmed, and can usefully add nothing to the reasons given by the Chancellor for the conclusion to which he came.

Appeals dismissed.

SIMMERSON v. GRAND TRUNK R. CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

[*Simmerson v. Grand Trunk*, 11 D.L.R. 104, affirmed.]

MASTER AND SERVANT (§ II E 5—266)—*Liability—Injury to servant—Brakeman giving signals.*]—Appeal by the de-

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fendants from the judgment of Middleton, J., 11 D.L.R. 104, 4 O.W.N. 1082.

D. L. McCarthy, K.C., for the appellants.

W. S. McBrayne, for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The facts are fully stated in the reasons for judgment of my brother Middleton: *Simmerson* v. *Grand Trunk R. Co.*, 11 D.L.R. 104, 4 O.W.N. 1082, and it is unnecessary to refer to them except as to one point.

My learned brother, in stating the facts, appears to have thought that a witness had testified that Bryant had given the signal to the engine-driver to reverse and go forward. In this he was in error. There was no direct evidence that it was Bryant who gave the signal. There was, however, ample evidence to justify the jury in drawing the inference that it was he who did so. It was Bryant's duty to give the signal; and, without it, the engine-driver would have been guilty of a breach of his duty in reversing and going forward.

As that inference was drawn by the jury, they were warranted in finding that Bryant was guilty of negligence in giving the signal without seeing that the respondent had reached the top of the car.

Upon that finding we agree that the respondent was entitled to recover, for the reasons stated by my learned brother.

Appeal dismissed with costs.

Re BRIGHT and TOWNSHIP OF SARNIA.
Re WILSON and TOWNSHIP OF SARNIA.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

DRAINS AND SEWERS (§ III—15)—*Assessments—Setting aside—Independent judgment of engineer—Inclusion of expenses and fees of solicitors and engineer.*]—Consolidated appeals by Robert Bright, James Bright, Thomas Wilson, and Fred Wilson, from an order of the Drainage Referee, dated the 3rd March, 1913, dismissing an application by the appellants to set aside the report, plans, and specifications of A. S. Code, O.L.S. and C.E., and provisional by-law No. 10 D. of the Corporation of the Township of Sarnia, intituled "A by-law to Provide for the Improvement of the Cow Creek Drain in the Township of Sarnia."

R. I. Towers, for the appellants.

T. G. Meredith, K.C., and *A. I. McKinlay*, for the respondents.

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The judgment of the Court was delivered by MEREDITH, C. J.O.:—All of the objections raised by the appellants were dealt with upon the argument except two, viz.: (1) that the report, plans, and specifications and the assessment made by the engineer were not the result of his independent judgment; and (2) that the engineer included as part of the cost of the work upwards of $1,000 for fees and expenses of solicitors and engineers, and that there was no authority under the Drainage Act to assess them against the drainage area.

There is nothing to warrant the conclusion that the report, plans, specifications, and assessments were not the result of the independent judgment of Mr. Code, the engineer. He testifies that they were. The fact that he heard and considered the objections of the engineer employed by the Corporation of the Township of Plympton to the scheme which he had originally recommended, but which was referred back to him by the Council of the Township of Sarnia, and that he modified that scheme after consideration of these objections, is of no consequence if, as he testified, and there is no reason to doubt, his judgment was convinced that they were right to the extent to which he yielded to their objections. It is not necessary to say more on this branch of the case than that I entirely agree with the reasoning upon which the learned Referee proceeded in refusing to give effect to the contention of the appellants.

The other question was also fully dealt with by the Referee, and I agree with his conclusion as to it and the reasoning on which it is based.

Appeal dismissed with costs.

MALCOLMSON v. WIGGIN.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

VENDOR AND PURCHASER (§ I B—5)—*Liability for purchase money—Payment of portion to vendor's solicitor—Conversion by.*]—Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth, of the 11th February, 1913, after trial without a jury, dismissing the action, which was brought to recover a balance said to be due upon the purchase by the defendant from the plaintiff of a house and lot.

J. G. O'Donoghue and *M. Malone*, for the appellant.

S. F. Washington, K.C., for the defendant, the respondent.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—On the 1st April, 1912, the appellant sold to the respondent a house and lot in Hamilton for $4,450. In order to

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complete the purchase, it was necessary for the respondent to borrow on mortgage of the property $4,000, and arrangements were made to procure the loan from James E. Stedman, a client of Mr. Gauld, who also acted for the respondent in completing the purchase.

