Dominion Law Reports

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COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT, THE RAILWAY COMMISSION, AND THE CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

ANNOTATED

Alphabetically Arranged Table of Annotations found in Vols. I-LXVII. D.L.R.

VOL. 67

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CASES REPORTED IN THIS VOLUME.

TABLE OF ANNOTATIONS.

CONCISE BRIEFS OF THE LAW.

APPEARING IN VOLS. 1 TO 67 INCLUSIVE.

BALDWIN v. BALDWIN.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave and Duff, J. July 4, 1922.

APPEAL (§ VII E—320)—HUSBAND AND WIFE—SEPARATION ON GROUNDS OF OUTRAGE AND ILL-USAGE—QUE. C.C. ARTS. 189 AND 190—DISCRETION OF COURT—CIRCUMSTANCES OF PARTIES—RANK AND CONDITION ACCORDING TO LOCALITY—INADVISABILITY OF INTERFERENCE WITH JUDGMENT BY PRIVY COUNCIL.

In proceedings brought under Arts. 189 and 190 of the Civil Code of Quebec for a separation between husband and wife on the ground of outrage, ill-usage, or grievous insult, the grievous nature and sufficiency of such outrage, ill-usage and insult are left to the discretion of the Court which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties, and this makes it desirable that the matter should be dealt with by the Courts of the place where the events happened, and the Privy Council will not interfere with the decision of the local Court unless it is clear that injustice has been done.

[See Annotations Divorce Law in Canada, 48 D.L.R. 7, 62 D.L.R. 1.]

APPEAL by husband from the judgment of the Court of King's Bench for the Province of Quebec (appeal side) in an action for separation brought under Arts. 189 and 190 of the Quebec Civil Code. Affirmed.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—Their Lordships do not think it is necessary to call upon the respondent in this case.

The proceedings are brought under arts. 189 and 190 of the Civil Code of Quebec. Under art. 189 a husband and wife may respectively demand a separation on the ground of outrage, ill-usage or grievous insult, and by art. 190:—

"The grievous nature and sufficiency of such outrage, ill-usage and insult are left to the discretion of the court, which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties."

That makes a distinction between the case of a separation on the ground of adultery, which is a thing as of right, and the case we are dealing with, which is one of discretion. It makes it all the more desirable that the matter should be dealt with upon the spot by the Courts of the place where the events happened, Courts which are cognisant of the social standards which obtain there. It is of course true that a right of appeal is given to the King in Council, and if any case were brought before their Lordships in which they thought injustice had been done the appeal would be entertained freely; but for the reasons which

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have been given, in a case of this kind their Lordships are reluctant to interfere with the discretion exercised by the Court below in a matter into which discretion enters. It is true that this case is complicated very much by the fact that the trial Judge decided differently from the Court of Appeal, and that it was only by a majority of one that the Court of Appeal have decided as they did to reverse his judgment. There are therefore three Judges each way. But one thing that has influenced the decision of their Lordships is that there is a specific incident in the case, the Miss Oakes incident. Their Lordships have scrutinised the evidence, they have scrutinised the judgment of Howard, J., and the judgment of the Court of Appeal, and they think the trial Judge was not justified in regarding Miss Oakes's evidence in the way he did. It is not necessary to go into the reasons for that. There is nothing in the inconsistencies of which the trial Judge speaks which amounts to anything when one comes to deal with them carefully from the point of view of evidence, and their Lordships think the probabilities are vastly in favour of the truth of the story told by Miss Oakes. Taking that view, an incident is established which is of itself of great importance, an outrage or insult, not the less such because the wife did not know of it at the time. When she came to know of it, which she did in good time for the purposes of these proceedings, she was entitled to say that a life with a husband who had behaved in such a manner was a life which ought not to be forced upon her within the meaning of arts. 189 and 190 of the Code. There are other things which are also against the husband. On the other hand, there has been a great deal of exaggeration of view in this case, probably on both sides. The Judges appear on occasions to have approached the consideration of the evidence with a very strong feeling one way or the other. Their Lordships do not mean that they have not given the best consideration they could to the evidence, but in giving that consideration there has generally been some point of view which ruled the scope of the outlook on the details. Their Lordships think that is present in Howard, J.'s judgment, and perhaps there are some traces of it in the judgments of the Court of Appeal. However that may be, for the reasons given their Lordships are unable to advise His Majesty to interfere with the judgment of the Court of Appeal of Quebec.

In their Lordships' opinion this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

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CANADA DRUGS LTD. v. ATTORNEY-GENERAL OF SASKATCHEWAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon, and McKay, JJ.A. June 29, 1922.

CONSTITUTIONAL LAW (§ I A—20)—SASKATCHEWAN TEMPERANCE ACT—AMENDMENTS 1921-22, CH. 76, SEC. 5—RESTRICTION OF LIQUOR WAREHOUSES TO CITIES HAVING POPULATION OF 10,000—RESTRICTIONS ON DELIVERY OF LIQUOR—VALIDITY—POWERS OF PROVINCIAL LEGISLATURE.

Section 49c (c) of the Saskatchewan Temperance Act, as amended by 1921-22, ch. 76, sec. 5, which provides that "nothing within this Act shall prevent the transport within the Province, where lawful of any other liquor, provided such transport be by common carrier, by rail or water, must be interpreted according to the rule of construction laid down in sec. 102 (1) of the Act (R.S.S. 1920, ch. 194) and so read is ultra vires the Provincial Legislature in so far as it is intended to affect or prevent delivery of liquor sold for export to persons outside of the Province.

Held, by Lamont, J.A., that sec. 49b (1) of the amendment of 1921-22, which prohibits the location of liquor warehouses except in cities having a population of not less than 10,000, was intra vires; Turgeon and McKay, JJ.A., held the provision ultra vires. Haultain, C.J.S., expressed no opinion on this point.

APPEAL from a Judge in Chambers (1922, 66 D.L.R. 815 holding that certain provisions of the Saskatchewan Temperance Act were *ultra vires*. Varied.

A. J. Andrews, K.C., *D. A. McNiven*, for appellant.

T. D. Brown, K.C., for respondent.

HAULTAIN, C.J.S.:—By this appeal certain provisions of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, and the amendments thereto are called in question as constituting an interference with inter-provincial and foreign trade, and therefore beyond the powers of the Provincial Legislature to enact.

In dealing with the provisions in question, consideration must be given to the rule of construction which has been laid down by the Legislature in sec. 102 of the Act, which is in the following terms:—

"102—(1) While this Act restricts and regulates transactions in liquor and the use thereof within the limits of Saskatchewan it shall not affect and is not intended to affect *bona fide* transactions in liquor between a person in Saskatchewan and a person in any other province or in a foreign country and the provisions of this Act shall be construed accordingly."

The question to be decided is, whether the Legislature has actually interfered with inter-provincial or foreign trade. *R.* v. *Nat. Bell Liquors, Ltd.* (1922), 65 D.L.R. 1.

Inter-provincial and foreign trade are subjects coming within the classes of subjects to which the exclusive legislative authority

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of the Parliament of Canada extends. (B.N.A. Act, 1867, sec. 91, 2).

On the other hand, "It is not incompetent for a provincial legislature to pass a measure for the repression or even for the total prohibition of the liquor traffic within the province, provided the subject is dealt with as a matter of a merely local nature in the province, and the Act itself is not repugnant to any Act of the Parliament of Canada." *Att'y.-Gen'l. of the Dominion* v. *Att'y.-Gen'l. of Ontario*, [1896] A.C. 348, 65 L.J. (P.C.) 26; *Att'y.-Gen'l. of Manitoba* v. *Manitoba License Holders' Ass'n.*, [1902] A.C. 73, at p. 78, 71 L.J. (P.C.) 28, 50 W.R. 431.

The last cited case further decides, at p. 31 of the Law Journal Report, that "matters which are 'substantially of local or of private interest' in a province—matters which are of a local or private nature 'from a provincial point of view'—to use expressions to be found in the judgment, are not excluded from the category of 'matters of a merely local or private nature' because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades."

But a Provincial Legislature cannot do indirectly what it cannot do directly, and, while ostensibly legislating with regard to a matter within its legislative jurisdiction, actually legislate with regard to a matter within the exclusive legislative jurisdiction of Parliament.

It will be necessary, therefore, to consider whether the legislation in question actually interferes with inter-provincial or foreign trade, and whether that interference is only the indirect result of the legislation and not its main purpose and object, but merely incidental thereto.

The provision restricting export liquor warehouses to cities of a certain population is, in my opinion, within the powers of the Legislature to enact. The object with which liquor is kept within the Province does not, in my opinion, alter the character of the liquor or in any way limit the absolute control over it or any other property in the Province, exclusively belonging to the Legislature.

Section 49b (3), as amended by 1921-22, ch. 76, sec. 5, does not apply to liquor removed from a warehouse for the purposes of export, and need not therefore be considered.

Section 12, R.S.S. 1920, ch. 194, which requires a return to be made to the chief inspector by every liquor exporter prior to

the delivery of any liquor sold, is in my opinion beyond the powers of the Legislature, inasmuch as it delays, interferes with and affects a *bona fide* transaction in liquor between persons in the Province and persons in other Provinces or foreign countries. The right to sell for export to such persons cannot be restricted or regulated by provincial legislation.

Section 49c, as amended by 1921-22, ch. 76, sec. 5, enacts that:—

"49. Nothing in this Act contained shall prevent:

(a) the transport within the province of liquor lawfully purchased under the authority of this Act for lawful use therein;

(b) on a change of residence, the transfer of liquor from the former to the new dwelling-house;

(c) the transport within the province, where lawful, of any other liquor, provided such transport be by common carrier, by rail or water."

If this section is intended to affect or prevent the delivery of liquor sold for export to persons outside of the Province, it is, in my opinion, beyond the powers of the Legislature. It directly interferes with inter-provincial and foreign trade, and attempts to deal with a matter which is not merely of a local nature in the Province and directly infringes on the exclusive jurisdiction of Parliament in respect of the regulation of trade in a matter of inter-provincial or international concern. *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96, 51 L.J. (P.C.) 11.

I am inclined to think, however, that the section in question does not apply to export liquor en route to its inter-provincial destination. The mode of shipment and delivery of such liquor, as part of a *bona fide* transaction between a person in Saskatchewan and a person in any other Province or in a foreign country, is by sec. 102 not affected by the Act.

If the section purports to govern the shipment of export liquor, it is, in my opinion, also beyond the competence of the Legislature, because its effect would be, if strictly enforced, to absolutely prohibit the shipping of liquor from export warehouses, except, perhaps, in the case of warehouses situated immediately on the line of railway. If to "transport within the Province" means, as I think it does, to transport from one point to another in the Province, then the removal of liquor from an export warehouse to the railway station by automobile, truck or dray, could only be effected in breach of the section.

In considering this point it must be remembered that the real question to be decided is, whether the Provincial Legislature by the legislation under consideration has exceeded its powers. If the provisions of the statute prohibit or interfere with inter-

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national or inter-provincial trade, then it is obvious that they are beyond the powers of the Legislature to enact. The evils which have arisen from this international trade, great as they probably are, can only be dealt with and removed by competent authority, and that, in my opinion, is the Parliament of Canada. References to "rum-running" and international comity are altogether beside the question. We are not concerned with the nature or magnitude of the evil or with what the remedy should be. The only question we have to decide is, who has the power to apply the remedy?

On the other points raised by this appeal which I have not specifically dealt with, I concur in the judgments of my brothers Lamont and Turgeon.

LAMONT, J.A.:—The question involved in this appeal is whether or not certain sections of the Saskatchewan Temperance Act are beyond the competence of the Provincial Legislature to enact.

The plaintiffs are a body corporate, incorporated by letters patent of the Government of Canada, and empowered to carry on in Canada and elsewhere the business of exporting liquors. The head office of the company is in this Province, and for years it has carried on the business of exporting liquors from Saskatchewan to other Provinces and to the United States of America. To facilitate their business, the plaintiffs had warehouses at Yorkton, Regina, Gainsboro' and Bienfait; the two latter of these places being in close proximity to the boundary line between Saskatchewan and the United States. In each of these warehouses the plaintiffs kept a large stock of liquors, and prior to June 1, 1922, they carried on an extensive export business with customers outside of Saskatchewan. A large portion of the liquor sold to these customers was delivered to them at the warehouses above mentioned and was taken away in automobiles, or it was taken to the boundary of the Province by the plaintiff company itself in automobiles and delivery made at the boundary line. At the last session of the Legislature certain amendments were made to the Temperance Act, 1921 (Sask.), ch. 76, sec. 5, and it is the validity of these amendments, *inter alia*, that the plaintiffs in this action impeach.

By these amendments sec. 49 of the Act was repealed and a new section substituted, which, in so far as it is material to this case, reads as follows:—

"49—(1) Except as authorised by this Act no person by himself, his servant or agent shall have or keep or consume or give liquor in any place wheresoever other than a dwelling house . . . .

49a. Nothing in this Act shall prevent any person from having

liquor for export sale in his liquor warehouse, provided such liquor warehouse and the business carried on therein comply with the requirements of section 49b or from selling from such liquor warehouse to persons in other provinces or in foreign countries, but no warehouse shall be deemed a liquor warehouse within the meaning of this section if the person having liquor therein fails to comply with the provisions of subsection (3) of section 38, of subsection (3) of section 11, or of section 12.

49b—(1) The liquor warehouse in section 49a mentioned shall be located only in a city having a population of not less than ten thousand according to the last census taken under the authority of an Act of the Parliament of Canada and shall be suitable for the business of export sale and so constructed and equipped as not to facilitate any violation of this Act, and not connected by any internal way of communication with any other building or any other portion of the same building, and shall be a ware-room or building where no other commodity or goods than liquor for export from the province are kept or sold and wherein no other business than keeping or selling liquor for export from the province is carried on.

49c. Nothing in this Act contained shall prevent:—

(c) the transport within the province, where lawful, of any other liquor, provided such transport be by common carrier, by rail or water."

These amendments came into force on June 1 last. Prior to that date the Liquor Commission notified the plaintiffs to move their stocks of liquor by June 1 from the locations aforesaid to a city having a population of 10,000. In Saskatchewan there are only three cities having that population: Regina, Moose Jaw, and Saskatoon. The plaintiffs, in obedience to this notice, moved their stocks from Yorkton, Gainsboro' and Bienfait to Saskatoon and Regina, and in so doing incurred considerable expense, for the said stocks amounted to over $200,000. The plaintiffs allege, and it is not disputed, that the places at which they had, prior to June 1, been carrying on business were infinitely more convenient, both for the plaintiffs and their customers, than the cities to which they were compelled to remove their stocks. They also allege that if they are not permitted to carry on business at the former location of their warehouses they will suffer great loss, damage, and inconvenience in the conduct of their business. The Liquor Commission, purporting to act under sec. 49 (c) also notified the plaintiffs prior to June 1 not to transport any liquor unless such transport was by means of a common carrier, by rail or water, and threatened to prosecute any of the plaintiffs' customers or the plaintiff company

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itself if any liquor lawfully sold for export was transported in any other manner. From the plaintiffs' point of view, the objectionable provisions in the amendments are those compelling them to keep their stocks for export in the 3 cities, which are all over 100 miles from any boundary of the Province, and that limiting transportation to a common carrier, by rail or water.

The matter came before a Judge in Chambers in the form of questions of law set down for argument. No evidence had been taken, but it was agreed that the parties should admit any facts necessary to support the questions submitted that were not admitted in the pleadings. The plaintiffs asked for a declaration that the provisions referred to were *ultra vires*. The chamber Judge held the provisions impeached to be within the competence of the Legislature to enact. From his decision this appeal is brought.

The right of a Provincial Legislature to prohibit traffic in liquor within the Province has been authoritatively established and is not now open to question. (*Att'y.-Gen'l. of Ontario* v. *Att'y.-Gen'l. of the Dominion, supra.*) Such legislation falls within sub-sec. 16 of sec. 92 of the B.N.A. Act, 1867, as being a matter of a "merely local or private nature within the province." (*Att'y.-Gen'l. of Manitoba* v. *Manitoba License Holders' Ass'n, supra.*) In this latter case the Privy Council went further, and pointed out that the legislation then under review, which was the Manitoba Liquor Act, was none the less a "matter of merely local or private nature," from a provincial point of view, because it indirectly affected business operations outside the Province. Their Lordships, at p. 79, said:—

"The judgment, therefore, as it stands, and the Report to Her late Majesty consequent thereon, shew that in the opinion of this tribunal matters which are 'substantially of local or of private interest' in a province—matters which are of a local or private nature 'from a provincial point of view,' to use expressions to be found in the judgment—are not excluded from the category of 'matters of a merely local or private nature,' because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades."

Although provincial legislation upon a subject matter expressly assigned to the Provinces does not become invalid because it has an effect outside the Province, or because it interferes with the industrial pursuit of persons in the Province, yet such effect

or such interference must be only the indirect result of the legislation and not its main purpose or object, and must be an incidental effect merely of the legislation. *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, 56 L.J. (P.C.) 87; the *Fisheries* case, [1898] A.C. 700, 67 L.J. (P.C.) 90.

In Lefroy's Legislative Power in Canada, p. 656, the author points out that, during the argument before the Privy Counsel in the *Prohibition* case (1895), while discussing the meaning of an Act "merely of a local nature," over which the Province had jurisdiction, Lord Herschell defined it as "an Act not touching by its immediate and direct operations those outside the province."

The object of the Liquor Act is to promote temperance within Saskatchewan. Legislation which is directed towards that object is within the competence of the Province even although it may indirectly affect business operations outside the Province. On the other hand, if the purpose and object of the provincial legislation is directly to affect inter-provincial or foreign trade, such legislation is *ultra vires* of the Legislature, because the legislative ambit of a Provincial Legislature is the area of the Province.

In the recent case of *Nat. Bell Liquors Co.*, 65 D.L.R.1, the Privy Council, in discussing the validity of a provision of the Alberta Liquor Act, 1916, ch. 4, which enacted that "no person shall within the Province of Alberta keep for sale any liquors except as authorised by this Act," where there was nothing in the Act itself authorising a liquor exporting business to be carried on, said at p. 6:—

"In their Lordships' opinion the real question is whether the Legislature has actually interfered with inter-provincial or with foreign trade."

In *R.* v. *Regina Wine & Spirits, Ltd.* (1922), 65 D.L.R. 258, my brother Turgeon in his judgment stated the rule applicable to this case in, if I may be permitted to say so, clear and succinct language. He said at p. 264:—

"Examining in particular the sub-section which is under review in this case, our duty is to ascertain what it is, not in title or by declaration but 'in pith and substance.' Is it a regulation properly and reasonably incidental to the main purpose of the Act, or is it really an attempt to go further than the Act, in the main, purports to go and than the Legislature has power to go, by preventing or hindering the exportation of liquor from Saskatchewan to other Provinces or to foreign countries? In the first case it is *intra vires*, in the second case it is not, even although, in the second case, it may have the effect of facilitating the enforcement of the local law. The Legislature cannot do

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indirectly what the decision in *In re Heffernan* v. *Hudson's Bay Co.* (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322, declared that it cannot do directly. To put the case broadly, it cannot, under the pretense of legislating to promote temperance in Saskatchewan, pass laws which, in reality, are meant to promote temperance in another country or another Province, by preventing or hampering trade in liquor between Saskatchewan and such other country or Province."

The question therefore is: Are the provisions impeached in this action in their true nature and character directed towards the prohibiting or regulating of the liquor traffic within the Province, or are they a direct attempt to regulate the traffic in liquors between Saskatchewan and the United States or one of the other Provinces?

The legislative intention with which an Act is passed must be determined by the terms of the enactment itself considered with reference to the subject matter thereof. The purpose of the amendments of last session is, therefore, to be found in the language used considered in its relation to the provisions of the main Act. In considering the amendments we must bear in mind the terms of sec. 102, which reads as follows. [See judgment of Haultain, C.J.S., p. 3.]

In dealing with a similar provision of the Manitoba Act, 1900, ch. 22, in the *License Holders'* case, *supra,* their Lordships, at p. 80, said:—

"Now that provision is as much part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all bona fide transactions in liquor which come within its terms."

Section 102 is a clear expression of legislative intention, and the impeached provisions must be construed in the light of that intention.

We will consider first the amendment requiring all warehouses in which liquor is kept for export to be located in cities having a population of 10,000. This provision undoubtedly affects the export traffic in liquor. Purchasers from the United States, or other Provinces of Canada, instead of being able to obtain liquor at places near the boundary, must, under the amendment, obtain the same from Regina, Moose Jaw, or Saskatoon. The carrying on of business is, therefore, rendered more inconvenient by the amendment, but is this inconvenience a direct attempt to regulate the export trade?

Considering that the plaintiffs had four warehouses at widely different points in the Province, and considering the admission of fact on record, "that there are a number of other export

liquor dealers carrying on business in the Province," each having doubtless numerous warehouses, it seems to me that the Legislature may well have taken the view that the wide distribution of export liquor warehouses throughout the Province made it difficult, if not impossible, for those charged with the enforcement of the Liquor Act to prevent liquor sold for export from getting into illegitimate channels on its way to the boundary line, and that, for the purpose of lessening the opportunities for violating the Act and the more efficient enforcement of the same, the number of places from which the export traffic might be carried on should be lessened. In my opinion, this is a reasonable conclusion to draw from the provisions in question, considered in relation to the whole Act and in view of the legislative intention set out in sec. 102.

Sections 49a and 49b do not prohibit the export traffic. Those engaged in the business may still continue to carry it on, and although their customers may find it more inconvenient to obtain the liquor, that inconvenience, in my opinion, is merely an indirect and incidental result of legislation directed toward preventing infractions of the Act in Saskatchewan.

Section 49 (1), which prohibits any one keeping liquor in Saskatchewan elsewhere than in a dwelling house, unless otherwise provided, is, in my opinion, valid legislation, if it does not apply to liquor kept in a bonded warehouse under license from the Dominion Government. To control the liquor traffic in Saskatchewan the Legislature must have the right to say where liquor shall be kept and in what manner it shall be sold. Liquor kept for export is none the less liquor in Saskatchewan, and in my opinion the Legislature was well within its rights when it enacted that liquor kept for export shall be kept only in cities having a population of 10,000.

The next provision is 49c. Assuming that this section means that which the Liquor Commission evidently thought it meant, namely, that liquor sold in Saskatchewan for export in the Province should only be transported in the Province by a common carrier, by rail or water (and this really means by rail, for there is no common carrier transporting by water in any of these three cities), it is, in my opinion, an attempt to directly regulate the carrying out of a transaction which has its beginning in Saskatchewan and its end in some other Province, or in a foreign country. This the Provincial Legislature cannot do, for such legislation "touches by its immediate and direct operation those outside of the province."

The power of the Legislature to directly regulate transactions "merely of a local or private nature," is limited to those which

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have their beginning and their end within the Province. This is made clear by the language of the Privy Council in *Citizens Insurance Co.* v. *Parsons, supra*, where, in defining the scope of the power of the Dominion Parliament to legislate for "the regulation of trade and commerce" exclusively assigned to it, their Lordships, at p. 113, (7 App. Cas.), said:—

"Construing therefore the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, *regulation of trade in matters of inter-provincial concern*, and it may be that they would include general regulation of trade affecting the whole dominion."

I adhere to the view I expressed in *R.* v. *Waller* (1921), 60 D.L.R. 557, at pp. 562, 563, 34 Can. Cr. Cas. 312, 14 S.L.R. 237, namely:—

"The right to keep liquor in Saskatchewan for export to a foreign country or to other Provinces implies a right to make a sale of it, to deliver it and to receive the purchase price thereof in this Province."

To this I would add, the right to have the liquor transported to the boundary of the Province on its way towards its destination.

Had it been made to appear that the usual mode of transporting liquor sold for export—which, as the record shows, was by automobile—had, by reason of the speed which automobiles can attain, facilitated infractions of the Act, and rendered the detection of these infractions more difficult, and had the prohibition in respect of transport been limited to carrying by automobile, it may be that such legislation could have been upheld upon the principle upon which I have held that sec. 49b. can be supported. But where, instead of limiting the prohibition to that mode of transport which may actually have facilitated infractions of the Act, the Legislature prohibits all modes of transport save by common carrier by rail, regardless of other modes which may not lend themselves to breaches of the Act, the only reasonable conclusion at which we can, in my opinion, arrive is, that an attempt was being made to regulate inter-provincial and foreign traffic in liquor. However meritorious the abolition or regulation of such traffic may be, it can only be lawfully enacted by the Dominion Parliament.

I am therefore of opinion that sec. 49c., assuming that it applies to liquor sold *bona fide* for export, was beyond the power of the Provincial Legislature to enact. From the language of the statute, however, it seems to me questionable if that section

was ever intended to apply to the export trade. It does not expressly apply to liquor sold for export, it simply applies to "other liquor." As I have pointed out, if the section applies to the transport of liquor *bona fide* sold for export, it directly affects the carrying out of such a transaction. But sec. 102 expressly declares that the provisions of the Act shall be construed as not affecting or being intended to affect *bona fide* transactions in liquor between a person in Saskatchewan and a person in any other Province or in a foreign country. The only way by which effect can, in my opinion, be given to sec. 102 is, by holding that the words "other liquors" in sec. 49c. were not intended to include liquors *bona fide* sold for export. To this conclusion I think we are driven by the language of sec. 102.

With respect, therefore, to the provisions impeached in the statement of claim, I hold them to be valid or invalid as hereinafter set out.

1. Section 4 of ch. 70, 1920 (Sask.). Valid to the extent necessary for the proper enforcement of the Act.

2. Sub-sections 2 (a) and (b) and sub-secs. (3) and (4) of sec. 11, as amended by sec. 8 of ch. 70 of 1920. Valid.

3. Section 12, as amended by sec. 9 of ch. 70 of 1920. Valid with the exception of the clause requiring that a written return with particulars of every sale made shall be given to the chief inspector or other person named by him *prior* to delivery of the liquor. In my opinion, unless someone in the city in which the warehouse is situated is authorised to receive the return, the delivery of the liquor cannot be held up until the return reaches the officer in some other city.

4. Section 49a., as amended by 1921-22, ch. 76, sec. 5. Valid. Sub-sec. 3 of sec. 38, as amended by 1920, ch. 70, sec. 22, is reasonable, and in my opinion necessary for the proper enforcement of the Act.

5. Section 49b. Valid, except sub-sec. (2), which prohibits the plaintiff company from storing and keeping in its warehouse liquor belonging to others.

As the plaintiffs have this right under their charter from the Dominion Government, and as I am unable to see that the warehousing of liquor the property of others is calculated to lead to infractions of the Act to any greater extent than the keeping of plaintiffs' own liquor, the sub-section cannot, in my opinion, be said to be necessary to the proper administration of the Act.

6. Section 49c. Invalid in its present wide form, in so far as it applies—if it does apply—to the transportation of liquor *bona fide* sold for export.

I would therefore allow the appeal in respect of the provisions

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which I have held invalid, and would dismiss it in respect of the others. As the appellant company fails in the great majority of the provisions impeached, there should be no costs of appeal.

TURGEON, J. A.:—The trail judge points out in the course of his judgment (1922), 66 D.L.R. 815 at p. 816 that the issues raised in this action will likely cease in the near future to have any but an academic interest on account of certain legislation under consideration by the Parliament of Canada. I agree with him in this respect, and the position is even clearer to-day than it was when his judgment was written, as the legislation in question has since passed both Houses of Parliament and now awaits only the assent of His Excellency the Governor-General to become effective. It provides for the total abolition of the export trade in liquor, and thereby settles definitely a question which in recent years has been the subject of resolutions of the Legislative Assembly of Saskatchewan and of restrictive measures on the part of the Provincial Legislature. Incidentally it may be pointed out that the fact that Parliament has enacted this anti-export law without its validity being called in question by anyone and in pursuance of the aforesaid resolutions of the Legislative Assembly itself, which requested Parliament to do this very thing, serves to throw some light upon the matters now before us. It seems clear that the power to legislate upon the matter in question belongs exclusively to the Parliament of Canada under the powers conferred upon it by No. 2 of the clauses enumerated in sec. 91 of B.N.A. Act. *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96. Such being the case we have the starting point, that legislation *in pari materia* is entirely beyond the powers of the Provincial Legislature.

This appears to me to bring us at once to a clear understanding of the flaws which are to be found in part, at least, of the provincial enactments under examination in the case at Bar. When consideration is given, as it must be given, to the conditions which existed at the time the legislation was passed and which the legislation was intended to remedy, such as the location of export liquor houses near the United States boundary and the carrying on of export traffic across such boundary, we are able to discover whether the subject matter of the legislation is within the power of Parliament or of the local Legislature.

It does not seem even to have been denied that certain portions of this legislation were not, in fact, intended to put an end to the exportation of liquor to the United States. The trial Judge in his judgment expressly justifies its validity on the ground that it was so intended and that such intention was a laudable one. His Lordship describes conditions along the boundary line which

in his opinion made it desirable that the traffic in question should be stopped. But the discovery of a proper matter for legislation within any portion of the territory of Canada does not, by itself, solve anything from a constitutional point of view. You have the condition which calls for legislation; you must still ascertain whether the power to legislate lies at Ottawa or with the Provincial Legislature.

Having said this much I will now, as briefly as possible, in view of the academic character which intervening federal action has given to this litigation, indicate those portions of the legislation under review which, in my opinion, are *ultra vires* of the Provincial Legislature, either as constituting a partial prohibition of or an undue interference with export trade between Saskatchewan and other Provinces or foreign countries.

All this legislation is in the form of amendments to the Saskatchewan Temperance Act, an Act designed to promote temperance within Saskatchewan by restricting and regulating transactions in liquor and the use of liquor within the limits of the Province. (See sec. 102.) Such an object is within the legitimate scope of provincial legislation, provided the Legislature takes care to confine itself within the limits set for its activities by the Judicial Committee of the Privy Council in *Att'y-Gen'l of Manitoba* v. *Manitoba Licence Holders' Ass'n.* [1902] A.C. 73, where the following passage is found at p. 78:—

"It is not incompetent for a provincial legislature to pass a measure for the repression or even for the total abolition of the liquor traffic within the province, *provided the subject is dealt with as a matter 'of a merely local nature' in the province*, and the Act itself is not repugnant to any Act of the Parliament of Canada."

In order to ascertain whether the legislation objected to by the appellants in this case is *ultra vires*, the Legislature as going beyond the field of action thus measured off for provincial jurisdiction, we have but to bear in mind the test provided by the Judicial Committee in the recent case of *R.* v. *Nat. Bell Liquors Ltd.*, 65 D.L.R. 1.

"In their Lordships' opinion the real question is whether the Legislature has actually interfered with inter-provincial or with foreign trade."

Read in the light of this test, the following provisions seem to me to go beyond the powers of the Legislature and to encroach upon the matters reserved exclusively to the Parliament of Canada.

(1) That part of sec. 49b (1) as enacted by sec. 5 of ch. 76 of the statutes of 1921-22, which provides that export liquor ware-

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houses shall be located only in cities having a population of not less than 10,000 people. This provision, read in conjunction with the rest of the Act, would prohibit the exportation of liquor from any point in the Province, excepting only the cities of Regina, Saskatoon and Moose Jaw, to another Province or to a foreign country. It is an attempt to do for the whole of the Province, excepting these three cities, what the Court decided in *Hudson's Bay Co.* v. *Heffernan, supra,* the Legislature cannot do absolutely. This provision appears even to go expressly beyond the scope of the main Act as set out in sec. 102, above referred to. I fail to see what it can have to do with transactions in liquor or the use of liquor within the Province. How can it be said not to interfere with inter-provincial or with foreign trade? It does not appear to be aimed at anything else. In my opinion this enactment is *ultra vires.*

(2) Section 49 (b), (1) and (2), are *ultra vires* in so far as they may be construed to prevent one exporter from having liquor on his premises which belongs to another.

(3) Section 49b (3) as enacted by sec. 5 of ch. 76 of the statutes of 1921-22, which relates to the removal of liquor from a liquor warehouse and make such removal conditional, in some cases, upon the consent of the provincial liquor commission. In my opinion this provision is *ultra vires,* as being an undue interference with export trade.

(4) Section 12 of ch. 194 of R.S.S. 1920, enacted by sec. 9 of ch. 70 of the statutes of 1920. This section deals with a written return to be given to the chief inspector prior to the delivery of liquor for export. In my opinion this provision is *ultra vires* for the same reason as the provision last referred to.

(5) Section 49c of ch. 76 of the statutes of 1921-22 is objected to by the appellants on the ground that it interferes with the transportation of liquor for export. In my opinion this provision is *intra vires* in so far as it affects only the transportation of liquor within the Province. Reading the whole Act with the amendments and taking into consideration the restrictive provisions of sec. 102, it is doubtful to me whether the Legislature can be said to have intended to provide for anything else than transportation from one point to another within Saskatchewan. *R.* v. *Western Wine & Liquor Co.* (1917), 39 D.L.R. 397, 29 Can. Cr. Cas. 307. In so far, however, as this section may be construed to affect or to prevent the transportation of liquor destined for a point outside Saskatchewan, it is, in my opinion, *ultra vires* for the reasons that I have given in dealing with sec. 49b (1) above.

Section 4 of ch. 70 of the statutes of 1920 is also objected to. I think, however, that a misapprehension exists upon this point.

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In my opinion this section refers only to "wholesalers" defined in the interpretation section of the main Act, and referred to particularly in secs. 38, 39 and 40 under the heading of "Wholesalers."

In so far as the other provisions objected to are concerned I need only say that, in my opinion, they are all *intra vires* the Legislature for the reasons given in *R.* v. *Regina Wine & Spirits, Ltd.*, 65 D.L.R. 258.

The appeal should be allowed but without costs and the judgment appealed from varied as above.

MCKAY, J.A., concurs with TURGEON, J.A.

Judgment below varied.

CHILDS v. FORFAR.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Middleton and Lennox, JJ. November 4, 1921.

PARENT AND CHILD (§I—4)—CIVIL OBLIGATION OF PARENT TO SUPPORT INFANT CHILD—MORAL OBLIGATION—CHILD MAINTAINED BY OTHER PARTY WITH PARENTS' KNOWLEDGE AND CONSENT—IMPLIED PROMISE TO PAY—REASONABLE COST.

While there is no civil obligation on the part of a parent to maintain his infant child there is an undoubted moral obligation to do so, and where another person with the knowledge and consent of the parent undertakes to discharge this moral obligation for him, there is an implied promise to remunerate him what is reasonable for such service.

[*Latimer* v. *Hill* (1916), 30 D.L.R. 660, 36 O.L.R. 321, applied.]

AN appeal by the defendant Harold Forfar from the judgment of the County Court of the County of Oxford in favour of the plaintiff against the appellant for the recovery of $452 and costs in an action for money paid and the value of services rendered in maintaining a child of the defendants, who were husband and wife. Affirmed.

W. D. M. Shorey, for appellant.

J. S. Duggan, for respondent.

MEREDITH, C.J.C.P.:—The judgment appealed against can be supported only by actual promise to pay, made by the male defendant to the plaintiff; and, of course, it should be enough whether expressed or tacit and whether made by this defendant himself or by another person authorised to make it for him: but it must be borne in mind that this defendant was under no legal obligation to pay for the maintenance of his child apart from an actual contract to do so.

Although the Legislature of this Province has recently, in line with some of the Poor Laws of England, made children in some cases liable for the support of their parents, there has never

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been any law in this Province making parents liable for the support of their legitimate children. The Poor Laws of England are not in force in this Province; and there is nothing in the Criminal Code of Canada purporting to create such a liability; and if there were it would be ineffectual, civil rights being within the exclusive jurisdiction of the Provincial Legislatures. The Criminal Code applies only to cases in which the father or head of the family "is under a legal obligation to provide necessaries for any child . . . ;" and it may be that in other Provinces such a general liability exists; as there is in England in the Poor Laws; and the law as it is in this respect in this Province is not without something to be said in its favour: child-farming is generally against the interest of the child, of the parent, and of the public; families, homes, and home-ties, and direct paternal duties, rights, and powers are generally distinctly in the interests also of the child, the father, and the public.

In this case a tacit agreement is out of the question: the plaintiff relies, and relies solely, upon an expressed agreement. If there were not an expressed agreement, then the plaintiff and his witnesses are unworthy of credit, and the testimony of the defendants should be accepted and given full effect.

The testimony for the plaintiff was an agreement with the female defendant, to which the male defendant was in no sense a party, that the female defendant should pay $2.50 a week for the child's maintenance as a member of the plaintiff's family, his wife being the female defendant's sister; that that was rescinded soon after it was made, because the female defendant was unable to make the payment, and the male defendant would not pay anything; that a new agreement was then made in substitution for the old one, and that that agreement was that nothing should be paid, but that the child should be given to the plaintiff's wife and him.

The case of *Latimer* v. *Hill*, 35 O.L.R. 36; 36 O.L.R. 321; 26 D.L.R. 800; 30 D.L.R. 660, was very much discussed in this Court recently, first in this Division and afterwards in the other Division, without any one of the nine Judges before whom it was argued having even suggested that in this Province there was any legal liability apart from contract on the part of the father to maintain his child; or that he had not a legal right, notwithstanding his contract to the contrary, to the custody of his child.

The bargain, in this case, is thus stated by the plaintiff's wife:

"Q. 55. I understand there was a distinct bargain between you and the mother of the child, you were to be paid what they were going to pay the man in Englehart? A. Yes.

"Q. 56. Two and a half a week? A. Yes.

"Q. 57. And that was distinctly agreed between you and Mrs. Forfar at two and a half a week? A. Yes.

"Q. 58. No doubt about it? A. No.

"Q. 59. Clearly expressed between you? A. Yes.

"Q. 60. Did your husband know about that? A. No, it was a bargain between her and I.

* * * * * * *

"Q. 225. And the child was given about ten days or two weeks after it was born? A. I went to the hospital and got the mother and the child and brought them here.

"Q. 226. The father had nothing to do with the bargain? A. No.

"Q. 227. And, as far as you know, doesn't know anything about it? A. Yes.

* * * * * * *

"Q.261. I put it, she couldn't pay you the board while you were keeping her and you made a new bargain in which she agreed to give you the child? A. When she couldn't pay.

"Q. 262. And that is four or five years before the child went to Toronto? A. Yes.

"Q. 263. How can you claim anything for board if you made a new bargain?

"Mr. Ball: Is not that a question for His Honour?

"A. When they gave us the child, and took her away, wouldn't you expect board?

"Q. 264. You should have asked Mr. Ball that. You say the original arrangement was to pay $2.50 a week and she was unable to pay, and she arranged with you, you should keep the child for good? A. Yes.

"Q. 265. And that was made three or four years before the child was returned to Toronto? A. No, shortly after we had her.

"Q. 266. Then it would be seven or eight years before.? A. Yes.

"Q. 267. This is correct, isn't it? A. Yes.

"Q. 268. You are not going back on that? A. No.

"Q. 269. And you never asked her for money? A. No."

A brother-in-law of the women, who was a witness for the plaintiff, gives this version of the matter as he says it was related to him by the female defendant:—

"His Honour: If he had had any conversation he knows of? A. Mrs. Forfar told me she made an arrangement with Mrs. Childs to keep the youngster for so much a week, and her husband was no good and wouldn't pay her anything, and she had

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to pay her own hospital bill, and she finally gave Mrs. Childs the youngster to keep, and she was finished with her husband.

"Q. 428. Was anything said about paying Mrs. Childs? A. She agreed to pay $2.50 a week and couldn't keep it up, and turned the youngster over to Mrs. Childs."

And the plaintiff himself made his position in this action very plain, in these words:—

"Q. 527. There is no agreement to pay board after that? A. Certainly not, after. The youngster was given to us.

"Q. 528. You understood that? A. If I adopt a child I don't expect you or any one else to pay for it.

"Q. 529. Why didn't you keep the child? A. I made this trip to Toronto and Mrs. Childs, and the child was left there at their request.

"Q. 530. I don't see how you have any board and maintenance? A. I would sooner have the child than all the money he has got.

"Q. 531. Why don't you? A. I was not the father of the child and guess he can keep the child.

"Q. 532. That is some explanation why you didn't ask him for the money? A. I had Mr. Ball ask for it.

"Q. 533. Not until after the law trouble? A. Yes, because I expected Forfar was man enough to pay for it.

"Q. 534. You swore you adopted the child? A. She gave us the child.

"Q. 555. And that is the same reason why you didn't ask for any board? A. Certainly.

"Q. 535. I suppose that is consistent with the affidavit. In the affidavit filed in the law proceedings? It would be on the strength of that you made this statement in the affidavit that the child was given by her mother about ten days or two weeks after she was born. According to your evidence to-day you have been in error. It would be after her second visit. That is correct there? A. No. there . . . .

"Q. 536. Except as to time? A. Yes.

"Q. 537. The child was given to you by the mother? A. Yes.

"Q. 538. And kept on that understanding? A. Yes.

"Q. 539. The father had nothing to do with that? A. The father only spoke to me on one occasion.

"Q. 540. As far as you are concerned he was no party to this arrangement? A. No.

* * * * * * *

"Q. 582. And because you couldn't get the child, you are

going to make a demand for board? A. Simply ask him to pay for her keep.

"Q. 583 And that is the reason you ask in this action? A. Certainly.

"Q. 584. Then in your statement of claim it is untrue (para. 6) "that at the time the said Marion Forfar was brought to the plaintiff's home and was left with the plaintiff, the defendants had no home to which the said child could be taken nor means to support the said child, and the defendants then entered into an agreement with the plaintiff that he would be paid for the support, maintenance, and clothing of the said Marion Forfar." A. I never made that statement.

"Q. 585. The lawyer made it for you? A. It is not true. I didn't make that statement. That is not true."

Whatever a juror might do sympathetically, it ought to be obvious that he could not conscientiously find that there was ever any kind of actual bargain, expressed or tacit, on the part of the male defendant to pay the plaintiff anything: that any verdict in the plaintiff's favour must be based upon a fictitious bargain created for the purpose of making him pay: but, though fictions in law have been invented to support actions, fictions in fact never have been and never can be.

The plaintiff failed to prove any kind of legal liability on the part of the male defendant to him, and distinctly proved that there never was any; so his action should have been dismissed except for the consent given by the defendant at the trial in these words:—

"Q. 707. And you think you ought to pay them what is fair for the keep of it? A. Sure.

"Q. 708. His Honour: What do you think is fair? A. I thought about $200.