Stedman held a mortgage made to him by Francis S. Depew on property which the mortgagor had subsequently sold to a Miss Law. Upon this mortgage there was or was assumed to be owing $1,133, and this sum Stedman required to make up, with other money he had in hand, the $4,000 he was to lend to the respondent. A solicitor named Ogilvie acted for the appellant; and, as the learned Judge found, acting for Miss Law, received from her the $1,133 to pay to Stedman in discharge of the Depew mortgage.

The appellant and the respondent met at the office of Mr. Gauld to close the transaction; Ogilvie being also present, representing the appellant. Stedman had, in the meantime, signed and left with Mr. Gauld a statutory discharge of the Depew mortgage, with instructions, when the money should be paid to him, to apply it to make up the amount to be lent to the respondent.

Mr. Gauld informed the appellant that until the Depew mortgage-money was received by Stedman there would not be money enough to enable Stedman to advance the $4,000 he had agreed to lend to the respondent, and the transaction could not be closed.

Ogilvie, without the knowledge of the appellant, had received from Miss Law the whole of the mortgage-money, and appropriated it to his own use; $300 of the principal having been paid to him on the 28th July, 1910; $350 on the 27th January, 1911; and the balance of the principal on the 9th February, 1912; the interest had also been paid to Ogilvie.

All the parties who took part in closing the purchase, except Ogilvie, were ignorant of the fact that these payments had been made, and believed that the $1,133 was still owing on the Depew mortgage, and that it would be paid by Miss Law on presentation to her of the certificate of discharge.

Ogilvie subsequently paid to the appellant part of the money he had received from Miss Law, but a balance is still unpaid; and the action is brought to recover that balance.

The learned Judge dismissed the action. His view was, that, when the transaction was closed, all parties knew that the $1,133 had been received by Ogilvie from Miss Law, and that it was agreed that Ogilvie should become the appellant's debtor for that sum, and that the respondent should be discharged from the payment of a like amount of the purchase-money.

I am unable to agree with that view, which could be sup-

ported, if at all, only on the hypothesis that the appellant knew that Ogilvie had received the $1,133; but there is no evidence of this; and, on the contrary, Mr. Gauld testified that, when the transaction was closed at his office, and Ogilvie said "We will take that," i.e., the certificate of discharge, Ogilvie said to the appellant, "I will have the money for that in a few days"—referring to the certificate.

It is impossible, upon the evidence, to hold that the appellant accepted the certificate of discharge in satisfaction of $1,133 of the purchase-money payable by the respondent. Putting the case for the respondent at the highest, it was no more than if Stedman had signed an order directing Miss Law to pay the money to the appellant; and what the parties contemplated was, that, on presenting the certificate to Miss Law, the money would be paid, not that the appellant should become the assignee of the Depew mortgage or have to proceed against Miss Law for the recovery of the money payable on the mortgage.

The judgment of the Court below should, in my opinion, be reversed, and judgment should be entered for the appellant for the unpaid balance of the purchase-money, $125.75, with costs.

The respondent must pay the costs of the appeal.

Upon payment of the judgment debt and costs, the certificate of discharge of the Depew mortgage is to be handed out to the respondent; and the appellant, if required, is to execute to him an assignment of any interest the latter may have in the mortgage.

Appeal allowed.

Re RATTENBURY and TOWN OF CLINTON.
Re McCAUGHEY and TOWN OF CLINTON.
Re PIKE and TOWN OF CLINTON.

County Court, Huron County (Ont.), Doyle, County Judge, July 29, 1913.

TAXES (§ III B 1—122)—*Assessment of Hotel Properties—Effect of Local Option By-law—Reduction in Value—Business Assessment—Inapplicability to Hotel without License—Assessment Act, 4 Edw. VII. ch. 23, sec. 10(h).*]—Appeals by Joseph Rattenbury, John J. McCaughey, and Thomas G. Pike and Joseph E. Reinhardt, hotel-keepers in the town of Clinton, from decisions of the Court of Revision for the town, affirming the assessments of the appellants.