"Q. 709. His Honour: For the whole time? A. Over and above what we had given them."

In the face of this consent, I cannot understand why this appeal was brought: the consent is not to pay $200, but is to pay "what is fair:" and, having regard to all the evidence, it cannot be considered that the amount awarded is not "fair."

Therefore I am in favour of dismissing this appeal.

RIDDELL, J.:—This is an appeal by the defendant Harold Forfar from the judgment of the County Court of the County of Oxford.

Mrs. Childs and Mrs. Forfar are sisters; the latter was a stenographer, earning $15 to $18 a week; marrying young, she found herself *enceinte;* she and her husband had no house, no provision for the coming child. She told Mrs. Childs that her

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husband wanted to send the child, when it should be born, to a friend's at Englehart, and pay $2.50 per week for its support, but that she objected to the proposition; and she asked her sister to stick to her, to help her.

The child was born in Toronto in 1911: the two sisters arranged, shortly after its birth, to take the child to Woodstock, to the plaintiff's house, and did so. Mrs. Forfar desired to carry on her profession of stenographer and had to arrange about the baby. There is ample evidence justifying the finding of the learned County Court Judge, which I adopt:—

"I find that the defendant Florence Forfar agreed to pay $2.50 a week to the plaintiff for the care of the said child soon after its birth; but that she found she was unable to pay this amount, and then agreed that the plaintiff should keep the child; and that the defendant Harold Forfar agreed to this arrangement, as the defendants were not keeping house, and Mrs. Forfar continued her work as a stenographer during the period for which the plaintiff claims for maintenance."

The appellant and his wife did not take up housekeeping until 1918; and then they had the wife's father take the child away from the plaintiff; and took her into their own house.

There is no evidence of an express promise on the part of the defendant Harold Forfar to pay for the support of his infant child—and he seeks to avoid the judgment against him on that ground.

But, knowing of the arrangement made by his wife, and approving of it ,as he must be held to have done, he must be considered bound by what she agreed to. I am of opinion that, under all the circumstances, there was an implied contract on his part that, if he should take away the child under his paternal powers, he should reimburse the plaintiff for the maintenance of the child.

We cannot, indeed, apply the Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, sec. 27—*Re Davis* (1900), 18 O.L.R. 384—but the Legislature there seems to indicate such a duty as I have indicated.

I am, however, of the opinion that even without this the plaintiff should recover.

It is true that by the common law of England there is no civil liability on the parent to support his child, "unless, indeed, the neglect to do so should bring the case within the criminal law:" *per* Cockburn, C.J., in *Bazeley v. Forder* (1868), L.R. 3 Q.B. 559, at p. 565; *Mortimore* v. *Wright* (1840), 6 M. & W. 482; *Urmston* v. *Newcombe* (1836), 4 A. & E. 899; *Fluck* v. *Tollemache* (1823), 1 C. & P. 5.

It is also true that the statutory Poor Law of England, which imposed this duty, was not introduced into this Province—the statute of Upper Canada (1792), 32 Geo. III. ch. 1, by sec. 6, expressly providing for the exclusion of "any of the Laws of England respecting the maintenance of the poor or respecting bankrupts."

But certain duties are imposed by the Criminal Code—sec. 241, providing that any one "who has charge of any other person unable by reason . . . of . . . age . . . to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is . . . under a legal duty to supply that person with the necessaries of life," has been authoritatively interpreted as imposing upon a father the duty of providing necessaries for his young children: *Rex* v. *Lewis* (1903), 6 O.L.R. 132, 7 Can. Crim. Cas. 261; *Rex* v. *Yuman* (1910), 22 O.L.R. 500, 17 Can. Crim. Cas. 474. Section 241 of the present Code is in the same words as the original Code of (1892), 55 & 56 Vict. ch. 29, sec. 209. He might, indeed, be excused if he had no means for the purpose: *Rex* v. *Yuman*, supra; but the evidence here is to the contrary.

Moreover, to neglect to supply the child with necessaries would be an offence at the common law; Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 907—"It is an indictable misdemeanour at common law to refuse or neglect to provide food or other necessaries for . . . a child . . . unable to provide for and take care of himself, whom the party is obliged by duty . . .' to provide for." See *Rex* v. *Friend* (1802), R. & R. 20. And that the mere relation of father was enough to impose such duty is indicated by Lord Russell of Killowen in *Regina* v. *Senior*, [1899] 1 Q.B. 283, at p. 292, which was approved in *Rex* v. *Lewis*, 7 Can. Crim. Cas. at p. 269, 6 O.L.R. at p. 42.

However it would have been at the common law or elsewhere, both reason and binding authority shew it to be a duty now in this Province.

It is text-book law that when any one does for another what that other might be legally compelled to do, both request and promise to pay are implied.

In the present case, the fact that the child which the defendant should legally have supplied with necessaries was, with his full knowledge and consent, supplied with them by the plaintiff, in itself provides in law all the elements of a contract.

The amount allowed is not too much on a *quantum meruit*. The appeal should be dismissed.

MIDDLETON, J.:—While it is the law that there is no civil obli-

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gation on the part of a parent to maintain his infant child (*Bazeley* v. *Forder*, L.R. 3 Q.B. 559), his undoubted moral obligation to do so makes it very easy to find an implied promise to remunerate any person who, at his request or with his knowledge, undertakes to discharge this moral obligation for him: *Latimer* v. *Hill*, 35 O.L.R. 36, 26 D.L.R. 800, 36 O.L.R. 321, 30 D.L.R. 660.

In this case I think the trial Judge rightly found an implied promise to pay, and the appeal should be dismissed.

LENNOX, J.:—I am of opinion that upon the facts appearing in this case the plaintiff is entitled to recover. This is all that is involved in the appeal. As to the liability of a father for the care or support of his child independently of contract, express or implied, I refrain from the expression of an opinion.

Appeal dismissed.

BELAIR v. LA VILLE DE STE. ROSE.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 29, 1922.

TAXES (§ I E—45)—TOLL BRIDGE OVER NAVIGABLE RIVER—GRANT FROM CROWN OF RIGHT TO BUILD BRIDGE—NATURE OF BRIDGE AS BEING AN IMMOVABLE—RIGHT OF MUNICIPAL CORPORATION TO TAX—RIVER SEPARATING MUNICIPALITIES—RIGHT OF MUNICIPALITY EXTENDING TO MIDDLE OF RIVER—CITIES AND TOWNS ACT, R.S.Q. 1909, ARTS. 5281 AND 5282.

Under the Cities and Towns Act, R.S.Q. 1909, Art. 5281, a municipal corporation has the right to tax immovables situated within its territory, and this right extends to the right to tax a bridge, built on piles across a navigable river, the ownership in the bed of which is in the Crown, and which divides one municipality from another. The jurisdiction of the municipality extends to the middle of such river, and the bridge may be lawfully taxed as to the part within the municipality, the ownership of the bridge being in the person taxed and the bridge being an immovable by its nature and the permanency of its erection.

APPEAL by defendant from the judgment of the Court of King's Bench reversing that of the Superior Court (Que.), which had dismissed an action by the respondent to recover the annual taxes imposed on part of a bridge between two municipalities. Affirmed.

J. O. Lacroix, K.C., and *J. P. Belair*, for appellant.

P. H. Germain, K.C., for respondent.

IDINGTON, J.:—When due regard is had to the statutory definitions given the words used relative to what properties are taxable within the powers of the respondent and to the terms of the statute under and by which the appellant owns the bridge in question, I can see no ground for the appellant's pretensions herein. Nor do I see any ground for the final forlorn hope, as it were, set up here for the first time, that he does not know how

much of the bridge property he is assessed for. Plainly he is assessed for so much thereof as lies within the bounds of the municipality which on that side next the river extends to the middle of the stream according to the law laid down in the case of *Maclaren* v. *Att'y-Gen'l for Quebec*, 15 D.L.R. 855, [1914] A.C. 258, 20 Rev. Leg. 248.

The township boundaries in question there seemed to have been definitely fixed by iron stakes placed on the respective banks of the stream, but the majority of this Court held that to include the land to the middle of the stream and the Court above maintained that holding, notwithstanding many surrounding circumstances tending to rebut that presumption of law.

And the assessment, according to the actual cadastral number is specifically declared by statute as sufficiently definite.

I think the appeal should be dismissed with costs.

DUFF, J.:—I concur in the dismissal of this appeal with costs.

ANGLIN, J.:—The plaintiff appeals from the judgment of the Court of King's Bench reversing that of the Superior Court which had dismissed with costs the action of the respondent municipality to recover the sum of $300 for annual taxes imposed on a part of a bridge crossing the river Mille Isles, or Jesus, between Ste. Rose and Ste. Thérèse. This property is assessed as No. 425 in the cadastral survey of the municipality of Ste. Rose.

The appellant contests the validity of the assessment on four distinct grounds: (1) The bridge is not his property; (2) The bridge is not an immovable; (3) The bridge is not within the limits of the municipality of Ste. Rose; (4) The assessment *ex facie* covers the whole bridge, of which a part is admittedly within the municipality of Ste. Thérèse.

By statute of Lower Canada of 1830 (ch. 56) James Porteous was authorized to erect the bridge in question as a toll bridge. By sec. 3 of that Act the bridge and its dependencies and approaches, including the toll house and turnpike to be erected thereon, "are vested in Jas. Porteous, his heirs and assigns forever." The appellant is admittedly the assign of Jas. Porteous, and holds and enjoys all the rights in regard to the bridge formerly belonging to Porteous. In view of the terms of the statute, I cannot regard it as open to question that the bridge is the property of the appellant, subject to such qualifications and restrictions upon his exercise of the rights of ownership as the statute imposes.

The fact that he has merely a right of servitude over the bed of the river presents no obstacle to his owning the structure of the bridge and its appurtenances.

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(2) Whether the bridge and its appurtenances constitute an immovable is the only question which I regard as seriously debatable. The taxing power is conferred by art. 5730 (R.S.Q. 1909) of the Cities and Towns Act:

"5730. The council may impose and levy annually on every immovable in the municipality, a tax not exceeding two per cent. of the real value as shewn on the valuation roll. (3 Ed. VII., c. 38, s. 474)."

There is no definition of the word "immovable" in the Cities and Towns Act. We, therefore, turn to the general law—the provisions of the Civil Code dealing with "The Distinction of Things"—to ascertain the scope of the term "immoveable."

The following articles bear on this question:—

"375. Property is immoveable either by its nature or by its destination or by reason of the object to which it is attached, or lastly by determination of law.

376. Lands and buildings (*bâtiments*) are immoveable by their nature.

377. Windmills and water-mills, built on piles and forming part of the building, are also immoveable by their nature when they are constructed for a permanency.

381. Rights of emphyteusis, of usufruct of immoveable things, of use and habitation, servitudes and rights or actions which tend to obtain possession of an immoveable, are immoveable by reason of the objects to which they are attached."

"Buildings" (*bâtiments*) is not defined.

Although Littré defines *bâtiment* as "Any structure serving to house either men, animals or things" and adds "etymologically, a *bâtiment* is something which holds, receives . . . . a bridge is a construction and not a bâtiment" . . . . etc., the word "*bâtiments*" in art. 376 C.C. appears to be used in the wider sense of "constructions." Thus in Baudry-Lacantinerie, Des Biens, No. 26, we read of the word "*bâtiments*" in the corresponding article of the Code Napoléon, No. 518:—

"26. It is important to be quite clear regarding the principle of immobilization which has its necessary but sufficient cause in the physical adherence of objects to the ground, in their incorporation. In fact, this principle alone makes possible the solution of the difficulties met with in applying the law. The law has not defined a *bâtiment;* but given the principle that governs art. 518, this expression certainly includes all structures fixed to the ground by foundations or piles; and all those which are incorporated with the ground and can be regarded as an integral part of the land itself, no matter whether they are above or below the surface. Thus, not only dwelling houses, barns, stores, but also

bâtiments, shafts, galleries and other works necessary for the development of a mine, are immoveable by their nature."

Laurent says (vol. 5, No. 409):—

"The word *bâtiment* as used by the law must not be taken in a restrictive sense. Everything that is attached to the soil, so as to make one thing with it, is immovable by nature."

In Murray's Oxford Dictionary, "building" is defined—"that which is built; a structure, edifice; a structure in the nature of a house built where it is to stand." In *Reg. ex rel.* v. *Proprietors of the Neath Canal Navigation* (1871), 6 Q.B. 707, 40 L.J. (M.C.) 193, Blackburn, J., said that the word "buildings" in a taxing Act (1833, ch. 90, sec. 33) would cover such a structure as the Holborn viaduct, which carries the main artery of London over Farrington St., but would not apply to a street paved and faced with stone work, which remains "land."

The words *"bâtiments"—"buildings"* in art. 376, C.C., may, therefore, be taken to mean "structures" and it follows that a bridge is over a river resting on piers is an immoveable by nature because it is a structure permanently affixed to the soil or bed of the river. This would certainly be the case if the appellant were the owner of such soil or bed. The fact that he is not such owner but is merely entitled to a servitude or right to maintain the bridge upon it does not prevent the character of immoveability attaching to the Bridge. Demolombe, vol. 9, No. 128.

"It matters little," says Huc (vol. 4, No. 9) "if the structures thus incorporated were built by the proprietor himself or by a third party."

In Aubry & Rau, vol. II, No. 164, we read:—

"*Bâtiments*, or other works joined to the soil, are immovable by their nature, whether built by the owner of the land or by a third party, for instance, by a farmer, lessee or usufructuary; and this is so even in the case where the third party erecting the building has reserved to himself the right to destroy them when he has finished using them."

The fact that the bridge is built on the bed of a river belonging to the Crown presents no difficulty. The statute declares the appellant's ownership of it; and its attachment to the soil gives to it its character of an immoveable. Demolombe, vol. 9, Nos. 126-7; Dallos Code Ann., art. 518, Nos. 23-25.

As something analogous to a windmill or a water-mill—built on piles, specifically mentioned in art. 377 C.C., which should probably be taken to express a rule of general application of which the windmill and the water-mill are illustrations (Fuzier-Herman Code Civil, Ann. vol. 1, art. 519, No. 6), the bridge may possibly also be regarded as within the purview of that

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article and the corresponding article of the Code Napoléon, No. 519. But if the word "building" should be given the narrower meaning of a "structure in the nature of a house," the presence in art. 377 of the words "and forming part of the building" (*"et faisant partie du bâtiment"*) would probably exclude the bridge from its purview unless the conjunction "and" (*et*) should be replaced by the disjunctive "or" (*ou*), the view taken of the construction of art. 519 C.N. (Huc. vol. IV, No. 13). On the other hand, if "building" should mean any "structure," as I think it does, it would seem to be unnecessary to resort to art. 377 C.C.. since art. 376 would cover the case.

Moreover, the right of resting and maintaining the bridge on the bed of the river, which the statute of 1830 undoubtedly confers, I think, vests in the appellant an interest in or right to the use of the bed or *fond* of the river in the nature of a servitude, which is declared by art. 381 C.C. to be an "immoveable." The bridge itself, in my opinion, and the right to maintain it on the river bed would, therefore, appear to be taxable under art. 5730 (R.S.Q. 1909) of the Cities and Towns Act.

(3) The combined operation of art. 5280 R.S.Q. 1909, arts. 10 and 11, of the Charter of the Town of Ste. Rose (1918, ch. 98), and art. 16 of the Municipal Code of 1916, puts it beyond all doubt that the territory of the Town of Ste. Rose extends to the middle of the River Jesus and includes the portion of the bridge shewn on the cadastral plan as No. 425. The case falls within art. 5281 of the R.S.Q. 1909, which confers "jurisdiction for municipal and police purposes" over the whole territory of the municipality, and not within art. 5282 which confers merely "police powers" over navigable or other waters lying in front of the municipality and applies when the municipal boundary does not extend to the middle of the river, as it does in this case.

(4) Finally, notwithstanding some apparent inaccuracy in the description of the cadastral lot No. 425, as given in the official registry of the county, and in the Livre de Renvoi Officiel in the Department of Crown Lands, the assessment is of the cadastral No. 425 and a reference to the cadastral plan produced in the record indicates that that number covers only the portion of the bridge lying within the municipality of Ste. Rose. Moreover, this defence was not pleaded and there appears to have been no inquiry at the trial as to the alleged inaccuracy of the cadastral description in the county registry office and the Department of Crown Lands. Had there been such an investigation, it might have been demonstrated, as is probably the case, that the area of 89 perches and 40 feet, mentioned in the description, comprises only the superficies of that part of the bridge which lies within

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the municipality of Ste. Rose. This ground of appeal, I think, should not be entertained.

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

BRODEUR, J.:—In this case the question to be decided is whether or not the town of Ste. Rose has the right to tax a bridge belonging to the appellant Bélair.

The bridge is constructed over the Rivière Jesus and joins the parish of Ste. Thérèse to the town of Ste. Rose. It appears that the bridge was built by James Porteous by virtue of an Act passed by the Legislature of Lower Canada in 1830. The present owner, Bélair, who has the same rights as Porteous, pretends that the town of Ste. Rose has no right to tax this bridge: Firstly, because it is not within the territorial limits of the town; Secondly, because it forms part of the public domain; and Thirdly, the appellant alleges that if the bridge is taxable, the tax is imposed illegally because it covers the whole of the bridge while only a part of it is in Ste. Rose.

1. Is the bridge partly within the territorial limits of Ste. Rose? In order to answer this question, it is necessary to know if the municipality of the town of Ste. Rose extends to the middle of the Riviere Jesus.

The town was incorporated in 1918 by the Quebec Legislature, and sec. 1 of its charter states expressly that its territory shall be the same as that of the village of Ste. Rose. Now, the village of Ste. Rose was governed by the Municipal Code which says in art. 19 that the limits of a municipality bordering on a navigable or floating river shall extend to mid-stream.

Consequently, the territory of Ste. Rose is declared by its charter to be co-extensive with that of the former village of Ste. Rose.

But the appellant Bélair argues that by art. 5282, R.S.Q. 1909, in the Cities and Towns Act, the jurisdiction of a town bordering on a navigable river or stream extends to the middle of such river or stream *for police purposes only*, and that the town of Ste. Rose has not, by reason of this art. 5282, the right to tax the islands or the private properties in the Rivière Jésus.

This pretention would have some weight were it not for art. 5281 of the same Cities and Towns Act, which declares that the corporation has jurisdiction over the whole extent of its territory for municipal and police purposes and for the exercise of all the powers conferred upon it. This latter article gives as broad a jurisdiction as possible to a town municipality and naturally includes the right to tax immovables situated within its territory. Now the town of Ste. Rose, by the terms of its charter,

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includes one-half of the river; and, in consequence, it can exercise there all the powers conferred upon it.

Even if this art. 5282 stood alone in the Cities and Towns Act and did not re-affirm the provisions of art. 5281, it would still be an interesting question to decide if the Act should be interpreted as restrictively as the appellant suggests.

The words "police purposes," which occur in this art. 5282, have in their ordinary acceptance a rather restricted meaning. We, ordinarily, associate them with the good order which peace officers must maintain; in many cases they refer to the political organization of a municipality in general and include orders made for everything that concerns the security and well-being of the municipality or its inhabitants. We have taken this expression from American municipal law where it is defined "such as arise ordinarily in the administration of the affairs of cities and towns in the exercise of their powers to promote the public health, convenience and welfare."

Cyclopedia of Law, vol. 31, p. 503, Words and Phrases Judicially Defined, verbo: "Police purposes." *Sessions* v. *Crunkilton* (1870), 20 Ohio St. 349, 358.

To promote the well-being of a municipality it is absolutely necessary to levy taxes on the properties included within its limits or on the persons who benefit by its orders. And Tiedeman on Municipal Corporations, para. 254, says:—"The power of taxation is but one phase of the police power of the government."

There is, therefore, only one possible answer to the question which is asked at the beginning of this paragraph, and that is that the bridge in question is partly situated within the territory of the town of Ste. Rose.

2. Does this bridge form part of the Crown domain?

To answer this question we must examine the Act of 1830, which authorised its construction.

It is built upon the bed of the river which belongs to the Crown. But is it incorporated with the soil so as to become part of the ground itself by right of accession? If this were so, the bed of the river and the bridge would be one thing and then the municipal corporation, which cannot tax the property of the Crown, would be unable to levy imposts upon the bridge.

The Act of 1830 merely authorised the person from whom the appellant acquired the property to place piles in the river and build a bridge upon them. This Act restricts the right previously enjoyed by the public to make use of the river bed where the piles were erected, and of the river itself for purposes of navigation.

But the Legislature reserved to the Crown the ownership of

the soil where the piles of the bridge were erected. When the bridge ceases to exist, the Crown will enter again into full possession and enjoyment of the ground at present covered by the piles. The Legislature give the enjoyment of a certain part of the river-bed, but the property in that same part of the river-bed remains vested in the Crown. The right of enjoyment, therefore, becomes separated from the bare ownership. (art. 443 C.C.) This statute has given to Porteous and his representatives the right to build a bridge which the Act, in art. 3, declares to be their property. The bridge is an immovable by its nature because it is a *bâtiment* and was erected for a permanency upon ground of which Porteous and his representatives have the enjoyment (arts. 376 and 377 C.C.).