J. L. Killoran, for the appellants.

The Mayor and Reeve of the town supported the rulings of the Court of Revision.

DOYLE, Co.C.J.:—The appellants in each of the above-mentioned appeals appeal against their assessments, on the grounds

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of (1) overcharge on land, and (2) that the appellants are not liable for business tax.

The appellants contend that the passage of a local option by-law by the town corporation has reduced the value of the appellants' hotel properties to one-half of their former value.

A standard author, Weir, "Assessment Law of Ontario," p. 130, says: "It is a popular error that the cost of the buildings, less proper allowance for wear and tear, and other deterioration, should be the assessed value. By 'value of the land' and 'actual value,' in this section, is doubtless meant the market-value, or the value as an asset of the owner's estate. Its actual value must, however, be measured in dollars, and is not more than what, within a reasonable time, and with due care, can be realised from the sale of it. . . . Strictly speaking, the value of the land, as of any other commodity, is the price it will bring at the time it is offered for sale: *Squire qui tam* v. *Wilson,* 15 U.C.C.P. 284."

There is no doubt that the passage of the local option by-law in Clinton has most materially reduced the value of all hotel property there, if it has not made it wholly unsaleable.

The appellants contend, and not unreasonably, that the by-law has reduced the value by one-half. It is a serious question whether any of these properties could not be sold, without their contents or fixtures (which are not assessable), for half the sum at which they are now assessed.

Yet, as shewn by the case cited, the value of land is the *price* it *will bring* at the *time it is offered* for sale.

Adopting McCaughey's present valuation, for assessment purposes, of his hotel property, including stable and sheds, which I believe to be a reasonable estimate, I order and adjudge that the assessment of the said property be and the same is hereby reduced to $2,500; the rink property to remain at the sum at which it is assessed. There was evidence shewing that the hotel building is from fifty to sixty years old.

I order and adjudge that the assessment of the hotel property, including the stable and sheds, of the appellant Joseph Rattenbury, be and the same is hereby reduced on the assessment roll to $3,500. The buildings on this property are new, and the whole property is certainly worth $1,000 more than the McCaughey hotel property.

And I also order and adjudge that the assessment of the Pike hotel property, including all of the buildings, be and the same is hereby reduced to $800.

As to the business tax, assessed against these appellants, when they were assessed, those three hotels were "licensed," and properly assessable as "licensed" hotels, for a business tax. But, subsequently, and before appeal, the local option by-law

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was passed by the respondents, which deprived the appellants of the opportunity to renew their licenses.

The appellants are now all hotel-keepers, but not "licensed;" and, therefore, they are *not* in the class of persons mentioned in the Act as liable to business assessment: see the Assessment Act, 4 Edw. VII. ch. 23, sec. 10 (1) (h).

The only hotel-keeper defined by that Act, as liable to a business tax, is "every person carrying on the business of a . . . hotel in respect of which a *tavern license has been granted.*" No tavern license having been granted to any one of the appellants, they are clearly not within the Act.

In America, "hotel" has been held to be a synonym for "inn": *Cromwell* v. *Stevens*, 2 Daly 15.

"I agree that the words 'hotel' and 'tavern' are undergoing a change in their meaning, there being temperance hotels and temperance taverns, as well as houses for the sale of excisable liquors:" per Chitty, L.J., in *Webb* v. *Fagotti*, 79 L.T.R. 684.

"An inn or hotel may be defined to be a house in which travellers, passengers, wayfaring men, and other such like casual guests are accommodated with victuals and lodgings and whatever they reasonably desire for themselves and their horses, at a reasonable price, while on their way:" Stroud's Judicial Dictionary, 2nd ed., 978, tit. "Inn," and cases cited. "Neither a boarding-house, restaurant, nor coffee-house, is an inn:" *ib.*

Inn, hotel, tavern, public-house, the keeper of which is now by law responsible for the goods and property of his guests, are treated as synonymous in the English Act, 1863, 26 & 27 Vict. ch. 41.

"Taxing Acts must be construed strictly, and any ambiguity will entitle the subject to be exempt from the tax:" Weir's Assessment Law, p. 49, and cases cited.

I order and adjudge that the "business tax" assessed against each of the appellants be and the same is hereby disallowed, and I order that it be struck out of the assessment roll.

And I order the said assessment roll to be amended according to all of the foregoing adjudications.

The appellants, being all clearly entitled to succeed, I allow them their costs.

Appeals allowed.

Re EMMONS v. DYMOND.

Ontario Supreme Court, Lennox, J., in Chambers. June 5, 1913.

APPEAL (§ XI—720)—*Leave to Appeal to Appellate Division—Order of Judge in Chambers—Refusal of Leave—Con. Rule* 1278.]—Motion by the defendant for leave to appeal to the Ap-

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pellate Division from the order of Britton, J., 4 O.W.N. 1363, refusing to transfer this action from a County Court to the Supreme Court of Ontario. LENNOX, J., was not able to say that there was "good reason to doubt the correctness of the judgment" of Britton, J.; and it would be necessary for him to entertain that opinion, as well as to find that important matters were involved, before he could make an order under Con. Rule 1278. The application for leave was, therefore, refused; costs in the cause. E. C. Cattanach, for the defendant. R. U. McPherson, for the plaintiff.

Re PHILLIPS.

Ontario Supreme Court, Lennox, J., in Chambers. June 7, 1913.

INFANT (§ I C—11)—*Custody—Right of Father—Welfare of Infant—Conduct and Character of Father.*]—Motion by the father of Ethel Gladys Phillips, an infant, on the return of a *habeas corpus*, for an order for delivery of the infant by the Children's Aid Society to the applicant. The learned Judge said that he found it very difficult to decide what should be done in this matter. The right of a parent to the custody and care of his child should not be interfered with except for weighty reasons satisfactorily shewn. There were a number of statements in the affidavits and papers filed on behalf of the Children's Aid Society that could not be regarded as evidence. The affidavits in support of the father's claim made it pretty clear that, in a general way, in his outside life, he was a well-behaved man; but they afforded no actual evidence as to the relations alleged to exist between the father and a woman at whose house he was boarding. So long as the father continued to make his home there, it could not be said that he was a fit and proper person to have the care, custody, education, or control of his daughter Ethel Gladys Phillips. It was, therefore, directed that the application should stand adjourned until Friday the 20th June instant. If it should then appear, to the satisfaction of the learned Judge, that the applicant had permanently abandoned his present residence and established a respectable and suitable home for himself and his daughter, and entered into an undertaking faithfully to carry out the new arrangement, the order asked for would be made; otherwise the application would then be dismissed with costs. C. Elliott, for the applicant. W. B. Raymond, for the Children's Aid Society.

Re McCOUBREY AND CITY OF TORONTO.

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Ontario Supreme Court, Lennox, J., in Chambers. July 17, 1913.

MUNICIPAL CORPORATIONS (§ II C 3—112)—*Early Closing By-laws — Regulation of Barber Shops — Early Closing By-law — Validity — Statutes.*]—Motion by Charles McCoubrey for an order quashing by-law No. 6513 of the City of Toronto, passed on the 16th June, 1913, and known as the barbers' early closing by-law. Lennox, J., said that he saw no reason to change the opinion he expressed at the argument, namely, that the by-law substantially complied with the Act. The legislative meaning was not at all clearly expressed, either in 4 Edw. VII. ch. 10, or in the Act of last session; but the exceptions of sec. 84, as applying to barber shops, would lead to manifest absurdity. The by-law should be amended by striking out the words "owner complained of," and in all other respects the application should be dismissed and the by-law confirmed. Owing to the unsatisfactory wording of the statute, there should be no costs. T. J. W. O'Connor, for the applicant. Irving S. Fairty, for the city corporation.

Motion denied.

ALLEN v. GRAND VALLEY R. CO.

Ontario Supreme Court. Trial before Kelly, J. June 30, 1913.