Under the Cities and Towns Act the town of Ste. Rose has the right to tax immovables belonging to private individuals. It is unquestionable that this bridge, which is situated within the limits of the municipality, is an immovable, and that in consequence it can be subjected to taxes even against a person who has only the enjoyment of the ground in which the piles are fixed.

Demolombe in vol. 9, No. 128, discussing the rights of a person who is authorised to build under conditions similar to those with which we are concerned, says:—

"Furthermore, as a matter of principle, it is quite possible that a person who is not owner of the ground itself may nevertheless be owner of an immovable built upon that ground: such is the right of superficies.

Now, this seems to be the nature of the right which results from a concession authorising an individual to build a factory on a navigable or floatable river, a sort of right of superficies which exists as long as the concession is in force. It is in accordance with this principle that the Cour de Caen has held that fisheries, salt pits, etc., established under government concession on the seashore, form, as regards the cessionnaire in the relations of private law, immovable things, although the seashore itself forms part of the public domain."

We have been referred to the decisions of this Court and of the Privy Council in the cases of *Central Vermont Ry.* v. *Town of St. Johns* (1887), 14 Can. S.C.R. 288, and *Township of Cornwall* v. *Ottawa and New York Ry.* (1916), 30 D.L.R. 664, 52 Can. S.C.R. 466, 20 C.R.C. 96.

These decisions relate to statutes which prevented the taxation of railway bridges as such and, in consequence, are very different from the case under consideration. We find in these decisions opinions which determine in a conclusive manner that these

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bridges are immovable and were it not for the special laws which govern them, they could be taxed in the ordinary course of events.

The Porteous bridge is not a part of the Crown domain. It is a property which, like all immovables belonging to individuals, is susceptible of taxation.

3. Is the tax illegal and does it affect the whole of the bridge?

The bridge is situated in two municipalities, but bears only one cadastral number. The corporation of Ste. Rose can only tax the part of the immovable included within its territory. The valuation roll as made may be ambiguous, but uncontradicted evidence establishes the fact that only the part of the bridge situated within the municipality has been valuated. The tax is, therefore, legal and does not affect the whole of the bridge, but merely the part included within the territorial limits of the municipality respondent.

For all these reasons I am of opinion that the Court of King's Bench was right in maintaining the validity of the tax claimed by respondent's action, and that the appeal should be dismissed with costs.

MIGNAULT, J.:—The Court of King's Bench, reversing the Superior Court judgment, condemned the appellant to pay the respondent $300 for municipal taxes imposed on the bridge known as Pont Bélair on the Riviere Jesus, opposite Ste. Rose, and the appellant appeals from this judgment. I shall examine very briefly his grounds of appeal.

In the first place, he says that he is not the owner of the bridge. His pretension is that he has only the right to collect tolls, but that the bridge itself, like the river it crosses and the public road of which it forms a part, is a dependency of the public domain and is therefore not subject to taxation by the municipal authorities.

The appellant's pretention would, perhaps, carry some weight were it not for the precise text of the Act of the Legislature 1830, ch. 56, which authorised James Porteous, the appellant's *auteur*, to build this bridge. Article 3 of that Act specifically declares:—

"That the said James Porteous, his heirs and assigns, are clothed forever with the ownership of the said bridge and of the said tollhouse, barrier and other dependencies which may be erected on or near to the same, and also of all embankments and approaches of the said bridge and of all materials which may be from time to time obtained and provided to build, construct, make, maintain and repair it."

And the same article adds that after the lapse of 50 years, His Majesty, his heirs and successors, may take back the posses-

sion and ownership of the said bridge, etc., on paying the value thereof. This, evidently, shews that the Legislature, the sovereign authority, granted to Porteous and his representatives the ownership of the bridge, and since the Crown may take back that ownership, on paying its value, the Crown must have parted with it. It is, therefore, useless to appeal to texts concerning the alienability of the public domain, for the Legislature can, evidently, authorise such alienation and although the appellant's ownership may be a restricted ownership, since he is obliged to allow the public, on payment of tolls, to make use of the bridge, it is none the less a true ownership.

The appellant's second pretension is that the bridge is not an immovable. I would like to know what the nature of the bridge is if it is not immovable, for it is certainly not a movable and it must be either movable or immovable. The word "*bâtiment*" in art. 376 of the Civil Code has a broad meaning, and includes even a bridge such as that of the plaintiff. My honourable colleague, Anglin, J., has discussed this question thoroughly, and expressed his conclusions in a convincing manner. I confess that the immovable nature of this bridge appears to me so evident that I would have dispensed with such a discussion. In my opinion, there is no question of a servitude. The bridge is immovable by its very nature.

If the appellant only enjoyed the right to collect tolls, this would seem to me to be an immovable right (Dalloz 1865, 1. 308). But the statute which he invokes confers upon him the complete ownership of the bridge, and to then ask the question as to whether this right of property affects an immovable or a movable is to solve the problem.

If the bridge is immovable, it is certainly subject to taxation. Article 5730 R.S.Q., which confirms part of the Cities and Towns Act, which applies to the town of Ste. Rose (saving the changes made by the charter of the latter) orders specifically that the council may impose and levy annually on all immovables within the municipality, a tax not exceeding 2% of the real value as shewn on the valuation roll. The Bélair bridge is, therefore, taxable.

The appellant's third objection seemed to me more serious at the hearing. The Bélair bridge is described in the valuation roll as being No. 425 of the cadastre. In the parish (now the town) of Ste. Rose the cadastre gives special numbers to each of the bridges crossing the Rivière Jésus (I express no opinion on the question as to whether or not a bridge can have a cadastral number, since art. 2167 of the Civil Code only speaks of lots of ground, for in this case it is simply a question of determining

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what the cadastre means by No. 425) and describes the bridge in question as follows:—

"Extract from the official book of reference of Parish of Ste. Rose, County of Laval.

Bridges.

No. of lot: 425.

Owner: Joseph Placide Bélair.

Description: Crossing the Riviére Jèsus from the south-east to north-west in a curving direction, situated partly in the Parish of Ste. Thérèse and partly in the Parish of Ste. Rose; bounded at one end, towards the south-east, by the Parish of Ste. Rose and to the other end, towards the north-west, by the Parish of Ste. Thérèse; on one side, towards the north-east, and on the other towards the south-west, by the Riviére Jèsus, and by an island which it crosses; containing one perch in width by 8 arpents, 9 perches and 4 ft. in length, and containing eighty-nine perches and forty feet in superficies. (89-40)."

The official cadastral plan shews, under No. 425, the bridge which extends from the land to the island in the river, which island appears to be in the Parish of Ste. Thérèse, that is the parish which is opposite Ste. Rose on the other side of the Riviére Jèsus. As we are concerned with the cadastre of Ste. Rose, the presumption would be that the bridge bearing this No. 425 is the part of the bridge situated within the limits of that parish. Mr. Longpré, mayor of the town and registrar of the county of Laval, said in his testimony that the part of the bridge which bears No. 425 is the part which is in Ste. Rose. By the description in the book of reference it seems to apply to the whole of the bridge, since it says that it crosses the Riviére Jèsus from south-east to north-west in a curving direction and that it is situated partly in Ste. Thérèse and partly in Ste. Rose. Comparing this description in the book of reference with the cadastral plan, we see that what the plan shews as being No. 425 is only a part of the bridge, for the plan does not shew the other side of the river or the curve mentioned in the book of reference. According to all the presumptions the valuation roll only deals with the part of the bridge in Ste. Rose.

In his plea the defendant pretends that this bridge is erroneously called an immovable, that it is neither more nor less than a toll bridge, entirely situated outside the limits of the municipality; he does not raise the objection that it is partly within one municipality and partly in another. The appellant's factum discusses the pretension made in the plea. Now, the town of Ste. Rose, according to its charter, 1918 (Que.), ch. 98, is the former village of Ste. Rose and its territory is the same (art. 10

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of the charter). The territory of the village of Ste. Rose, according to art. 19, para. 1, of the Municipal Code, extended to the middle of the river. I am convinced that the respondent's valuation roll applies to the part of the bridge situated in Ste. Rose.

Since the hearing a supplementary factum, filed by the respondent, alleges that that part of the bridge situated in Ste. Rose has been identified at the registry office by the attorneys of the parties as being of the exact length mentioned in the book of reference, 8 arpents, 9 perches and 4 ft. The appellant, who also produced a supplementary factum, did not contest this statement. In these circumstances, being of opinion that none of the appellant's pretensions is well founded, I do not believe that the record should be sent back to the Superior Court for the sole purpose of verifying a fact which appears to me to be sufficiently demonstrated by the proof already in the record, namely, that the respondent only imposed taxes on the part of the Bélair bridge situated within its limits.

I would dismiss the appeal with costs.

Appeal dismissed.

MACK v. BRASS.

Ontario Supreme Court, Appellate Division, Riddell, Latchford, Middleton and Lennox, JJ. November 4, 1921.

LANDLORD AND TENANT (§IIID—110)—DISTRESS—LANDLORD'S AUTHORITY TO BAILIFF—ILLEGAL SEIZURE BY BAILIFF—LANDLORD'S LIABILITY.

A landlord who authorises his bailiff to distrain the goods of his tenant for arrears of rent, is not liable for an illegal distress made by such bailiff unless he has in some way confirmed or ratified the seizure.

[*Goldberg* v. *Rose* (1914), 19 D.L.R. 703; *Becker* v. *Riebold* (1913), 30 T.L.R. 142; *Carter* v. *Vestry of St. Mary Abbots Kensington* (1900), 64 J.P. 548; *Burns* v. *Guardian of St. Mary, Islington* (1911), 56 J.P. 11, followed.]

APPEAL by plaintiff from a County Court judgment dismissing an action to recover certain goods claimed by the plaintiff as his property and alleged to have been wrongfully seized and detained by the defendant. Affirmed.

The judgment appealed from is as follows:

"The defendant is the owner of a building in the city of Toronto, and certain persons, named Batchelor and Wilson were his tenants of part of this building. These tenants had pur-

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chased some articles of office furniture from the plaintiff, and had placed them in their office in the defendant's building. The tenants fell in arrear with their rent, and their landlord placed in the hands of firm of baliffs, Wood & Co., a distress warrant authorising them to distrain the goods of the tenants upon the said premises for the said arrears of rent.

The bailiffs entered upon the said premises and distrained the goods in question and took possession of them. The goods have not been sold, but are still in the possession of the bailiffs. The plaintiff, who had received only $100 on account of the purchase-price of the said goods, demanded possession of the said goods from the bailiffs, alleging that they were his property; that the condition of the sale was that the property in them should remain his until paid for. The bailiffs refused to give up possession without instructions from the defendant. A letter was then written on behalf of the plaintiff to the defendant demanding possession, but no reply was sent to this letter.

Subsequently, the defendant, upon being called up by the plaintiff's solicitors by telephone, referred them to the bailiffs, without either refusing or consenting to the delivery of the goods. Nothing further was done by the defendant. He gave no instructions of any kind to the bailiffs apart from the distress warrant itself, took no part in the distress; and there is no evidence that he was on the premises when the distress was made, or that he had in any way interfered with the goods. It was contended on behalf of the plaintiff that the neglect or refusal of the defendant to instruct the bailiffs to give up possession of the goods was sufficient in itself to make him responsible.

The law applicable may be found in Woodfall on Landlord and Tenant, 18th ed., p. 600, set forth as follows:—

"In the case of an illegal distress, the action should be brought against the person actually committing the illegal act, and not against the landlord, unless it can be shewn that he expressly authorised the act or adopted and ratified it afterwards, of which his presence on the premises immediately after the committal of the wrongful act is evidence, though the mere receipt of the proceeds without proof of knowledge of the illegal act is not so."

In Halsbury's Laws of England, vol. 11, p. 204, para. 408, the law is set forth in similar language.

In *Goldberg* v. *Rose* (1914), 19 D.L.R. 703, a case decided in the Supreme Court of Alberta, it was held that "the landlord who has merely authorised a lawful distress for rent is not liable for the seizure by his bailiff of goods not subject to distress unless he has in some way confirmed such seizure.

I cannot find anything upon the above statement of facts to justify me in holding that the defendant authorised the seizure or detention of the plaintiff's goods, or that he ratified or adopted it in any way. He apparently deliberately kept clear of interfering in any way, probably relying on the bailiffs knowing their business. It was stated at the trial that the bailiff who made the seizure belonged to the firm of Wood & Co., who carry on business as bailiffs, and as such should know more about matters of this kind than the defendant.

For the above reasons, I think the action should be dismissed with costs.

The point raised by the defence was that as a matter of fact and law the plaintiff had no lien on the goods in question. In view of my conclusion as to the other branch of the case, it is not necessary for me to determine that point."

J. P. MacGregor, for appellant.

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

The judgment of the Court was delivered by

RIDDELL, J.:—The plaintiff had sold, under the Conditional Sales Act, certain goods to Batchelor and Wilson, who were tenants of the defendant. The defendant issued his warrant to Wood & Co., as baliffs . . . Distrain the goods and chattels Batchelor and Wilson, the tenant," etc. Wood seized the goods mentioned and declined to give them up. The defendant did not direct Wood to give the goods to the plaintiff, and the plaintiff sued the landlord in "detinue and trover." The trial Judge dismissed the action, and the plaintiff now appeals.

We may, I think, disregard the circumstances other than as set out above. There is nothing to indicate, much less to evidence, any ratification by the defendant of the seizure; and the sole question is as to the liability of the defendant for the act of his bailiff.

The case of *Gauntlett* v. *King* (1857), 3 C.B.N.S. 59, does, in my view, support the contention that the landlord is liable if his bailiff seizes goods of the tenant which are in law exempt from seizure, and I do not think it was decided upon any ground of detaining goods illegally seized, as is suggested in Halsbury's Laws of England, vol. 11, p. 204, para. 409. I do not find *Gauntlett* v. *King* followed in any subsequent case, and the law as laid down in *Freeman* v. *Rosher* (1849), 13 Q.B. 780, seems to have been uniformly followed.

Becker v. *Riebold* (1913), 30 Times L.R(142, accepts the principle that the landlord is not liable in such cases without subsequent ratification, and the cases *Carter* v. *Vestry of St. Mary Abbotts Kensington* (1900), 64 J.P. 548, and *Burns* v.

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Guardians of St. Mary Islington (1911), 56 J.P. 11, take that law for granted.

The case referred to by me on the argument of *Perring & Co.* v. *Emerson*, [1906] 1 K.B. 1, where the landlord was held liable will be found to depend upon the express provision of the statute (1888) 51 & 52 Vict. ch. 21, which, by sec. 7, enacts that not only an uncertificated bailiff, but also his employer, is liable in trespass for any seizure. This was to prevent any distress by a bailiff without the proper certificate.

I think the appeal fails and must be dismissed.

Appeal dismissed with costs.

PETERSON v. CUSHMAN MOTOR WORKS, LTD.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 29, 1922.

PRINCIPAL AND AGENT (§ IA—6a)—SALE OF GOODS—VENDOR CONTRACTING AS PRINCIPAL—BREACH OF WARRANTY—LIABILITY OF VENDOR FOR DAMAGES.

A defendant who contracts with a purchaser as a principal, the invoices being made in the defendant's name, the lien notes stating that the ownership of the property is in the defendant, the purchase price being charged to the purchaser in the defendant's ledger, cannot escape liability for damages for breach of warranty of the goods sold, on the ground that he is in fact merely an agent for the real vendor of the goods whom the purchaser had never heard of and whose ownership of the goods was carefully and deliberately concealed from the purchaser.

[*Colonial Investment Co. v. Borland* (1911), 5 Alta. L.R. 71; (1912), 6 D.L.R. 211, applied.]

APPEAL by plaintiff from the trial judgment in an action for damages for breach of warranty of goods sold. Reversed.

J. F. Lymburn and *Alex. Knox*, for appellant.

Frank Ford, K.C., and *S. B. Smith*, for respondent.

SCOTT, C.J., concurs with BECK, J.A.

STUART, J.A.:—In this case I agree with Beck, J.

Let me put what I think would be a perfectly parallel case. If a customer went into the shop of an incorporated company dealing in a certain article, say washing machines, and asked a clerk to supply him with one and the clerk suggested one of a certain make, and the customer, without seeing the article, decided to take it. Then the clerk said, "we can send this out to you but we need a written order," and he then presented a paper to the customer to sign which the customer did, and the clerk said, "I must take this to the manager for his approval of the sale," which he did, and the order was addressed to some company unknown to the customer and not mentioned by the clerk as being in existence, and the customer did not notice to whom it was addressed and never had his attention directed to the

matter at all. Then the manager places his signature as manager of this other company below a printed acceptance of the order with that other company's name printed as accepting and the clerk hands a copy of the order so accepted to the customer who leaves and goes home. The machine is delivered. The company operating the shop then writes such letters and sends such an invoice as are in evidence here. The machine is worthless. It will not wash at all. Is it to be said that the shopkeeper, the company handling the machines, could turn round and say, "Oh, *we* did not sell you this machine. We were selling only on commission as agents. Look at that order our clerk got you to sign, you ought to have read that order he presented to you and you would have seen that you were not dealing with us at all, but with somebody else altogether"?

For my part, I do not think such a position could be legally taken. The rule as to holding a party to the contents of an agreement which he has signed may be somewhat stringent with regard to the *terms* of the agreement, although even then it is not, I think, an absolutely invariable rule. But does the rule apply with regard to the party with whom he is supposed to be contracting? There is no doubt in the world that the plaintiff thought he was contracting with the defendant company, that in taking the order as he did, Halverson allowed the plaintiff to remain under that impression, that in writing the letters and sending the invoice which they did without making any reference to the Macdonald Co. or to their own position as merely agents of that company and in using the language of actual vendors, the defendant company confirmed that impression, and as a consequence established a privity of contract between themselves as principals and the plaintiff. Whether the Macdonald Co. could have held the plaintiff bound is a question we need not consider. The sole question is, can the plaintiff hold the defendant company bound to him by a contract between them. I think there was such a contract created by what occurred and that the written order was a mistaken embodiment of that contract through an error for which both Halverson and the defendant company were wholly responsible owing to their active concealment of what they were really trying to get the plaintiff to do, *viz.*, to contract with another company altogether. If it were necessary, I should be prepared to treat the name, the Macdonald Thresher Co., as a mere *alias* of the defendants.

Nor am I impressed with any suggestion of hardship upon the defendants. They assumed the position throughout of important business people, and spoke continually as if they were the vendors. It is entirely their own fault if their position of

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mere humble commission agents, which they now wish to assume, was not revealed to the plaintiff from the beginning, and whether they can have any recourse against the Macdonald Thresher Co. or not is no concern of the plaintiff.

BECK, J.A.:—This is an appeal by the plaintiff from the judgment of Tweedie, J., at the trial. The plaintiff alleges that he purchased from the defendant company a tractor for the price of $2,600; and at the same time a tractor plow for the price of $265, and that he paid for both; that at the time of the purchase, he informed the defendant of the purposes for which he required these implements and was given certain warranties which were broken; that the defendant admitted that the tractor was not up to warranty and agreed to supply another to the plaintiff in place of the one originally bought; that the plaintiff returned the tractor in April, 1919, but the substituted tractor was not delivered till the end of June, which was an unreasonable delay; that the second tractor failed also to come up to warranty. The trial Judge held generally that the plaintiff's complaints about the tractor were well founded; but dismissed the action on the ground that the plaintiff had made his contract with the Macdonald Thresher Co., Ltd., and not with the defendant company. The trial Judge consequently did not fix the amount of damages. Practically, the question and the only question we have to decide is with which of these two companies the plaintiff made his contract; then if the defendant company is liable, to fix the damages or order a reference.

The defendant company—the Cushman Motor Works of Canada, Ltd.—is described of Winnipeg, Manitoba. It was incorporated by Dominion charter and had its head office at Winnipeg. Its manager, in 1919, was A. E. Donovan, who was succeeded by John Meragh, who, in 1919, had been accountant; both lived at Winnipeg. In 1919, this company had a "transfer house" at Edmonton. One J. A. Halverson was an expert in the employ of the defendant company during 1919 and 1920. He lived at Edmonton. One Hoffman was the defendant company's agent at Sedgewick, Alberta. In 1917, the plaintiff had purchased from the defendant company—there is no dispute about this—a separator and engine, which had given him good satisfaction. In January, 1919, he wrote to the defendant company in regard to a tractor. On January 30, 1919, he received a letter from the defendant company saying that the defendant company's expert would call and see him. On February 17, the plaintiff again wrote to the defendant company referring to his former letter and the reply thereto, and asking that the expert should examine the combination thresher he had bought from the company, as

he wished to see if he could make a trade for a tractor and separator or turn the engine in as part payment on a tractor.

On February 20, the defendant company (per A. E. Donovan, manager) wrote to the plaintiff acknowledging his letter of the 17th. He said "*Our* W. Halverson will be round to see you shortly. . . . . We are pleased to *enclose circular of our tractor.* Should W. Halverson make terms with you, it will only be necessary to take the engine back, as your separator could be mounted on its own wheels, &c."

When giving evidence, the plaintiff said he had lost the circular but said that the circular "shewed the tractor and painted on the side in big letters was 'The Macdonald tractor.'" One of the exhibits is a catalogue of implements for sale by the defendant company which contains a picture of a Macdonald tractor, with lettering on two plates on the machine—one having the word "Macdonald" and the other the words, "Manufactured for Cushman Motor Works of Canada, Limited." The circular was probably the same in this respect. On cross-examination the plaintiff said that the words "exclusive agents" or "sold exclusively" (by) were in the circular referring to the Cushman Co.

Sometime towards the end of March, Halverson called on the plaintiff. The plaintiff already knew Halverson, for it was he who had sold the plaintiff the machinery in 1917. The plaintiff says that Halverson stated that he had been sent by the defendant company to make a trade for the engine bought in 1917; that after going into the matter it was agreed that the plaintiff should take a Macdonald tractor at $1,800: and also one three-bottom tractor plow at $625, returning the engine and paying in money $1,650. Then the plaintiff says:—

"When the deal was made Mr. Halverson pulled a book out of his pocket and pulled out a piece of paper and began writing on it and then he says: 'Here, Peterson, sign this'; and I said, 'What is that?'; and he says: 'This is the order for the tractor and the plows'; and I said, 'All right'; and I signed it." At this point, in the course of the evidence, the order was produced and the plaintiff admitted his signature to it.

The order was a printed form, with printing and blanks on both sides, the blanks in which were filled out in the handwriting (with indelible pencil) of Halverson. The name of the addressees was printed as "The Macdonald Thresher Company, Limited, Winnipeg, Manitoba." The order was for "one 12.24 Macdonald tractor and one three bottom tractor plow with braker bottoms and rolling colters and extra shars and ship to Sedgewick at once." The price was stated as "1650 and 1 20 H.P. Cushman

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Engine. F.O.B. Wpg. Man." The plaintiff's signature appears on the front and the back. The name "The Macdonald Thresher Company Limited per.....manager" appears in print at the foot of a printed form of acceptance at the foot of the order. The acceptance is dated March 31, 1919, and A. E. Donovan signs as manager,—though in fact he was manager of the defendant company. Presented with this order in the witness box the plaintiff's evidence was as follows:—

"Q. Did you read it over before you signed it? A. No sir; he told me it was the order for the tractor and the plows and I didn't think it was necessary to read it—it was just the order for the tractor and the plows.

The Court: You can read, I suppose? A. Yes, not very good, you know. Q. He told you what it was and he wanted you to sign it? A. Yes; he said it was the order for the tractor and the plows. Q. And you affixed your signature to the writing? A. Exactly.... Q. Was there anything said at that time by Halverson about the Macdonald Threshing Co.? A. Absolutely nothing; no sir. Q. Did you know at that time that there was such a company? A. I never heard of it; no sir. Q. You say you never heard of the Macdonald Thresher Co. A. I never heard of that company; no sir."

This evidence must be accepted inasmuch as not only was the plaintiff not cross-examined upon it, but it was stated before us upon the argument by counsel for the plaintiff, and, by the silence of counsel for the defendant company, admitted that Halverson was present throughout the trial.

A day or two after signing the order, the plaintiff went into Sedgewick and saw Halverson in the office of Hoffman, the defendant's agent, and arranged with Halverson to have substituted two braker bottom and one stubble bottom for the three braker bottoms. Besides so arranging with Halverson, the plaintiff wrote (March 27) to the defendant company referring to "Your agent, Mr. Halverson," and saying he was asking for this change.

On April 2 the defendant company wrote on their print captioned paper to the plaintiff acknowledging his letter of March 27, and saying they had made the change in the order as requested. They enclosed a copy of the "contract taken by our Mr. Halverson" and say that they will draw on the plaintiff through the Merchants Bank "as per enclosed."

The enclosure was an invoice showing the defendant company as the seller and the plaintiff as the buyer of:

"1 12-24 Macdonald thresher $1,800
1 3 bottom tractor plow with two breaker bottoms and one stubble bottom &c. $265
$2,065

Terms: $650. S/Dft. & $1,000 Nov. 15, 1919.
($415 to be allowed for 20 H.P. Eng.).
Drawing on you at sight through the Merchants Bank; sent with two notes for signature."

Asked as to his receiving the above mentioned letter, the plaintiff's evidence was as follows:

"Q. That letter refers to the order form, ex. 3? A. Yes. Q. That order form was enclosed with that letter? A. Yes. Q. Did you read the order form when you got it back? A. Not that I remember, no. Q. Did you notice the order form addressed to the Macdonald Thresher Co.? A. No sir. Q. You didn't notice that? A. No sir.

Q. *The Court*: Did you know whether you got the same order back? A. I didn't pay much attention to it, it was just a piece of paper, like a receipt for something. Q. Did you keep it in your possession? A. Well, it was by accident that I found it, yes. Q. You kept it right along? A. I laid it in the desk (? or) I gave to my children."

This evidence must also be accepted for the reason already stated. The defendant company sent notes (lien notes) and a draft through the Merchants Bank at Sedgewick, as follows:—

Draft drawn by defendant company payable to the order of the Merchants Bank, Sedgewick, at sight, for $650
Lien note drawn on defendant company's printed form, payable to defendant company for 115
Stated to be "given for 3 bottom tractor plow"; title to remain in the Cushman Motor Works of Canada, Limited.
Lien note drawn on defendant company's printed form payable to "Macdonald Thresher Co." substituted in typewriting for "The Cushman Motor Works of Canada, Limited," occurring in the printed form, for..... 885
Stated to be given for 12-24 Macdonald tractor; title to remain in the Cushman Motor Works of Canada, Ltd.=$1,650

Having received notice that these documents were at the bank, the plaintiff went into Sedgewick and went with Halverson to the bank. His evidence is as follows:—

"Q. Halverson was at the bank with you? A. Yes. Q. What took place at the time you signed the notes? A. Well, I signed the notes, I don't remember how many, one note I remember, because I read it, this note here, it says pay to the Macdonald

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Co., and I asked Halverson, I says, 'What is this here, I have nothing to do with that company, all our dealing has been with the Cushman Motor Works' and he said, 'that is alright, you have nothing to do with that company, you have nothing to do with that. That company is entitled to some money, that is nothing to do with you, they are entitled to some money so we had to put it in that form.' Then he read out the part where the Cushman Co. would hold a lien on the property until I paid it, and so I signed the note. Q. He pointed out this part did he, 'the title to and ownership of the goods for which this note is given shall remain at my risk in the Cushman Motor Works of Canada, Limited, until this note or any renewal or renewals thereof are fully paid, with interest.' That was pointed out to you? A. Exactly. Q. Halverson pointed that out to you? A. Yes."

Again this evidence must be accepted for the reason already stated. The draft and the notes in due course were paid.

There followed correspondence between the plaintiff and the defendant company and Halverson, running from April 16, 1919, to September, 1920, in which the plaintiff assumed throughout that he had bought the tractor as well as the plows from the defendant company and in which there was not one word on the part of the defendant company or Halverson calculated to disabuse him of that idea. On the contrary, the defendant company's letters recognise the position that it was in, from which the plaintiff bought the tractor; for instance, in a letter from the defendant company to the plaintiff, dated October 11, 1920, the expression is "regarding the Macdonald tractor purchased from us."

This is all put beyond question by a letter dated December 30, 1920, written by the defendant company to the Macdonald Tractor Co., in which they say:—

"We have again had a communication from Peterson and would strongly advise you to either write him direct or give us some authority to handle the matter from here. As already advised *we have not mentioned your name in the transaction at all*, feeling that if we had done so, it would have precipitated matters." The relationship between the Macdonald Co. and the defendant company cannot alter the situation as it existed between the plaintiff and the defendant company. It is said and perhaps proved that the defendant company were only agents for the Macdonald Thresher Co. in selling its threshers. As to the plows, the defendant company was the principal and it will be remembered that the separator which the defendant company took back on account of the combined price of the

tractor and plows had been sold as principal by the defendant company, and that in making the bargain the Macdonald Thresher Co. was not mentioned.

The plaintiff, in unwittingly signing an order, created no contract with that company. Sufficient support for this proposition will be found in the authorities quoted in *Colonial Investment Co.* v. *Borland* (1911), 5 Alta. L.R. 71; (1912), 6 D.L.R. 211, 5 Alta. L.R. 71, at p. 95; and see *Jadis* v. *Porte* (1915), 23 D.L.R. 713, 8 Alta. L.R. 489.

I find then, as a fact, that the plaintiff's contract was with the defendant company and not with the Macdonald Co.

The plaintiff has proved that he is entitled to damages for breach of contract. The trial Judge has so found and it is impossible to disturb his finding. The trial Judge was of opinion that the plaintiff was entitled to damages to the amount of between $2,000 and $3,000; but the plaintiff, although apparently entitled to a larger sum, seems ready to accept a return of the amount paid with interest.

The damages calculated in this basis would be as follows:—Price of tractor, $1,800; price of plows, $265; exchange for draft, $1.65; freight, $50; total, $2,116.65.

Allowance for interest from April 10, 1919, at the rate which the notes bear, viz., 10% approximately, $639.35; total, $2,756.

I would, therefore, give judgment for the plaintiff with damages to the amount of $2,756, with costs, and allowing the appeal give the plaintiff the costs of the appeal. This will leave the machinery at the disposal of the defendant company, if they see fit to remove it within two months from this date. Probably the parties may make some arrangement about it.

HYNDMAN, J.A., concurs with BECK, J.A.

CLARKE, J.A.:—With some hesitation I concur in the result reached by the other members of the Court. The relief claimed by the plaintiff is damages for breach of warranties mainly those enacted by the Farm Machinery Act, 1913 (Alta.) 1st sess., ch. 15, and not for any warranty in the written order of March 27, 1919, which does not contain any.

The person liable for breach of the statutory warranties is the vendor or seller. The written order does not use the words "sell" or "buy," it is an order to the Macdonald Co. to supply. Without more, this order would no doubt be construed as an order for sale and purchase, but I think it is open to shew that in fact the real vendor is the defendant and not Macdonald Co. The latter company would be surprised if it were called upon to answer an action for breach of warranty in respect of the plows mentioned in the written order, which it never owned and had

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nothing to do with. Yet it would have no defence if the writing conclusively fixed it as the vendor. I think, upon the facts of this case, it is not impossible to hold that the defendant was the real vendor, and contracted with the plaintiff as principal. The invoice was rendered in the defendant's name. The notes given in April stated that the ownership of the tractor was in the defendant and the defendant was given the right under the circumstances mentioned to declare the note due though made to the Macdonald Co.

The full purchase price was charged to the plaintiff in the defendant's ledger account and credit given for the note to Macdonald after the date of its payment.

There was printed on the tractor the words, "Manufactured for Cushman Motor Works, Winnipeg, Can." and in the agency contract the Macdonald Co. agrees to supply *to the Cushman Co.* an unstated number of tractors rated as 12-24 H.P., fully equipped, &c.

There is also the circumstances that the tractor referred to in the written order was replaced in the summer of 1919 by another tractor supplied by the defendant, and it is in respect of the second one the plaintiff's present claim arises, it certainly was not supplied under the written order of March, 1919. The defendant refers to it in its letter to the plaintiff of October 11, 1920 (ex. 30) as the "Macdonald tractor purchased from us."

I would be better satisfied if the Macdonald Co. had been joined as a defendant, but the plaintiff did not see fit to do so and the case must, therefore, be decided as between the present parties.

Appeal allowed.

KIJKO v. BACYZSKI.

Ontario Supreme Court, Appellate Division, Riddell, Latchford, Middleton and Mowat, JJ. November 4, 1921.

CONTRACTS (§IIC—228)—ILLEGALITY—PUBLIC POLICY—ALLEGED ILLEGITIMATE CHILD—BORN IN WEDLOCK—CONTRACT OF THIRD PARTY TO SUPPORT.

A contract by a third party to pay the mother for the support of a child which she claims to be the result of adultery with him while she was living with her husband is absolutely against public policy and public decency and cannot be enforced.

[*Aylesford Peerage* (1885), 11 App. Cas. 1; *Burnaby* v. *Baillie* (1849), 42 Ch. D. 282, referred to.]

AN appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff for the recovery of $312 and costs. Reversed.

The action was based upon a promise or agreement said to

have been made by the defendant, to pay for the maintenance of the plaintiff's infant child, of which the defendant was, as the plaintiff alleged, the father, although the child was born in wedlock, the plaintiff alleging that she had illicit intercourse with the defendant while she (the plaintiff) was living with her husband.

The plaintiff, although a married woman, sued in her maiden name.

The action was tried by one of the County Court Judges without a jury; and judgment was given for the plaintiff for $312, calculated on the basis of $6 a week from the 1st July, 1920, until the date of the judgment.

C. P. Tisdale, for appellant.

S. J. Birnbaum, for respondent.

RIDDELL, J.:—The facts of the case are as simple as they are disgusting. The plaintiff, a married woman (who sues in her maiden name), says that she had, while co-habiting with her husband, illicit intercourse on many occasions with the defendant; that she bore to him a child; and that he agreed to pay her $6 a week for the support of the child.

At the trial evidence was given which convinced the learned County Court Judge that the facts were truly as set out above, and he gave judgment for the plaintiff for $6 a week from the 1st July, 1920, till the date of the judgment, with costs. The defendant appeals.

We disposed of certain grounds of appeal upon the argument: the first, viz., that the plaintiff sued in her maiden name, is obviously untenable. Any one, in law, is entitled to take any name which he can induce others to call him by, although such a course may be evidence of fraud: *Du Boulay* v. *Du Boulay* (1869), L.R. 2 P.C. 430; *Cowley* v. *Cowley*, [1901] A.C. 450. The second, that the alleged contract was void as against the Statute of Frauds, is equally untenable—the child might or might not live for more than a year. All the cases from *Peter* v. *Compton* (1693), Skin. 353, 1 Sm. L.C., 11th ed. p. 316, down to *Reeve* v. *Jennings*, [1910] 2 K.B. 522, agree that such a case is not within the statute—*McGregor* v. *McGregor* (1888), 21 Q.B.D. 424 (C.A.), is a case not unlike the present.

It was contended that the evidence of the plaintiff should not have been received to bastardise her child, and I agree. The many cases cited in Taylor on Evidence, 10th ed., sec. 950, and Wigmore on Evidence, sec. 2063—to which I add *Nottingham Guardians* v. *Tomkinson*, 2 C.P.D. 343, and *Burnaby* v. *Baillie*, 42 Ch. D. 282, shews that, on grounds of public policy, neither

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spouse can be allowed to give evidence of non-access to prove the illegitimacy of the offspring. It is true that the rule as laid down by the cases does not go so far as to exclude the evidence given in the present case, but the same grounds of decency, morality, and public policy are as valid in this case as in those.

I think, therefore, that it has not been proved by the admissible evidence that the child is illegitimate, and that the ordinary presumption of law must be applied, "*pater est quem nuptiae demonstrant*"—a useful rule both in the civil, the canon, and the common law—see *Hargrave* v. *Hargrave* (1864), 9 Beav. 552.

The result is that the defendant agreed to pay the plaintiff $6 a week for the support of her legitimate child. Had the child been illegitimate, as contended by the plaintiff, there is respectable if not binding authority for the statement that an agreement on her part to support the child would be no consideration in law: *Crowhurst* v. *Laverack* (1852), 8 Ex. 208. But primarily the obligation to support a legitimate child is in the father, and not the mother: Eversley on Domestic Relations, 3rd ed. p. 539. There is nothing to indicate that the plaintiff was liable to support her child. I think, therefore, that the support by the plaintiff of the child was consideration for the promise on the part of the defendant to pay. I can find no illegality in the consideration.

Were there nothing more in the case, we should have the somewhat interesting but not wholly unprecedented result that if we should give effect to the contention of the plaintiff she would fail, but giving effect to the contention of the defendant he would be rendered liable.

But the whole story is so revolting as at once to indicate to any decent mind that there must be something illegal in the contract. Whatever might be the result were the case but one of a third party agreeing with the mother to support a child, against whose legitimacy nothing could be said, I cannot but think that a contract by a third party to pay the mother for the support of a child which she claims to be the result of adultery with him while she was living with her husband, is absolutely against public policy, as it is against public decency. Such a contract is one which the Courts could not undertake to enforce.

For this reason (which was not argued before us or at the trial) I would dismiss the action. There should be no costs to either party in this disgraceful affair.

LATCHFORD, J., agreed in the result.

MIDDLETON, J.:—I agree in the result, and desire only to add that I entertain some doubt as to there being consideration for the promise. Under the Criminal Code, the "parents" are liable

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to punishment for failure to maintain the child. See *Flint* v. *Pierce* (1912), 170 N.Y. St. Repr. 1056.

MOWAT, J.:—I think the appeal in this detestable case should be determined only upon the case and defence made at the trial.

The plaintiff a married woman and mother of the infant seeks to fasten liability upon the defendant, her paramour, by reason of an alleged promise to pay for the maintenance of the child. But the child was born in wedlock, and this Court might well adhere to the salutary presumption that the child is therefore legitimate. *Filiatio non potest probari.* The mother should not have been allowed to state in the witness-box that the child was not that of her husband: *Aylesford Peerage* (1885), 11 App. Cas. 1; *Burnaby* v. *Baillie*, 42 Ch. D. 282. In any event her and all evidence as to its paternity is unsatisfactory and inconclusive. The presumption cannot be displaced by a mere balance of probabilities. Illegitimacy is not proved.

If then the child is legitimate, there is no consideration to support a promise to pay for its maintenance; and the evidence also as to the promise is frail and fragmentary. The Illegitimate Children's Act is not applicable to the facts here, but it is to be noted that the Act is confined to children not born in wedlock, and the Act must be taken to be declaratory of what was understood to be the common law.

It is not necessary for me to dissociate myself from the majority of the Court, who find that any promise was void as against public policy, but the appeal may well be allowed upon the ground I have stated.

Appeal allowed.

WILSON v. COQUITLAM.

British Columbia Court of Appeal, Macdonald, C.J.A., McPhillips and Eberts, JJ.A. January, 10, 1922.

NEW TRIAL (§IIIB—16)—FIRE—DESTRUCTION OF BUILDING—DAMAGES—ORIGIN OF FIRE—EVIDENCE—FINDING OF JURY PERVERSE.

Where the evidence as adduced at the trial by the appellants is of such a nature and of such completeness contrasted with that adduced by the respondents, that the verdict of the jury for the respondents cannot be characterized as other than a perverse verdict, the Court will order a new trial.

[*Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; *Filliter* v. *Phippard* (1847), 11 Q.B. 347, 116 E.R. 506; *Vaughan* v. *Menlove* (1837), 3 Bing. (N.C.) 468, 132 E.R. 490; *Tuberville* v. *Stampe* (1697), 1 Ld. Raymond 264, 91 E.R. 1072; *Jones* v. *C.P.R.* (1913), 13 D.L.R. 900; *McClemont* v. *Kilgour* (1911), 27 O.L.R. 305; (1912), 8 D.L.R. 148, referred to.]

APPEAL by plaintiff from the judgment of Murphy, J. New trial ordered.

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WILSON v. COQUITLAM.

Macdonald, C.J.A.

J. E. Bird, for appellant; *S. S. Taylor*, K.C., for respondent.

MACDONALD, C.J.A.:—The plaintiff's case is that the fire which destroyed his premises, had its origin in the building of the defendants, and the contention of counsel for the plaintiff is that the doctrine of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, 37 L.J. (Ex.) 161, is applicable, and he complains that the trial Judge did not so instruct the jury.

The fire is alleged in the statement of claim to have originated through the negligent and improper erection and construction of a cooking range and its pipes, used by the chief of the fire brigade of defendants for domestic purposes.

If it were shewn that this allegation were true, no doubt the jury would have so found, but there was evidence given for the defence tending to shew that the fire originated from sparks emanating from the flue or pipe of an adjoining building, and on this conflict of evidence the jury found a general verdict for defendants. If the charge be not open to objection the verdict, I think, must stand.

The trial Judge told the jury that the *onus probandi* was on the plaintiff to shew that the fire originated from the defendants' negligence or that of its servants. He referred to the common law and told the jury that under it the defendants would be liable on mere proof that the fire originated in the defendants' premises, but that by statute 1774 (Imp.), ch. 78, sec. 86, that state of the law had been changed and the onus of proof that the fire had not an accidental beginning was shifted to the plaintiff. This, it is submitted by plaintiff's counsel was misdirection. The section of the statute is as follows:—

86. "No action, suit or process shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn or other building, or, on whose estate any fire . . . . accidentally begin, nor shall any recompense be made by such person, for any damages suffered thereby, any law usage or custom to the contrary notwithstanding."

It has been held by the Courts of Ontario and the Supreme Court of Canada, that that statute is in force in Ontario, and as the laws of England have been declared to be the laws of this Province as and from November 19, 1858, it is in force here also as it appears not to have been altered by any statute of this Province.

A considerable number of authorities were cited to us at the Bar, but in most of them the statute had no application. In some it was suggested that it relieved the defendant of liability even for negligence. *Filliter* v. *Phippard* (1847), 11 Q.B. 347, 116 E. R. 506, 17 L.J. (Q.B.) 89; *Viscount Canterbury* v. *Att'y.*-

Gen'l. (1843), 1 Ph. 306, 41 E.R. 648. In the former case, Denman, C.J., appears to have thought that where the fire was deliberately kindled it could not be said to have had an accidental beginning. The construction of the statute appears to depend upon what is meant by "accidentally began." In my opinion, it means the beginning of the conflagration which has done the injury.