ACTION (§ I B—5)—*Prematurity — Contract — Supply of Goods for Railway Construction — Action for Price — Guaranty — Defence of Sureties — Variation in Terms of Contract — Evidence — Term of Credit — Expiry before Action Brought — Counterclaim.*] — Action for the recovery of moneys claimed as a balance due for goods supplied to the defendant company for use in the construction of their railway. The plaintiffs claimed against the defendant company as principal debtors and against the defendants Verner and Dinnick, respectively the president and vice-president of the defendant company, on the 23rd July, 1909, as sureties by virtue of a written guaranty of that date, as follows (addressed to the plaintiffs): "In regard to the order which the Grand Valley Railway Company have placed with your firm for the special work for the Brantford Street Railway Company, amounting to some $60,000, the first work to be delivered in two months or sooner if possible, and the terms on each consignment to be fifty per cent. on delivery and the balance sixty days after delivery, we wish to state that, in connection with the said contract and these terms of payment, we hereby personally undertake to make these payments if the railway company fail to do so." One of the grounds of defence relied upon by the defendants Verner and Dinnick was, that there was such variation in the terms of

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the contract, in relation to what was called "job 34," as discharged them from liability, or that, so far as that job was concerned, they did not guarantee the payment for it, as it was finally agreed upon. Upon a review of the evidence, the learned Judge holds that the sureties must have intended to include in their guaranty the price of a complete lay-out of job 34; Dinnick's evidence was, that when he entered into the guaranty he knew that the contract had been made, but that he did not look at the terms and the prices. The sureties were chief officers of the defendant company and had knowledge of the company's operations. It was not until the estimates of the 24th September were agreed upon that the specifications of the complete lay-out intended by the proposal of the 13th July and the price of that job were finally arrived at; and, in that view of the matter, the sureties were not discharged from liability. The guaranty fixed the limit of the sureties' liability at $60,000, and the total contract-price, including the £2,411.8.4 which was finally agreed upon for job 34, was less than $60,000. The defendant company set up that, at the date of the commencement of the action, the plaintiffs had no cause of action; that the goods sued for were not delivered on or before the 9th June, 1911; and that the sixty days' term of credit had not expired. The learned Judge said that this defence was not borne out by the evidence. The period of credit dating from the delivery of the goods had expired at the time the action was begun; and it was not, therefore, premature. The defendant company counterclaimed damages for failure to deliver within the time contracted for, and for loss owing to alleged imperfect and incomplete and defective material and work supplied and done by the plaintiffs; but no evidence was submitted to substantiate these claims. Judgment for the plaintiffs for the amount sued for, with interest and costs. Counterclaim dismissed with costs. H. E. Rose, K.C., and G. H. Sedgewick, for the plaintiffs. F. Smoke, K.C., for the defendants.

HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.
(Decision No. 3.)

Ontario Supreme Court, Britton, J. July 8, 1913.

MORTGAGE (§ VI—90)—*Final Order of Sale—Accounting.*]—Appeal by the defendants McKillican and Smith from an interim report made by the Master at Ottawa, dated the 13th May, 1913.

C. H. Cline, for the appellants.

F. A. Magee, for the plaintiffs.

BRITTON, J.:—A previous report was made by the Master, and an application by way of appeal from it was made to Mr.

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Justice Sutherland, on various grounds, to open it up. This appeal was dismissed: see *Home Building* v. *Pringle*, 3 D.L.R. 896, 3 O.W.N. 1595. An appeal from Mr. Justice Sutherland's order was taken to a Divisional Court. That Court thought the facts not fully found by the Master, and sent the case back for further inquiry: see *Home Building* v. *Pringle*, 7 D.L.R. 20, 4 O.W.N. 128.

After further inquiry, the Master made the report which is the subject of the present appeal. I have before me the findings of fact by the learned Master, his report, and his reasons for his findings and for his report. The appeal was argued ably and at length before me, and, in addition, there were placed before me the written arguments used before the Master and before my brother Sutherland and before the Divisional Court.

I am of opinion that subsequent purchasers of portions of the mortgaged property, who have given mortgages thereon, are not necessarily subsequent incumbrancers, within the meaning of the Rules. The plaintiffs were at liberty to make such of the owners of (as put by the Master) "parts of the equity of redemption," as they, the plaintiffs, thought proper, parties to the action. The plaintiffs were not bound to add as parties all who appeared to have claims to portions of the mortgaged lands.

I cannot say that the learned Master was wrong in finding that there was nothing due by the defendant McKillican to the plaintiffs. Having so found, it would have been more logical to have given McKillican her costs. I would do so now; but, by the judgment of the Divisional Court, costs were left to the discretion of the Master. I am bound by that judgment and cannot interfere with the discretion vested in him. A very large amount of costs has already been incurred in this case—in fact the question is now mainly one of costs, as it appears that the residue of the mortgaged property is amply sufficient to satisfy the balance of the mortgage-debt; but I am bound to say that some of the points raised by Mr. Cline, for the appellants, are important and difficult, and would seem to invite the opinion of an Appellate Division.

I deal only with the last report and the reasons for it, not with any previous opinions or findings during the inquiry.

I agree with the Master that the defendant Smith is not, in this action, and as the matter now stands, entitled to an account and statement in detail of the plaintiffs' mortgage account and of the plaintiffs' dealings with the mortgaged property.

The appeal will be dismissed, under the circumstances, without costs.

Appeal dismissed.

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MUNRO v. DeBLOIS.

Nova Scotia Supreme Court, His Honour Judge Pelton, Master.
May 13, 1913.

COSTS (§ II—45)—*Collection—Setting-off Costs.*] — Motion for an order to set-off costs.

O. S. Miller, in support of application.

Daniel Owen, contra.

JUDGE PELTON:—On taxation in this case of Mr. Owen's costs of order to set aside execution, I expressed my opinion to which I adhere, that these costs should—as proposed by Mr. Miller—be deducted from the larger costs previously taxed by him on the order for judgment herein and remaining unpaid. It would be unjust and inequitable to allow Mr. Owen to collect his costs by execution or otherwise, while on the other side Mr. Miller's costs were unpaid.

Barker v. *Hemming*, 5 Q.B.D. 609, 43 L.T. 678, referred to by Mr. Owen, does not apply. That was a case of interpleader by the sheriff, an entirely different case from this. There the plaintiff had recovered judgment against two defendants, as to one of whom the judgment was set aside with costs. That defendant subsequently claimed goods taken in execution by the sheriff on the same judgment, and an order was made against him barring his claim with costs to be paid to the plaintiff, which costs he sought to set-off against the costs due to him by the plaintiff in the original action. It was held that the Master could not order this to be done, because the interpleader was a proceeding distinct from the action, that the rule only applied as between parties, by which it was meant not the same persons merely but parties to the particular litigation in their character of parties to it. *Per* James, L.J.: "They (the interpleader proceedings) are distinct from the action, and it is a mere accident that Hemming, a party to these proceedings, is also a party to the original action."

In a later case, *David* v. *Rees*, [1904] 2 K.B. 435, 91 L.T. 244, in which the effect of the rule, as well as the previous cases thereon, were fully discussed, it was held by the Court of Appeal that the provisions with regard to set-off of costs between parties are confined to cases in which judgments for costs are sought to be set-off against each other, are in the same action or proceeding (which is the present case), and do not extend to cases in which the judgment for costs are in distinct and independent litigation (which is not the present case). The amount of costs taxed by Mr. Owen will be deducted from the amount of costs taxed by Mr. Miller, and only the balance, after deduction, will be collected on the judgment herein. No execution

to be issued for Mr. Owen's costs. From the above memo., I presume counsel can agree on the proper order (if any) to be taken in this matter. If an order is needed and cannot be agreed upon, I will settle the form.

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Set-off ordered.

REX v. McNAMARA.

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County Court of New Westminster, B.C., His Honour Judge Howay.
April 8, 1913.

BAIL AND RECOGNIZANCE (§ I—3)—*Right to Bail—Criminal Charge—Extradition from Foreign Country for Theft in Canada.*]—Motion to admit to bail the accused, who was held in close custody on the charge of having stolen an automobile in New Westminster, and who had been arrested in the United States upon the charge and sent back under extradition process.

Sir Charles Hibbert Tupper, K.C., and *A. S. Johnson*, for the motion.

E. P. Davis, K.C., for the Crown, contra.

JUDGE HOWAY:—Counsel on both sides agree that the charge being one which before the Criminal Code would have been a felony, the granting of bail is in my discretion—that is, it is to be exercised by me not capriciously but on judicial grounds and for substantial reasons.

The governing consideration is not in dispute. I must be guided in my action by the probability of the prisoner's appearing to take his trial. In considering that question many things are enumerated in the authorities as factors: the nature of the offence charged, the severity of the punishment, the strength of the evidence, the character or behaviour of the accused, his means, his standing. I take this enumeration to be but a guide; merely another way of saying that the Court must weigh all the circumstances surrounding the alleged crime and the accused.