The fire that was kindled in the range is not the fire meant by the statute. Nearly every fire which burns in a house or building is deliberately kindled and is necessary to the well-being of the occupants. A fire so started may escape from the stove or fire-place in which it was kindled and cause a conflagration, and if the Act is to be given a sensible meaning, it is the beginning of the conflagration which brought about the injury which is meant by the statute when it speaks of "accidentally began." This construction is, I think, borne out by what was said by two of the Lords Justices in *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43, 88 L.J. (K.B.) 915. Although it would appear that Duke, L.J., took a different view of it when he said, at p. 51:—

"The question may some day be discussed whether a fire spreading from a domestic hearth accidentally begins within the meaning of the Act, if such a fire should extend so as to involve the destruction of property or premises. I do not covet the task of the advocate who has to contend that it does."

In all of the cases to which we have been referred, there was evidence of negligence. Negligence was pleaded and either proved or attempted to be proved by the plaintiff. In the case at Bar, negligence is pleaded and was attempted to be proved by the plaintiff, and I think the trial Judge was right when he told the jury that the onus of proof of that issue was upon the plaintiff.

The appeal should, therefore, be dismissed.

MCPHILLIPS, J.A.:—In my opinion the case is one which calls for—a direction—that a new trial be had between the parties, Upon the evidence, without entering into details in respect thereto, the case presents an overwhelming volume of testimony that upon the balance of probabilities the fire which caused the damage sued for originated in the fire hall of the respondents, and not from elsewhere. Now, what was the origin of the fire? As to that, it is clear that what would have been ordinarily a safe fire became unsafe because of the fact that there was negligence upon the part of the respondents—in the stovepipe chimney—owing to the manner in which it was installed. Not only was there evidence of negligence in the way the stovepipe was carried through the roof, but it was not in accordance with the require-

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ments of a by-law of the respondents dealing with such matters.

The fire hall was the property of the respondents, and the chief of the fire brigade lived in the building and was in charge thereof in pursuance of his duty. The fire was lighted in the stove which was in a room occupied by the chief of the fire brigade, he being in occupation thereof in the discharge of his duty to the respondents. The fire broke out in the roof or attic of the building, and it is reasonable to say that it was caused by the defective and negligent manner of carrying the stovepipe chimney up from the stove into the attic and out upon the roof, one pipe being loosely slipped into the other, giving opportunity for cinders to fall upon the floor of the attic and a fire would be the natural result. This constituted evidence of negligence of the completest kind and there was advanced no evidence to meet this very probable happening, save the very improbable contention that the fire originated upon the roof of the fire hall by reason of sparks from the chimney of the building immediately adjoining the fire hall, namely, the hotel which was next door. This contention advanced by the respondents is most unreasonable and against the balance of probabilities and cannot be said to be supported by any reasonable evidence. In that the order of the Court is to be a new trial, it is best to refrain from canvassing the evidence in detail. This much can be said in general summary—that the evidence as adduced at the trial by the appellants was of such a nature and of such completeness, contrasted with that adduced by the respondents, that the verdict of the jury for the respondents cannot be characterised as other than a perverse verdict.

The case was not shewn to be one of accidental fire for which there would be no liability. Where negligence is proved, liability follows. Lord Denman, C.J., in *Filliter* v. *Phippard* (1847), 11 Q.B. 347, 116 E.R. 506, said at p. 356:—"for fires which *accidentally begin* are not fires produced by negligence."

And at p. 358:—"that the clause in the Building Act respecting accidental fires cannot apply to such as are produced by negligence."

(See *Vaughan* v. *Menlove* (1837), 3 Bing. (N.C.) 468, 132 E.R. 490.)

In *Tuberville* v. *Stampe* (1697), 1 Ld. Raymond, 264, 91 E.R. 1072:—"So in this case if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire, for it shall be intended that the servant had authority from his master, it being for his master's benefit."

In the present case it was a chimney fire and a defective chim-

ney constructed in admitted non-compliance with the respondents' own by-law, the presumption was, and in that the trial Judge, with great respect, went wrong in his charge to the jury that the fire was due to the default of the occupier of the fire hall, that is the respondents, until the contrary was proved. But that onus was not in the charge put upon the respondents, but was put upon the appellants. (See *Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951, Lord Tenterden, C.J., at p. 958, 109 E.R. 1396). It is clear under the law of England—and it is the same in British Columbia—that a man is liable for so negligently keeping his fire that the house or property of his neighbour becomes damaged thereby, further it is *primâ facie* evidence of negligence when the fact is that the fire first broke out in his house, and that is the present case, and the case was not so presented by the trial Judge to the jury. The respondents had in this case to meet that exact case, and the onus was, therefore, upon the respondents when that fact was shewn, and it was shewn by the appellants.

The respondents in not constructing the chimney in the manner required by the by-law—and they were called upon to obey its terms, as were all the inhabitants of the municipality—committed a breach of a statutory condition (as admittedly the by-law was *intra vires, i.e.*, within the statutory powers of the municipality) and its breach imports negligence (and upon this point also, with great respect, the trial Judge erred in law in his charge to the jury) and gives a cause of action. See *Groves* v. *Lord Wimborne*, [1869] 2 Q.B. 402, 67 L.J. (Q.B.) 862, 47 W.R. 87; *Brittania Merthyr Coal Co.* v. *David*, [1910] A.C. 74, 79 L.J. (K.B.) 153; *Butler* v. *Fife Coal Co.*, [1912] A.C. 149, 81 L.J. (P.C.) 97; *Watkins* v. *Naval Colliery Co.*, [1912] A.C. 693, 81 L.J. (K.B.) 1056; *Jones* v. *C.P.R.* (1913), 13 D.L.R. 900, 30 O.L.R. 331; *Holborn Union Co.* v. *Vestry of St. Leonard* (1876), 2 Q.B.D. 145, 46 L.J. (Q.B.) 36, 25 W.R. 40; *McClemont* v. *Kilgour Mfg. Co.* (1911), 27 O.L.R. 305; (1912), 8 D.L.R. 148.

The present case was not left in the way—that upon the evidence *McKenzie* v. *Chilliwack Corporation*, 8 D.L.R. 692, [1912] A.C. 888, 82 L.J. (P.C.) 22, was. There Sir Samuel Evans said, at p. 696:—"In their Lordships' opinion the appellants in this case entirely failed to establish or to adduce any proof that the death of the deceased was in any way attributable to or materially contributed to by any negligent act or omission on the part of the respondents."

Here, we have positive evidence of the negligent act of the respondents in installing the chimney in a dangerous way and against the express terms of the by-law. The respondents must

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be held to be liable for the condition and state of its building, and the acts of the chief of the fire brigade in charge of the fire hall, and where as here, there is evidence of negligence even apart from the terms of the by-law, the consequences of such negligence and damages therefrom may be properly visited upon the respondents. (*Black* v. *The Christchurch Finance Co.*, [1894] A.C. 48, 63 L.J. (P.C.) 32.)

The case is one that entitles the appellants to have a new trial as, in my opinion, substantial wrong was occasioned at the trial by the trial Judge misdirecting the jury, but even if I should be wrong in this view, there should be a new trial upon the ground that the verdict was against the weight of evidence, and such that a jury could not reasonably or properly find in truth, a perverse verdict upon the evidence as adduced before them.

It follows that, in my opinion, the appeal should to the extent of granting a new trial, be allowed.

EBERTS, J.A., would order new trial.

New trial ordered.

REX v. MEHARG.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 9, 1921.

TRIAL (§IA—1)—CONDUCT AND DISPOSAL—TRIAL JUDGE GOING TO JURY ROOM TO INSTRUCT JURY — CONSENT OF COUNSEL — WAIVER OF RIGHT OF PRISONER TO BE PRESENT—NO SUBSTANTIAL WRONG OR MISCARRIAGE—CRIMINAL CODE, SECS. 943 AND 1019.

While it is inadvisable for the trial Judge in a criminal action to attend the jury in the jury room after they have retired to consider their verdict, in order to answer certain questions as to which they are in doubt, and to give them further instruction, the fact that he has done so, taking with him the registrar and Court stenographer (counsel on both sides having declined an invitation to attend) and the proceedings in the jury room having been transcribed by the stenographer, does not entitle the accused to a new trial, the Judge having power under the Criminal Code to adjourn the Court to the jury room, and the privilege of the prisoner under sec. 943 of the Code to be present having been waived by his counsel. In any event there had been no substantial miscarriage under sec. 1019 of the Code.

[*Rex v. Rogers* (1903), 6 Can. Cr. Cas. 419, applied.]

CASE stated by MULOCK, C.J. Ex., before whom and a jury Wilfrid Meharg was tried at Hamilton, in October, 1921, upon an indictment charging him with the murder of Edward J. Whitworth on the 23rd December, 1920.

The prisoner was found guilty, and the case stated by the Chief Justice was upon four questions of law arising upon the trial.

Questions 1, 2, and 3 were as to whether certain evidence was properly admitted and as to whether there was non-direction or misdirection in the charge to the jury.

Question 4 was stated by the Chief Justice as follows:—"After the jury had retired to consider their verdict, they sent to me, while on the Bench, a memorandum in the following words "The jury wishes to know if the foreman of the jury can have a private hearing with the Judge or the Crown-Attorney?"

"I submitted the request in open Court to the counsel for the Crown and for the prisoner, stating at the same time that there could be no communication either by myself or the Crown-Attorney with the foreman of the jury. Thereupon the request was discussed by both counsel and myself, and by common consent I sent word to the jury that, if they desired it, I would visit the jury in their room, but that no communication could be held with the foreman only. The Registrar, who took this message to the jury, returned with the message that the jury would appreciate it if I would go to their room, and I invited counsel on both sides to accompany me. Mr. Ballard, one of the counsel for the defence, suggested that I should go unaccompanied by either counsel, and I told them that I would do so, taking with me the registrar and the court stenographer. The three of us then proceeded to the jury-room, and the proceedings occurring therein are correctly set forth in the notes of evidence, as follows:—

"*Proceedings in jury-room*:—

"Foreman: We weren't just sure—I suppose I am allowed to tell you how many of us agree and how many do not agree.

"His Lordship: I cannot close your mouths; you can take any course you like.

"Foreman: There is eleven of us agree in one thing and one is not agreed and he said if we stay here for a year he won't change his mind.

"His Lordship: A case of eleven very obstinate.

"Foreman: I think it is a case of one obstinate man; every man is entitled to—

"Juryman: I am the one man: I understood you to say if a juryman thought a man didn't kill him and shoot him with the intention of killing him he could bring it in manslaughter.

"His Lordship: If you thought it was an accident.

"Juryman: Yes.

"Foreman: This is the thing, my Lord; this gentleman agreed with me when I put the question that he thought that Meharg shot at the man probably to wound him or scare him, and I told him, as I understand the law and as you directed us, if the man died from the wound then it was murder; is that so? He

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told me he thought Meharg may have shot at the man the second time to wound him so he would let go of Dickenson; he thinks that would be manslaughter; he don't think it is murder if by that wound the man died—if the man didn't have any direct intention of killing him at the time.

"Juryman: If I thought he had no intention of killing him, I think it is manslaughter, no matter whether he shot at him or not.

"His Lordship: Do you want me to tell you what is the law?

"Juryman: I certainly do.

"His Lordship: If, under the circumstances of this case, according to the version given by the prisoner that is, he went into that room to assist in the robbery; that Dickenson had gone around the counter intending to rob; that Dr. Whitworth turned around, saw him and resisted, and if at that period the prisoner fired that second shot intending that it should hit Doctor Whitworth, and Dr. Whitworth having since died of the wound, that would be murder.

"Juryman: You could bring it in any other things?

"His Lordship: Not according to your oath.

"Juryman: I understood you to say—

"His Lordship: Not according to your oath; if he intended to wound him with a bullet; that is a reckless shooting and it would stamp his act as a wrongful intentional act.

"Juryman: I give in—I am wrong.

"His Lordship: The intention to do wrong is the distinction; where there is an intention to wound, cause grevious bodily harm such as here, that may prove fatal, that takes it out of the category of accident.

"Juryman: I have my own belief.

"Foreman: That is the question we wanted; if we cannot agree now.

"His Lordship: You have agreed now.

"Foreman: You tell me you are agreeable.

"Juryman: When I know I am wrong I give in in a second."

(*a*) Was I wrong in so visiting the jury-room and instructing the jury therein as shewn in the notes of evidence?

(*b*) If I were wrong, was any substantial wrong or miscarriage, within the meaning of sec. 1019 of the Criminal Code, occasioned thereby?

T. J. Agar, for the prisoner.

Edward Bayly, K.C., and *Daniel O'Connell*, for the Crown.

Questions 1, 2, and 3 were answered by the Court unfavourably to the prisoner.

Agar, upon the 4th question, argued that the learned Chief

Justice of the Exchequer was wrong in visiting the jury-room and there instructing the jury, in the absence of the prisoner, even with the consent of the prisoner's counsel. Consent could not give jurisdiction. Reference should be made to *O'Connor* v. *Guthrie & Jordan* (1860), 11 Iowa 80; *Campbell* v. *Beckett* (1858), 8 Ohio St. 210; *Hoberg* v. *State of Minnesota* (1859), 3 Minn. 262; *Fish* v. *Smith* (1859), 12 Ind. 563. The learned Chief Justice himself doubted whether it was right for him to go into the jury room. Substantial wrong was occasioned, in that the Chief Justice had given a wrong direction to the jury while in the jury-room.

MEREDITH, C.J.O.:—(at the conclusion of the argument for the prisoner):—We think it is not necessary to hear counsel for the Crown in this case.

We have already dealt with the first three questions and have indicated our view as to them. The 4th question is the one that has just been argued.

Section 943 of the Criminal Code provides: "Every accused person shall be entitled to be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable." And sub-sec. 2 provides that "The Court may permit the accused to be out of court during the whole or any part of any trial on such terms as it thinks proper."

What occurred was that the jury required some further instruction, and counsel for the prisoner suggested that the learned Chief Justice, who was presiding, should himself go into the jury-room and there answer the inquiries of the jury. Counsel for the Crown did not think that that was the proper course, and ultimately it was arranged that the Chief Justice, with the court-stenographer and the registrar should go into the jury-room and ascertain what the jury wanted and answer such questions as they desired to ask. That was carried out, and there is a transcript of all that took place in the jury-room, which has been read.

Now, I think, in the first place, that the prisoner, under the Code, is entitled to be present, that is, has the privilege of being present, during the whole of the trial, but that that privilege he may waive; and the waiver by his counsel, in his presence and acted upon, was his waiver.

Then sub-sec. 2 also may be applied: there was substantially here a permission by the Court for the accused to be out of court during the time that this was taking place in the jury-room, if in fact it was out of court.

Then was what the Chief Justice did any more than adjourn-

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ing the Court to the jury-room? I think that that was all that it amounted to; he might have adjourned to some other room, he might have adjourned to some other place in the county for part of the trial. In *Rex* v. *Rogers* (1903), 6 Can. Crim. Cas. 419, the head-note is as follows:—

"1. At the trial of an indictable offence, the presiding judge may, with the consent of counsel for the Crown and for the prisoner respectively, adjourn the hearing to a private house within the same county for the purpose of taking there the evidence of a witness who is too ill to be moved therefrom, and may order that the court and jury proceed there for that purpose.

"2. The prisoner is bound by the consent of his counsel in such a matter which does not go to the jurisdiction of the court."

Of course that case does not touch the question of going into the jury-room, with which I have already dealt. What in fact was done was to make the jury-room the court-room for the time being; the prisoner chose to be absent from it, or was permitted to be absent from it, and his counsel voluntarily absented himself. So that this question must be answered against the prisoner.

If I had come to a different conclusion, I would have held that sec. 1019 was clearly applicable. There was, in my opinion, no substantial wrong or miscarriage in what was done. All that was done was done with the assent of the prisoner's counsel: what took place there in no way prejudiced the prisoner.

While we are answering all these questions against the prisoner, there is no doubt that the course adopted is one that ought not to be followed: it is an undesirable one, and it was unfortunate that the Chief Justice—as he himself recognises—fell in with the suggestion of counsel that he should go into the jury-room to answer the questions which the jury desired to ask. I have no doubt that in future no Judge will adopt that course.

MACLAREN, MAGEE, and FERGUSON, JJ.A. agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—I would like to say that I prefer to rest my judgment upon the last ground mentioned by Lord the Chief Justice, and that is, that no substantial wrong or miscarriage has occurred. I am not satisfied that counsel, in cases of felony, have the right to bind the prisoner by waiver. But here, even on the assumption that what was done was wrong, a full transcript of what actually occurred was kept by an officer of the Court, and Mr. Agar has had the opportunity of arguing from that transcript that some legal wrong wast done to the prisoner by the direction as to the law of the case. We have decided against him on that point, and nothing further appears to have taken place that would in any way prejudice the prisoner. *Conviction affirmed.*

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Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 9, 1922.

MORTGAGE (§ III—48)—IMPLIED COVENANT OF TRANSFEREE.

Under sec. 52 of the Land Titles Act (Alta.), in every transfer of land subject to mortgage, a binding contract is implied both with the transferor and mortgagee, that the transferee will pay the mortgage, and the mortgagee may sue the transferee directly upon this covenant in default of payment.

[*Great West Lumber Co.* v. *Murrin & Gray* (1916), 32 D.L.R. 485, followed, and see annotation following that case.]

APPEAL by defendant Singer from the judgment of Simmons, J., at the trial. Affirmed.

The facts of the case are fully set out in the judgments following.

Barron & Barron, for appellant.

Peacock & Skene, for respondents.

SCOTT, C.J., concurs with CLARKE, J.A.

STUART, J.A.:—I think there is no ground for this appeal except the one which was dealt with in *Great West Lumber Co.* v. *Murrin & Gray* (1916), 32 D.L.R. 485 (Annotated), 11 Alta. L.R. 173. Upon that point I have not yet seen any real answer to the arguments I presented in that case. But as the majority of the Court have now decided that I was wrong and that the statute means that it shall be implied (1) that the transfer is under seal (though it is not and the form does not so provide) (2) that the transferree has signed it (though he has not and the form does not so provide) (3) that the mortgagee is a party to the transfer (though he is not and the form does not so provide) in order to support the only implication expressly enacted, viz.: that of the presence of a certain clause in the transfer, I, of course, shall dissent no longer, and consent, but with reluctance, to the dismissal of the appeal. The result, of course, is impliedly either to change the whole form of the document or by a very circuitous route to create a statutory debt due from the transferree to the mortgagee. I might ask if the period of limitation would be 20 years as on a specialty? In the words of the brilliant author of the note to *Great West Lumber Co.* v. *Murrin and Gray* in 32 D.L.R. at 497, I think there is a splendid chance for the Legislature "to try again." Of course every one agrees as to what the law was before the statute with regard to the various relationships of the mortgagee, the vendor and the vendee. I think it was well settled. And having that in mind, it is quite easy to declare what the Legislature meant to say by sec. 52. But that ought not to settle the matter if the language used by the Legislature is not effective for that purpose. The problem is not merely one of previous law but of the interpretation of the

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statute. And my difficulty was that, in view of sec. 131, and particularly the concluding clause, it was, as I thought, very obvious that the Legislature intended implied covenants to arise only as against parties who had signed the document and in favour of parties to it. But as this does not present itself to the other members of the Court as a difficulty which needs consideration, the law, as far as this Court is concerned, may now be considered settled.

BECK, J.A.:—This is an appeal by the defendant Singer from the judgment of Simmons, J., at the trial.

The statement of claim sets up that the defendant, Landreville, was the registered owner of certain land; that he executed a mortgage upon it to the plaintiff company containing the usual covenants; that, subsequently, the defendant Singer became the registered owner of the land under a transfer from Landreville and that the defendant Singer is by virtue of sec. 52 of the Land Titles Act, ch. 24, 1906, liable to the plaintiff company for payment of the moneys secured by the mortgage with interest as therein provided.

The amount claimed is $5,292.78, made up as follows:—Principal, $2,800; interest, taxes, insurance and repairs, $2,492.78; $5,292.78.

The trial Judge held the defendant Singer personally liable on the ground that sec. 52 of the Land Titles Act created an implied covenant on Singer's part.

That section reads as follows:—"In every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be *implied* the following *covenant* by the *transferee both* with the *transferor* and the *mortgagee*, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor.

(2) Where a transferee declines to register any such transfer the transferor or the mortgagee may by notice call upon the transferee or such other person or persons as the Judge may direct to shew cause why the same should not be registered, and upon the return thereof the Judge may order the registration of the said transfer within a time named or make such further or other order and on such terms as to costs and otherwise as to him shall seem meet." (Sec. 2 added by ch. 3, 1916).

This section was given much consideration in *Great West Lumber Co.* v. *Murrin & Gray*, 32 D.L.R. 485, 11 Alta. L.R. 193. It may be worth while calling attention to annotations in the first mentioned reports of the case. The first ground of appeal is in substance that there being no privity of contract between the transferee and the mortgagee the implied covenant does not arise unless the transfer is executed by the transferee.

This ground is based upon some tentative observations made by Stuart, J., in the case just cited. For my part, I find myself unable to concur in these observations, and while I pointed out that cases as they arise may present many difficulties, yet I think all such difficulties can be decided with justice to all parties concerned (1) if, as I there held and still hold, sec. 52, in declaring an implied covenant on the part of the transferee to pay the mortgage debt is merely declaring the well-established previously existing implied obligation of the purchaser of an equity of redemption—an obligation implied in equity, but always subject to be modified or negatived by proof of the real intention either by evidence of expressed intention or by evidence of all the facts and circumstances of the transfer; and (2) if, as I also there held and still hold, the existence and effect of the implied covenant in favour of the mortgagee is wholly dependant upon the implied covenant in favour of the transferor.