It is very plain that the strength of each factor must depend upon the particular case. Sir Charles Hibbert Tupper has pressed very strongly the proposition that the Crown's case is weak, and that therefore I should admit to bail as no man would flee the realm to escape trial upon such a case. It is, however, a *prima facie* case; the extradition proceedings referred to by both counsel, and the committal for trial shew that. In any event weakness, if such it be, is but one element. The factor which operates most strongly upon my mind is that the prisoner is not shewn to be a person having his home and family here (as was the case in *Ex parte Fortier*, 6 Can. Cr. Cas. 191, but—and this is common ground—is here by virtue of extradition proceedings.

The fact that he, as stated before me, resisted extradition to

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the last ditch weighs heavily with me in reaching the conclusion to refuse bail. I cannot feel that the probabilities are that such a person will be present for his trial.

Under ordinary circumstances bail should not be granted to a person committed for extradition: *Re Watts* (1902), 5 Can. Cr. Cas. 538, 3 O.L.R. 279. Osler, J.A., says there: "I should be very slow to admit to bail a person who had been arrested or committed for extradition." He adds that he cannot recall an instance of its having been done. The reporter's note to the case shews that in that case the accused failed to answer the terms of his bail bond. The application will therefore be refused.

Motion denied.

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ST. GREGOR MERCANTILE CO. v. ROTH (Sklar, garnishee).

Humboldt District Court, Saskatchewan, Forbes, Dist.Ct.J. July 2, 1913.

GARNISHMENT (§ II B—40)—*Setting aside summons—Exemptions—Pendency of main action.*]—Application to set aside a garnishee summons and to order the delivery to the defendant of money paid into Court by the garnishee on the ground that it was exempt from seizure.

The application was dismissed.

A. D. McIntosh, for the plaintiffs.

H. J. Foik, for the defendant.

FORBES, Dist.Ct.J.:—This is an application to set aside the garnishee summons and service thereof and for payment out to the defendant of the moneys paid into Court on the grounds that said moneys so paid into Court are exempt from seizure or garnishment by the provisions of the Exemptions Act, R.S.S. 1909, ch. 47, sec. 2, thereof. The facts are not disputed. The defendant sold certain animals, fowls, etc., all of which were exempt from seizure under "execution." The garnishee was the purchaser and paid the sum due into Court. No judgment has yet been entered in the original action, but a defence has been filed. The cause of action has not yet been brought to trial. The defendant may succeed therein in which case the plaintiff would have no right to this money. See *Maple* v. *Shrewsbury*, 19 Q.B.D. 463 (C.A.) which says "so long as there is a defence on the record undetermined an order for payment out cannot be made." I think this is good law as it tends to the final disposition and avoids multiplicity of actions.

The procedure is wrong. I am asked to decide whether this "debt is attachable or not." For the proper steps to be taken in such a case see rule 512. The plaintiff is really asking for a "declaratory judgment." The Court will not pronounce a

declaratory judgment unless to establish some right. A judgment entirely "in the air" will not be granted. If I gave any judgment in this matter, my decision would be "in the air," as Harvey, C.J., styles it in *Gilmore* v. *Callies*, 19 W.L.R. 545, until a decision is reached in the principal action herein.

These objections were not taken on the argument, but they are fatal, and the application will be dismissed, but without costs consequently.

Application dismissed.

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RE HAMILTON.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. April 23, 1913.

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[*Re Hamilton*, 8 D.L.R. 529, 4 O.W.N. 441, affirmed.]

WILLS (§ III A—75)—*Construction—Gift in trust.*]—Appeal by Annie Seaborn Hill from the judgment of BOYD, C., *Re Hamilton*, 8 D.L.R. 529, 4 O.W.N. 441, 27 O.L.R. 445.

R. R. Hall and *S. T. Medd*, for the appellant. This is a question of construction, and the appellant claims to be entitled to the payment of the principal and interest of her share under the will, absolutely and without restriction of any kind. They referred to *In re Bown* (1884), 27 Ch.D. 411; *In re Croughton's Trusts* (1878), 8 Ch.D. 460; *In re Hutchinson and Tenant* (1878), 8 Ch.D. 540; *In re Diggles* (1888), 39 Ch.D. 253; *Williams* v. *Williams* (1851), 1 Sim. N.S. 358; *Webb* v. *Wools* (1852), 2 Sim. N.S. 267; *Loch* v. *Bagley* (1867), L.R. 4 Eq. 122; *Magrath* v. *Morehead* (1871), L.R. 12 Eq. 491; *Laing* v. *Laing* (1839), 10 Sim. 511.