Another ground of appeal is that there was proved to be an express covenant between the transferor and the transferee whereby the latter expressly covenanted to pay the mortgage moneys and indemnify the transferor and that this express covenant prevented the implied covenant in favour of the transferor coming into effect. The answer to this objection, I think, is that the implied covenant stands, except insofar as it is by agreement, express or implied, modified or negatived and the express agreement is to the same effect so far as it goes as the implied covenant and, therefore, does not interfere with it or displace it.

The answer to another ground of appeal is involved in what has already been said.

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

HYNDMAN, J.A.:—This is an appeal by the defendant Singer from the judgment of Simmons, J.

On April 14, 1914, the defendant Landreville, being the registered owner of certain land, executed and registered a mortgage in favour of the plaintiff to secure the sum of $2,800. At the time such mortgage was given, an agreement for sale was in existence between the parties defendant (not known to the plaintiff) and on the date of the mortgage an agreement in writing

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was executed between the defendants whereby Singer agreed to pay the amount of said mortgage and indemnify and save harmless his co-defendant, from all liability thereunder, the proceeds of the mortgage having been used to pay *pro tanto* the purchase price owing by him.

On April 21, 1914, a transfer under the Land Titles Act was executed in favour of Singer and duly registered on the 24th of the same month. The transfer contained a clause expressing same to be subject to the said mortgage.

Default was later made in payment of the mortgage and eventually the land was sold leaving a deficiency for which judgment was given against both defendants amounting to $5,886.95.

The judgment against the defendant, Singer, was by virtue of the covenant implied by virtue of sec. 52 of the Land Titles Act.

The defendant, Singer, bases his appeal on the ground that inasmuch as he made an express covenant with his co-defendant to pay said mortgage and indemnify him against the same as set forth in ex. 3, that consequently the implied covenant is displaced. This is the one and only ground relied upon.

It has been held in several decisions of this Court that whilst, *primâ facie*, a transferee of mortgaged property is directly liable to the mortgagee on the implied covenant, nevertheless the implication or presumption is capable of being negatived or rebutted by evidence shewing the exact relationship between the mortgagor and transferor and should it appear that where before the statute the mortgagor would have no right to indemnify against the purchaser capable of assignment to the mortgagee, then the statutory implied covenant in favour of the mortgagee is negatived. See *Short* v. *Graham* (1908), 7 W.L.R. 787; *Evans* v. *Ashcroft*, [1915] 8 W.W.R. 899; *Great West Lumber Co.* v. *Murrin & Gray*, 32 D.L.R. 485; see also *British Canadian Loan Co.* v. *Tear* (1893), 23 O.R. 664; *Assiniboia Land Co.* v. *Acres* (1916), 27 D.L.R. 103, 9 S.L.R. 142.

All that these cases decide is that where an implied covenant *primâ facie* exists, the same may be negatived or rebutted by facts which shew that under the arrangement between the vendor and purchaser of mortgaged lands no obligation existed requiring the purchaser to discharge the mortgage. The object of sec. 52 was no doubt to avoid the circuity of action which would result, had it not been so enacted.

It seems to me a very far-fetched argument indeed to say that because an express covenant to pay was entered into as is the case here, that such could have the effect of negativing liability to the mortgagee. On the contrary, I would think it

only tends to strengthen the implied covenant and ought to be so treated. It certainly does not rebut it and, consequently, cannot possibly have the effect contended for.

I would dismiss the appeal with costs.

CLARKE, J.A.:—I agree with the result and in the main with the reasons for judgment of my brother Beck. I do not at present, however, assent to the proposition that in the absence of an express declaration in the instrument negativing or modifying the implied covenant created by sec. 52, such covenant can be negatived or modified so as to affect the mortgagee, by an agreement to which he is not a party or that the existence of the implied covenant in favour of the mortgagee is dependent upon the implied covenant in favour of the transferor. It is not necessary to decide that point in this action, and I reserve it for further consideration when it arises.

Appeal dismissed.

Re FAIRWEATHERS Ltd.

Ontario Supreme Court in Bankruptcy, Orde, J. November 11, 1921.

BANKRUPTCY (§I—3)—MOTION—JUDGE HEARING UNFAMILIAR WITH LAW OF OTHER PROVINCE—REFERENCE TO PROPER COURTS OF OTHER PROVINCE—JURISDICTION—BANKRUPTCY ACT, SEC. 71.

Where a motion by way of appeal from a ruling of an authorised trustee under the Bankruptcy Act involves a question of the law of another Province with which the Judge hearing the motion is unfamiliar, he may, under sec. 71 (2) of the Act, refer the matter to the proper Court of that Province to deal with the whole matter of the appeal where in his opinion this is the most satisfactory way of determining the rights of the parties.

[*Stewart* v. *Le Page* (1916), 29 D.L.R. 607, 53 Can. S.C.R. 337; *Brewster* v. *Canada Iron Corp.* (1914), 7 O.W.N. referred to. See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

MOTION by the Corporation of the City of Montreal by way of appeal from the ruling or decision of an authorised trustee under the Bankruptcy Act, to whom Fairweathers Limited, an insolvent company, had made an assignment.

T. N. Phelan, for the Corporation of the City of Montreal.

R. S. Cassels, K.C., for the authorised trustee.

ORDE, J.:—The City of Montreal, in the Province of Quebec, through its treasurer, filed with the trustee proof of a claim against the insolvent company for $2,900 for water rates and business taxes for 1921, in respect of the business premises at 487 St. Catherine street west, Montreal, which had been occupied by the Montreal branch of the insolvent company prior to its assignment under the Bankruptcy Act. Of the $2,900, the sum of $1,200 is for water rates, and $1,700 for business tax. The city claims priority over ordinary claims under sub-sec. 6 of sec.

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51 of the Bankruptcy Act, and the trustee has disallowed the claim to priority, on the ground that the moveable goods of the insolvent had come into the hands of the trustee before any seizure was made.

From this disallowance the city now appeals, and also asks for an order transferring the proceedings to the Bankruptcy Court in Montreal, in order that the questions involved may be determined there. The trustee opposes the application to transfer the matter to the Bankruptcy Court in Montreal, and urges that the issue can be determined more satisfactorily by the Bankruptcy Court in Ontario, which, by reason of the location of the head office of the company, and the making of the assignment, in this Province, is the Court primarily charged with jurisdiction over the insolvent estate.

That once the Courts of one Province are seized of the matter, no Court in any other Province will be permitted to intervene in the proceedings or to interfere with the administration of the insolvent estate, except under the order of the Court so seized, is clearly established by the judgment of the Supreme Court of Canada in *Stewart* v. *Le Page* (1916), 29 D.L.R. 607, 53 Can. S.C.R. 337, a decision upon those provisions of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, sec. 125, which correspond to sub-sec. 2 of sec. 71 of the Bankruptcy Act. See also *Brewster* v. *Canada Iron Corporation* (1914), 7 O.W.N. 128. So that except in the enforcement of a lien or charge upon property of the insolvent company still locally situate in the Province of Quebec, where the right to proceed independently of the administration in bankruptcy is preserved to the creditor by sub-sec. 1 of sec. 6, the Courts of the Province of Quebec have no power to entertain or adjudicate upon the claim of the City of Montreal in this case, without an order of this Court obtained under sec. 71 (2).

It therefore becomes a question whether or not, in the exercise of my judicial discretion, it will be more reasonable, in view of all the circumstances, that I should attempt to try the question here or remit it to the Quebec Court for that purpose.

It was urged by Mr. Cassels that my judgment in *Re. F. E. West & Co.* (1921), 62 D.L.R. 207, in which, *inter alia*, I held that, in the existing state of the legislation of this Province, the City of Toronto was not entitled to any preference or priority under sub-sec. 6 of sec. 51 for business taxes, rendered it unnecessary to refer the matter to the Quebec Court, or to deal with the appeal otherwise than on the footing of that case. But this contention overlooks the fact that my judgment was based upon the omission (, as I regarded it, from the legislation of this Province of any provision

which, by virtue of sub-sec. 6, gave to a municipality any preference for business taxes which could be enforced after the bankruptcy had intervened. But the expression "business tax" may mean entirely different things in different Provinces, and my decision was not intended to mean, and cannot be interpreted as meaning, that the mere appellation of "business tax" to some particular form of impost excludes it from the operation of sub-sec. 6 in every Province, and without regard to the local statutory provisions for its realisation.

In the present case the goods of the insolvent upon the premises in question are admitted to have been sufficient to answer the liability for the taxes claimed, had a seizure been made by the city before the insolvent company assigned to the trustee. And the city contends that under the law of the Province of Quebec it was entitled nevertheless to collect the water rates and the business tax in question, either in spite of or by virtue of sub-sec. 6 of sec. 51. This necessarily involves a question of Quebec law; and, if the circumstances were such that the duty of dealing with that question were cast upon me, I should be obliged to deal with it in the ordinary way, by hearing evidence as to the law of Quebec and dealing with such evidence as a matter of fact rather than of law. This procedure, at all times unsatisfactory, would be particularly so where the question is to some extent a technical one, involving the consideration possibly of the Civil and Municipal Codes of the Province of Quebec and the charter of the City of Montreal. In such a case it will clearly be much more satisfactory to have the application of the law of Quebec to the question in issue dealt with by the Courts of that Province, rather than by the unsatisfactory method, which for lack of a better one, the Courts of one country are forced to adopt when dealing with the laws of another. In my judgment, sub-sec. 2 of sec. 71 is particularly adapted for just such cases as this, and it would be difficult to suggest a more appropriate occasion for resorting to the benefit of its provisions than the one now before me.

It was not made quite clear to me whether or not, after the assignment, the goods of the insolvent upon the premises in question had been removed by the trustee from the Province of Quebec into the Province of Ontario. If so, the trustee may desire to contend that, assuming that in spite of the assignment the city still had the right by law to seize goods found upon the premises in question, the removal from the premises or from the Province before seizure has affected the city's preferential claim. While that question might, perhaps, be reserved for myself to deal with, yet, inasmuch as the question, if raised, may involve some consideration of Quebec law, I think it preferable that my

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order should not in any way hamper or interfere with the freedom of the Bankruptcy Judge in Montreal to deal with the whole matter involved in the appeal. It may not be amiss to say that it would seem to me to be highly improper that any act of an authorised trustee, such as the removal by him of goods from one Province to another, should be allowed prejudicially to affect preferential rights in existence at the time of the assignment, even though such rights depended for their full enforcement upon the continuance upon the premises in question of the goods of the insolvent until actual seizure. But the question is not yet ripe for any considered judgment of mine upon that point.

There will be an order, under the authority given to me by sub-sec. 2 of sec. 71, referring the appeal of the City of Montreal from the trustee's decision, to the Judge in Bankruptcy for the Province of Quebec exercising jurisdiction in the City of Montreal, including the right to either party to appeal from his decision to the Appeal side of the Court of King's Bench of that Province.

The costs of this application will go to the party ultimately successful upon the issue involved. The trustees costs will, of course, be payable out of the estate.

RE BELL.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Dennistoun, JJ.A. March 23, 1922.

BANKRUPTCY (§ I—9)—FRAUDULENT PREFERENCES—CONCURRENCE OF INTENT BETWEEN DEBTOR AND CREDITOR—MORTGAGE OF HOMESTEAD BY DEBTOR—RIGHTS OF JUDGMENT CREDITORS—EQUITY OF REDEMPTION—BANKRUPTCY ACT, SEC. 31.

In order to avoid a conveyance under sec. 31 of the Bankruptcy Act, as constituting a fraudulent preference, it must be shewn that it was given with intent to give a preference, and there must be concurrence of intent on the part of the creditor as well as the debtor. "Pressure" as used in sec. 31 (2) of the Bankruptcy Act means actual pressure in its original sense, the pressure which is brought to bear, by a creditor upon his debtor, and not some secret motive under the impulse of which the debtor acts.

If the owner of an urban homestead mortgages it, his interest in the property is confined to the equity of redemption, it is the equity of redemption only which is available to judgment creditors and the exemption rights of the owner are likewise confined to the equity of redemption.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

EXEMPTIONS (§ IIA—5)—PURPOSE OF ACT—PUBLIC POLICY—ASSIGNMENT OF—RIGHT TO RECEIVE AMOUNT IN CASH.

The $1,500 exemption of an urban homestead is designed to provide shelter for the debtor and his family as a matter of public policy, and while it retains its characteristics is never available for the payment of debts. It is a right personal to the debtor which he cannot assign or transfer *qua* exemption. It is only after he has received it in cash that he is free to determine that he will pay it over to a creditor.

APPEAL from an order of Macdonald, J. Affirmed.

The judgment appealed from was as follows:—

MACDONALD, J.:—Motion to set aside a real property mortgage made by Allan B. Bell, a debtor, to P. J. Procter on lot 10, block 15, D.G.S. 80 to 89, plan 386, St. Boniface, on the ground that it was given within 3 months from the making of an authorised assignment by the debtor when insolvent and as a preference over other creditors.

On June 15, 1921, Bell, the debtor, called upon Procter, the mortgagee, and represented that he was $1,200 short in closing a transaction and that this $1,200 was forthcoming within a week and asked Procter to accommodate him for 1 week with a loan to that amount and offered as security a mortgage on the above-described property. The loan being for such a short time Procter did not consider security necessary and advanced Bell the money. Ten days afterwards Procter met Bell on the street and the latter told Procter that he had settled with his client and that he would send him a cheque at once.

On July 2, Bell came with a cheque for the $1,200 but on presentation payment was refused. A second cheque was given on a "trust account" but on presentation payment was refused. Procter then secured as security for the $1,200 the mortgage on the property mentioned.

On August 24, 1921, Bell, the debtor, made an assignment to the Traders' Trust Co., authorised assignees, and this motion is made on their behalf under Rule 120 to set aside the mortgage.

Section 31 of the Bankruptcy Act, 1919, ch. 36, as amended by ch. 34, 10-11 Geo. V, sec. 8, provides that:—

"Every conveyance or transfer of property or charge thereon made . . . by any insolvent person in favour of any creditor . . . with a view of giving such creditor a preference over the other creditors shall, if the person making . . . . the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making . . . . the same, or if he makes an authorised assignment, within three months after the date of the making . . . . the same, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorised assignment."

There is no question about the bankruptcy of the debtor at the time of the giving of the security referred to.

Counsel for Procter contends that the property mortgaged and being the security referred to, is the homestead of the debtor and is exempt to the extent of $1,500, and that the debtor could do as he liked with this exemption and that therefore the mortgage being under the amount exempt could not be challenged.

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There is, however, a prior mortgage to the extent of $3,000, and counsel for the authorised assignee replies that the $1,500 exemption is absorbed in this mortgage.

It is conceded that the $3,000 mortgage was a *bonâ fide* security either for money advanced or as security for the balance of the purchase-money of the property; in any event there is no suggestion that this mortgage was a fraudulent preference or in any way affected the position of creditors to their injury. Such then being the case, I cannot see why the debtor is not entitled to his exemption rights. If the property was sold under the mortgage and realised $1,500 in excess of the mortgage claim, the mortgagor would be entitled to this $1,500 as his exemption right. Why then could he not mortgage up to the full value of his exemption? If he had mortgaged in excess of his exemption rights the mortgage would no doubt be invalid to the extent of such excess. If the $3,000 mortgage was given as a preference it would be invalid for the excess over the $1,500 and in that event also his exemption would be clearly absorbed and any subsequent mortgage under similar conditions would be the subject of attack. In my opinion the mortgage is valid as a charge against the debtor's exemption.

I am also of opinion that the mortgage security should be upheld on the ground that it is not a fraudulent preference in contemplation of the Bankruptcy Act.

The mortgagee cannot be said to have acted in bad faith, he had no knowledge of the insolvency of the debtor, his unhesitating compliance to the request of the debtor for the use of $1,200 for a week and his demurring to accepting security for such a short time establishes that fact. The debtor was no doubt hopelessly insolvent. He secured his money from the mortgagee under false and fraudulent pretences and representations. He was willing at the time to give the security which was subsequently given and is now attacked. Can it be said under these circumstances that it was given with a view of giving a preference?

"The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it. It must be shewn not only that he has preferred a creditor but that he has fraudulently done so. It depends upon what was in his mind. [Halsbury, L.C., in *Sharp* v. *Jackson*, [1899] A.C. 419, p. 421, 68 L.J. (Q.B.) 866].

The debtor knew he could not repay Procter; he allayed suspicion of any pecuniary entanglement by his false pretences and his offering of security and what was in his mind at the time of giving the security might most reasonably be the false pretences

under which he secured the friendly assistance of Procter and the carrying out of his offer of the security at the time.

I think under all the circumstances that Procter is entitled to hold his security as against the trustee in bankruptcy and I therefore dismiss the motion with costs.

The trustee appealed from the above judgment.

H. W. Whitla, K.C., for appellant.

J. C. Collinson, for respondent.

PERDUE, C.J.M.:—Both Bell and Procter were at and before the making of the mortgage in question barristers and solicitors separately practising their profession in Winnipeg. The facts in connection with the giving of the mortgage are stated by Procter in his affidavit sworn on October 5, 1921. They are to the following effect:—

On June 15, 1921, Bell came to Procter's office and stated that he, Bell, was closing a deal for a client who resided at Hartney, Man., who had given him a cheque for some $3,000, payment of which had been refused by his client's bank; that he, Bell, in closing the deal had given his own cheque to the other party and that he was short in his bank some $1,200 to cover his outstanding cheque by reason of his client's cheque having been dishonoured; that the client was a responsible man and able to make his cheque good. He asked Procter to let him have $1,200 for a week till he could see his client and have the matter made right. At the same time Bell offered him security on his house property, but Procter told him that as the accommodation was only required for a week he need not give the mortgage. Procter then gave him a cheque for the amount. About 10 days thereafter Bell told Procter that the matter had been straightened out with his client and that he would repay the $1,200. On July 2, Bell came to Procter's office and gave him a cheque on a trust company, signed by Bell, for that amount. Procter deposited the cheque in his own bank and it was returned dishonoured. Procter then saw Bell, who asked him to present the cheque again. This was done and payment of the cheque was again refused. Bell then gave Procter a cheque for the amount on Bell's firm trust account in a bank in exchange for the one given on the trust company. Procter presented the second cheque at the bank and was told to present it later. It was again presented on the following day and Procter was told by the banker to leave it with the bank and was given the impression that Bell was making arrangements to cover it. Not having received payment, Procter got in touch with Bell as soon as he could and reminded him of the security promised at the first interview. Bell then gave Procter a note for the amount

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payable in a month and the mortgage in question as security. Procter states that he had no knowledge at the time of the transaction that Bell was insolvent or in financial difficulties. He learned of Bell's insolvency for the first time in the latter part of July after the mortgage had been given. The mortgage is on the actual residence of Bell and his family. The actual residence is exempt from seizure under legal process to the extent of $1,500 under sec. 9 (*c*) of the Judgments Act, R.S.M., 1913, ch. 107. This exemption does not pass to the authorised trustee: the Bankruptcy Act, secs. 25, 10.

A further affidavit of Procter was sworn on October 7, 1921, in which he states that before giving the $1,200 to Bell he asked him to verify at the bank how much the alleged client's account was short of the $3,000; that Bell shortly thereafter returned and stated that his client's account was short about $1,700, that he, Bell, could put up $500 and that was why he, Procter, gave the $1,200 to Bell. The affidavit also states that since the assignment in bankruptcy was made by Bell, he, Procter, had made inquiries and found that the story told by him, Bell, was wholly untrue, that as a fact he had no such client and no such cheque from a client and that the $1,200 was obtained from him, Procter, by Bell under false pretences. In para. 5 of the same affidavit he states that looking back on the conduct of Bell at the various times he saw him in connection with the transaction after giving him the $1,200, he now realises that Bell was afraid of the consequences of his act, and that he verily believes such was Bell's condition of mind when he gave the security in question.

Bell made an affidavit in reply in which he says that the statements made in Procter's affidavit sworn on October 7, are substantially correct with the exception of those contained in para. 5, as to which he says:

"At the time of giving the mortgage in question herein I had no apprehension as to the possible consequences referred to in the said affidavit, but my only desire and intention in making said mortgage was to give security to the said Percy John Procter for the payment of his claim against me."

It will thus be seen that Bell admits the statement of Procter that the money was obtained from Procter by Bell under false pretences.

There are many decisions in this and other provinces upon the subject of fraudulent preference by a debtor under provincial enactments, prior to the passing of the Bankruptcy Act.

In *Johnson* v. *Hope* (1889), 17 A.R. (Ont.) 10, it was held by the Ontario Court of Appeal that, as the statute then stood, it must be shewn that the grantee had knowledge or notice of

the embarrassed condition of the debtor before a transaction could be avoided as a fraudulent preference under the Ontario Act. This view appears to have been taken by the Supreme Court of Canada in *Baldocchi* v. *Spada* (1907), 38 Can. S.C.R. 577, although prior to that decision there was considerable judicial authority to the contrary. See *Gibbons* v. *McDonald* (1890), 18 A.R. (Ont.) 159, and *Schwartz* v. *Winkler* (1901), 13 Man. L.R. 493, at p. 505.