G. H. Watson, K.C., for the respondent, the trustee. The word "wish," used as it is here by the testator, is not merely precatory, but an operative word, and is not limited to the expression of a mere "hope." This is the view of the learned Chancellor, and is supported by the cases cited by him: *In re Burley*, [1909] W.N. 253; *Liddard* v. *Liddard* (1860), 28 Beav. 266. [RIDDELL, J., referred to *Bousfield* v. *Bousfield* (1869), 21 L.T.R. 136, as being in apparent conflict with the view taken by the learned Chancellor.] In that case the devise was direct; and it is distinguishable from the case at bar. The trustee had exercised a proper discretion in declining to pay over the appellant's share absolutely. He referred to the cases cited in the judgment of the learned Chancellor, and also to *Re McGill*, 9 D.L.R. 7, 4 O.W.N. 565, in which Kelly, J., followed that judgment; Theobald on Wills, 7th ed., p. 461; *Gisborne* v. *Gisborne* (1877), 2 App. Cas. 300; *Tabor* v. *Brooks* (1878), 10 Ch.D. 273; *In re Courtier* (1886), 34 Ch.D. 136; *Train* v. *Clapperton*, [1908] A.C. 342; *In re Cotton's Trustees and School Board for London* (1882),

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19 Ch.D. 624, 628; *In re Jump*, [1903] 1 Ch. 129; Lewin on Trusts, 11th ed., p. 739; *In re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334; *Re Martin & Dagneau* (1906), 11 O.L.R. 349, followed in *Re Porter* (1907), 13 O.L.R. 399; *McFarlane* v. *Henderson* (1908), 16 O.L.R. 172; *Blackburn* v. *McCallum* (1903), 33 S.C.R. 65.

Hall, in reply, referred to Theobald, 7th ed., p. 644, where it is laid down that "where a fund is given immediately to a legatee with a direction to pay it to her, the direction to pay overrides a restraint on anticipation." He also referred to *In re Bown, supra; In re Tippell's and Newbould's Contract* (1888), 37 Ch.D. 444; *In re Grey's Settlements* (1886-7), 34 Ch.D. 85, 712. As to the merits of the case, he relied on *In re Johnston*, [1894] 3 Ch. 205, approved in our own Court of Appeal in *Lewis* v. *Moore* (1897), 24 A.R. 393, 395, 408.

MULOCK, C.J., SUTHERLAND, and LEITCH, JJ., would dismiss the appeal, agreeing with the reasons given in the judgment appealed from.

RIDDELL, J.:—The very careful, able and exhaustive argument of Mr. Hall has not convinced us that there is error in the judgment appealed from.

The only case which has given us any trouble is *Bousfield* v. *Bousfield*, 21 L.T.R. 136, a decision of Malins, V.-C., which seems to be opposed to the decision in appeal. But there, there was a direct and immediate gift, a legacy to the beneficiary, not, as here, a gift or legacy to trustees in trust to pay—which is considered by Theobald, 7th ed., p. 644, to make a difference.

Even supposing that this is not a difference of moment, *Bousfield* v. *Bousfield* is not reported in contemporary reports, is not cited in any succeeding case or referred to in text-books of authority. It stands alone; and, unless the difference suggested be substantial, it is in conflict with other cases, and should not be followed.

The appeal should be dismissed with costs—and I have nothing to add to the reasoning of the Chancellor.

Mr. Watson suggested rather than argued that we should or might interfere with the decision of the Court below in reference to the discretion of the trustee. There is no cross-appeal, no notice of motion to vary the judgment, Con. Rule 813; upon challenge by the Court to state his position, counsel did not ask to be allowed to cross-appeal, or to be put in the same position as if he had served notice under Con. Rule 813—and we should not consider whether, had proper steps been taken, a successful attack might have been made by the trustee upon this part of the Chancellor's judgment.

Appeal dismissed.

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