In *Johnson* v. *Hope*, *supra*, it was also held that where the creditor deals *bonâ fide* with the debtor and there is no concurrence of intent between the two the transaction cannot be impeached as a fraudulent preference under the Ontario Act. This view was confirmed by the Supreme Court of Canada in *Benallack* v. *Bank of B.N.A.* (1905), 36 Can. S.C.R. 120, a case decided under an Ordinance of the Yukon Territory almost identical with the Ontario and Manitoba statutes upon the same subject. That Ordinance as amended declared in sec. (2) that every gift, conveyance, assignment, transfer, etc., of goods, chattels, or effects, etc., made by any person when he is in insolvent circumstances or unable to pay his debts in full *with intent to defeat or delay or prejudice* his creditors or to give one or more of them a preference or which has such effect shall as against them be utterly void. Sec. 2 declared such gift, etc., void, whether made owing to pressure or not if it has the effect of defeating, delaying or prejudicing creditors.

In sec. 31 of the Bankruptcy Act as re-enacted by 10 & 11 Geo. V, ch. 34, sec. 8, the words "with intent to defeat, etc." found in the provincial enactments, are not used, but in place of them we find the words "with a view of giving such creditor a preference over the other creditors." This expression is the same as that used in the corresponding section of the English Act. See 1914, ch. 59, sec. 44 (Imp.). It has been held by the highest authority that the words "with a view" mean the same thing as "with an intent": *Ex parte Taylor; Re Goldsmid* (1886), 18 Q.B.D. 295, at p. 299, 56 L.J. (Q.B.) 195, 35 W.R. 148; *New, Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q.B. 19, 66 L.J. (Q.B.) 554; affirmed by the House of Lords, *sub nom. Sharp* v. *Jackson*, *supra*.

The Supreme Court of Canada held, in the *Benallack* case, *supra*, that in order to avoid the conveyance, it must be shewn, under the Yukon Ordinance, that it was made with intent to give a preference and there must be a concurrence of intent on the part of the creditor as well as on the part of the debtor. The English authorities decided under the Imperial Bankruptcy Act have laid down the principle that the primary duty of the

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Court was to construe the words of the statute rather than to depend on decisions prior to the statutory definition. See *Ex parte Griffith; Re Wilcoxon* (1883), 23 Ch. D. 69, 52 L.J. (Ch.) 717, 31 W.R. 878; *Ex parte Hill; Re Bird* (1883), 23 Ch. D. 695, 52 L.J. (Ch.) 903, 32 W.R. 177. But decisions of the Supreme Court of Canada interpreting the meaning and effect of a statutory enactment where the wording is almost identical should, I think, be followed in this Court until reversed or qualified by the higher Court in decisions arising under the Bankruptcy Act.

Section 31 (2) of the Bankruptcy Act is essentially the same as sec. 2 of the Yukon Ordinance under which the *Benallack* case, *supra*, was decided. In that case, Idington, J., who delivered the judgment of the Court, said at p. 128:—

"I cannot read this amending section 2 of the Yukon Ordinance as doing more than striking at the doctrine of pressure. If the words 'whether made owing to pressure or partly owing to pressure' had been inserted in the first section just after the word 'intent' the same legal effect would have been produced."

He quoted the view expressed by Sir William Ritchie in *Gibbons* v. *McDonald* (1892), 20 Can. S.C.R. 587, that there must be "a concurrence of intent on the one side to give and on the other to accept a preference over other creditors."

It appears to me to be necessary to consider what meaning is to be given to the word "pressure" as used in sub-sec. (2) of sec. 31. There is no interpretation of that word in the Act. In *Ross Bros.* v. *Pearson* (1905), 1 W.L.R. 338, Harvey, J., speaks of pressure as "force, demand, or request coming from the creditor." He cites, at p. 342, the following passage from the judgment of Romilly, M.R., in *Johnson* v. *Fesenmeyer* (1858), 25 Beav. 88, 53 E.R. 569; affirmed in 3 DeG. & J. 13, 44 E.R. 1174:

"Formerly it was supposed that in order to prevent a transaction being void as a fraudulent preference, it was necessary to shew something like coercion or pressure on the part of the creditor, and a reluctant yielding by the debtor. The term "pressure" has been retained, although now it is only calculated to mislead, as it has been decided that the only question in cases of this description is, whether the Act is voluntary on the part of the bankrupt."

In *Ex parte Blackburn; Re Cheesebrough* (1871), L.R. 12 Eq. 358, 25 L.T. 76, it was said that although the creditor knew the circumstances of the debtor to be desperate, the creditor is not debarred from pressing his debtor for payment, and if he did so and payment was made, such payment was not a fraud-

ulent payment. I would also refer to *Johnson* v. *F[illegible]nmeyer, supra; Ex parte Topham; Re Walker* (1873), L.R. 8 Ch. 614, 42 L.J. (Bcy.) 57; *Ex parte London & County Banking Co.; Re Brown* (1873), L.R. 16 Eq. 391, 42 L.J. (Bcy.) 112, 21 W.R. 842; *Smith* v. *Pilgrim* (1876), 2 Ch. D. 127, 34 L.T. 408. In all these cases and in many more that might be cited, the word "pressure" was used in the sense of compulsion, force or influence which, coming from the creditor, operated on the debtor and caused him to make payment or give the security.

In *Bills* v. *Smith* (1865), 6 B. & S. 314, 122 E.R. 1211, 34 L.J. (Q.B.) 68, there was a total absence of pressure by the creditor who had not even asked for his money. Blackburn, J., at the trial directed the jury that if the bankrupt, though aware that bankruptcy was unavoidable and though no application had been made for payment, paid the debt simply in discharge of his obligation to pay on a given day, without any view to give a preference to this particular creditor, the payment would not be a fraudulent preference. The jury found for the defendant (the creditor). On an application for a new trial, Cockburn, C.J., in giving the judgment of the Court, refusing the motion, discussed the doctrine and effect of pressure and then proceeded at pp. 321-2:—"The effect of pressure, therefore, in legalising the payment is only that it rebuts the presumption of an intention on the part of the debtor to act in fraud of the law, from which fraudulent intention alone arises the invalidity of the transaction. But if the fact of pressure by the creditor only operates in the way pointed out, *why may not any other circumstance*, which in like manner would serve to repel the presumption of fraudulent intention, be available for this purpose? . . . . But if there are circumstances by which the presumption may be rebutted, these circumstances, whatever they may be, are for the consideration of the jury, and cannot properly be withdrawn from them; and a direction to the jury that, although the transaction was apparently voluntary on the part of the debtor, if the effect of the evidence on their minds is to satisfy them that the desire to give a fraudulent preference was not the motive operating on the debtor in handing over his assets to the particular creditor, they ought to uphold the transaction, is in our opinion, perfectly correct."

As evidence is still admissible to rebut the *primâ facie* presumption that the security was given with a view, that is, an intent to give a preference, is it not permissible to shew what was the real motive of the debtor in giving it?

There is, however, a passage in Lord Halsbury's judgment in *Sharp* v. *Jackson*, already cited, which requires careful con-

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sideration. He was dealing with the effect produced by apprehension of legal proceedings upon the mind of the debtor, although the creditor had made no threat that he contemplated such a step. After quoting from Lord Mansfield's judgment in *Thompson* v. *Freeman* (1786), 1 Term. Rep. 155, the Lord Chancellor said at p. 425:—"My Lords, it seems to me that after that decision, which, as I say, has now lasted more than a hundred years, and has never, so far as I know, been controverted or qualified, it is idle to suggest that you must have an actual threat or the *actual pressure* of a creditor."

He then applied the principle laid down by Lord Mansfield to the case under consideration and drew the conclusion that, although no one had threatened the bankrupt with criminal proceedings, the facts indicated that what was in the bankrupt's mind was that he might probably be prosecuted for an act of misconduct of which he had been guilty. Lord Halsbury then proceeded:

"If what the Legislature had in view was the exercise of a voluntary right on the part of debtors to do what they pleased, the mere voluntary deciding (I will not use the word 'preferring') to pay one creditor and to leave another creditor unpaid, if that is really what the Legislature intended to prohibit by positive enactment, then can it be said that it was a mere voluntary decision on the part of this particular bankrupt that he would favour one set of creditors rather than the other, when in truth and in fact it was an endeavour to save himself from a criminal prosecution which induced him to do the act in question? It becomes then no longer a voluntary act, but an act under pressure—pressure not the less because it is pressure upon his own mind and his own consciousness—from an apprehension of what will happen if bankruptcy takes place; not a pressure by threats of creditors to assert their rights."

The above passage deals with actual pressure, where the debtor yields to threats by his creditor, and, secondly, with the impulse which arises in the mind of the debtor through apprehension of prosecution or other drastic proceedings against him, although there was no threat or request by the creditor. If the security was given by the debtor under the influence of either of these motives it was not given voluntarily. Because either would have the same effect they were both spoken of as *pressure*. But the secret fear which arises in a man's own mind, not induced by anything another person says or does, and which operates as the dominant motive for doing the act, can only be called "pressure" in a figurative sense. I would take the word as used in sec. 31 (2) to mean actual pressure in its original sense, the

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pressure which is brought to bear by a creditor upon his debtor, and not some secret motive under the impulse of which the debtor acts, but which is not actual pressure.

In the case in which Lord Halsbury was giving judgment, a solicitor had misapplied moneys of estates of which he was trustee. The breaches of trust might, when discovered, render him subject to various penal consequences. On the eve of his bankruptcy he made a settlement in favour of his *cestuis que trust*, without any request from them. It was held that this was not a fraudulent preference, the debtor's object being to shield himself.

Section 31 (2) declares that if any such conveyance, transfer, etc. (referring to the first part of the section) was made within 3 months before the commencement of the bankruptcy proceedings there is a *primâ facie* presumption that it was made with a view of giving a preference. As this is only a *primâ facie* presumption evidence is admissible to rebut it: *Codville* v. *Fraser* (1902), 14 Man.L.R. 12; *Craig* v. *McKay* (1906), 12 O.L.R. 121. Sub-section (2) also purports to exclude pressure as an element and to declare that evidence of pressure shall not be receivable or avail to support the transaction. But the question with what view the security was given is one of fact: *Bills* v. *Smith*, *supra*. The evidence offered to rebut the *primâ facie* presumption might disclose a dominant motive impelling the debtor to give the security, such as fear of prosecution or disgrace, although no actual pressure whatever had been used upon him. I do not think that it would be proper to exclude such evidence. It appears to me that this is a further reason why the word "pressure" should be confined to its natural meaning.

The affidavits made by Procter shew the means by which Bell obtained the money from him. Procter's affidavit of October 7 states positively that Bell obtained the $1,200 from him under false pretences. Bell in his affidavit admits this statement (along with others) to be "substantially correct"; but says that at the time he had no apprehension as to the possible consequences. It was easy for Bell after becoming bankrupt to make an affidavit as to his motive for giving the mortgage but it would be safer to infer that motive from the facts that occurred at the time and are not disputed. Bell, unknown to Procter, had been in the practice of borrowing from one person to pay another. We can infer that such a practice would become more difficult as it went on. Procter, unfortunately for himself, became a late, if not the very last, victim. A mortgage had been offered by Bell in the first instance, and it could not safely be refused when Procter became anxious and asked for it. To refuse it then

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might bring serious consequences. He must conciliate Procter and so the mortgage was given. In this, as in the *New, Prance & Garrard* case, *supra*, the debtor was not actuated by "any feeling of bounty" towards the person to whom the security was given, but the real object was to conciliate him, to quiet him for the present and to gain time. The mortgage I would infer was given, not for the purpose of preferring Procter, but for the benefit of Bell himself. Macdonald, J., appears to have drawn the same inference. He says:—

"What was in his [Bell's] mind at the time of giving the security might most reasonably be the false pretences under which he secured the friendly assistance of Procter and the carrying out of his offer of the security at the time."

I agree with the view my brother Dennistoun takes of the plaintiff's claim upon the debtor's exemption. If the mortgage is good as against the assignee it can be enforced against the land. If the mortgage is not good as against the assignee I do not see how it could be enforced against such an intangible interest as the debtor's right to exemption. That right might be terminated at any time by the debtor moving out of the house. The $1,500 representing the exemption must, in case of a sale by the assignee, be paid to the debtor before he can be compelled to give up possession. It would be difficult for the creditor to intercept this money if the debtor refused to give it up.

For the reasons I have given in the earlier part of my judgment I would dismiss the appeal.

CAMERON, J.A. (dissenting):—This is an appeal from the judgment of Macdonald, J., on a motion to set aside a certain mortgage made by Allan B. Bell, the insolvent, to Percy J. Procter, dated July 14, 1921, to secure the sum of $1,200, under the Bankruptcy Act. The motion was heard on affidavits and the facts are set out in the reasons for judgment of Macdonald, J., who held the mortgage valid and dismissed the motion.

By sec. 8, ch. 34, 1920, sec. 31 of the Bankruptcy Act, ch. 36 of the statutes of 1919 was repealed and the following substituted therefor:—

"31. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incurring, taking, paying or suffering the same,

or if he makes an authorised assignment, within three months after the date of the making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy or under the authorised assignment.

(2) If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *primâ facie* to have been made, incurred, taken, paid, or suffered with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

(3) For the purpose of this section, the expression 'creditor' shall include a surety or guarantor for the debt due to such creditor."

The decision in *Benallack* v. *Bank of B.N.A.*, *supra*, turned on the construction of the Yukon Ordinance, the text of which is to be found in the judgment of Craig, J., who delivered the judgment of the Territorial Court affirming the judgment of Dugas, J., at the trial dismissing the plaintiff's action, at p. 126. Section (1) of the Ordinance resembles sub-sec. (1) of sec. 31 of the Bankruptcy Act, except while the latter has the words, "with a *view* of giving such creditor a preference over the other creditors," the former has the words "with *intent* to defeat or delay or prejudice his creditors or to give one or more of them a preference, etc." Also the words "which has such effect" are found in the first section of the Ordinance but not in sub-sec. (1) of the Bankruptcy Act. There are other differences not very material.

Section 2 of the Ordinance is as follows:—

"2. Every such gift, conveyance, assignment, transfer, delivery over or payment, whether made owing to pressure or partly owing to pressure or not, which has the effect of defeating, delaying, or prejudicing creditors or giving one or more of them a preference, shall, as against the other creditors of such debtor, be utterly void."

The apparent effect of that sub-section is to make every conveyance to a creditor prejudicial or preferential as to other creditors whether or not made owing to pressure or partly owing to pressure utterly void. Under sub-sec. (2) of the Act a similar situation merely purports to create a presumption that the conveyance was made with a view to a preference whether it was made voluntarily or not or under pressure.

Idington, J., who gave the judgment of the Court in the *Benallack* case, says of sub-sec. (2) of the Ordinance, which was

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passed after the decision in *Molsons Bank* v. *Halter* (1890), 18 Can. S.C.R. 88:—

"Does it do more than remove the question of pressure out of consideration in arriving at a proper conclusion in a case falling within the first section which was practically passed upon by the decisions referred to? I think not. 'Every *such* gift, &c.,' evidently means that class or those classes designated by the preceding section."

The decisions he refers to are *Molsons Bank* v. *Halter, supra; Gibbons* v. *McDonald, supra,* and *Stephens* v. *McArthur* (1891), 19 Can. S.C.R. 446.

It does not appear in that case, *Benallack* v. *Bank of B.N.A.*, that the securities impeached were defended as having been obtained under pressure, but rather as having been taken by the bank in the ordinary course of business without knowledge by the bank of the debtor's insolvent circumstances. It was on the ground of want of concurrence by the bank in the fraudulent intent that the securities were upheld. Idington, J., says that there has been a long line of decisions to the effect that such concurrence is necessary to avoid a transaction under the ordinance and though there had previously been no express decision of the Supreme Court he adopts the dictum of Chief Justice Sir William Ritchie in *Gibbons v. McDonald, supra,* that there must be a "concurrence of intent on the one side to give and on the other to accept a preference over the other creditors."

He adds that until the Legislature obliterates the element of intent and plainly declares that the result of the transaction is to govern it will be difficult to arrive at any other conclusion.

In *Baldocchi* v. *Spada, supra,* the transaction there impeached as a preference was upheld on the ground that the creditor had no reason to know of the debtor's insolvency.

The decision in the *Benallack* case was followed by Orde, J., in *Re Webb* (1921), 64 D.L.R. 633, where he discussed this section of the Act. He says (p. 636):—

"But it seems still to be necessary, in order that the transaction may be held to have been entered into 'with a view of giving such creditor a preference' that the creditor was aware of the insolvent condition of the debtor."

On the facts of the case before him he held that the mere taking of security by a creditor did not impute to him knowledge of the debtor's insolvency and he upheld the security impeached in the proceeding. In the case before us there can be no question that Procter had no knowledge of the insolvency of the debtor.

We are now confronted with the question as to the state of the law in England bearing on the subject now before us. The

provisions in our sec. 31 are found in the English Bankruptcy Act of 1869, ch. 71, sec. 92, which, however, ended with this proviso: "This section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration."

It was on this proviso that the decision of the House of Lords hinged in *Butcher* v. *Stead* (1875), L.R. 7 H.L. 839, 44 L.J. (Bcy.) 129, 24 W.R. 463. Lord Cairns in that case construed the word "payee" as meaning "person receiving payment as a creditor" thus covering the case of the creditor involved in the proceedings who had received payment for goods from a debtor on the eve of insolvency entirely without knowledge of the debtor's circumstances. That Act was repealed by the Bankruptcy Act of 1883, ch. 52 (see sec. 169), and the above proviso was struck out and does not appear in sec. 48, corresponding to former sec. 92. Nor does it appear in sec. 44 of the Act 1914, ch. 59. In these two last-mentioned Acts the saving clause to the section saves only the rights of those making title *bonâ fide* through a creditor.

The effect of the decision in *Butcher* v. *Stead*, *supra*, was to leave the doctrine of pressure where it stood before the Act of 1869. As stated by Lord Mansfield in *Thompson* v. *Freeman*, *supra*, cited and followed in *Sharp* v. *Jackson*, *supra*: "A bankrupt when in contemplation of his bankruptcy cannot by any voluntary act favour any one creditor; but if, under fear of legal process, he gives a preference, it is evidence that he does not do it voluntarily."

As Lord Halsbury says of that statement of the law in *Sharp* v. *Jackson*, *supra*, at p. 425: "There is the principle stated—it is not a voluntary act; and, as Lord Cairns says, the word 'preference' here imports in it the voluntary act of a person who can do either the one thing or the other as he prefers."

And he cites the further statement of Lord Mansfield:—

"And though the defendant in this case had taken no steps to secure himself, in case he was called upon, yet the bankrupt, acting from mistake, was under the same apprehensions of legal process as if the defendant had actually *threatened* her; so that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundless that might be."

Lord Halsbury adds at p. 426:—

"It becomes then no longer a voluntary act; but an act under pressure—pressure not the less because it is pressure upon his own mind and his own consciousness from an apprehension of

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what will happen if bankruptcy takes place; not a pressure by threats of creditors to assert their rights."

The authorities and decisions under the successive sections of the English Bankruptcy Acts relating to fraudulent preference are dealt with in Williams' Bankruptcy Practice, 12th ed. 294; *Ex parte Griffith; Re Wilcoxon, supra,* and *Ex parte Hall; In re Bird, supra,* are referred to, p. 294, as settling the law that it is sufficient to constitute a statutory fraudulent preference that the preferring the creditor should have been the substantial, effectual and dominant view with which the debtor made the preference, and that it was not necessary it should have been his sole view. Both these decisions are by the Court of Appeal.

At p. 300 the author says:—"The result of omitting the preferred creditor from the saving clause at the end of the fraudulent preference section seems to be that questions as to the *bonâ fides* of the creditor will no longer arise."

It was held in *Stephens* v. *McArthur* (1890), 6 Man. L.R. 496, by the Full Court of this province that to set aside a conveyance as a preference under the provincial Act then in force it was not necessary to prove notice to the transferee or creditor. The judgment in that case was reversed in the Supreme Court, 19 Can. S.C.R. 446, but not on that point, as stated by Killam, C.J., in *Schwartz* v. *Winkler* (1901), 13 Man. L.R. 493, where he reiterated the views previously expressed by the Full Court. The expressions used by Strong, J., in *Stephens* v. *McArthur* in the Supreme Court at p. 456, indicate he considered notice to the creditor immaterial.

The judgment of the Supreme Court in *Gibbons* v. *McDonald, supra,* affirmed the judgment of the Ontario Court of Appeal, upholding the security there impeached as given in consequence of pressure. Strong, J., expressly bases his decision on this ground. Ritchie, C.J., held that the case was disposed of by the previous decision of the Supreme Court in *Molsons Bank* v. *Halter, supra.*

In *Codville* v. *Fraser* (1902), 14 Man. L.R. 12, the Full Court held that the dominant "motive" of the debtor under the Manitoba Act as under the English Bankruptcy Acts was what the Court must seek for to determine the character of the transaction and that the knowledge of the creditor was immaterial. Killam, C.J., considered that the amending Act there in question had eliminated the factor of pressure.

The judgment of the Supreme Court in the *Benallack* case (1905) is at variance with the decisions of the Manitoba Courts on the necessity of concurrence on the part of the creditor to

avoid a conveyance as a fraudulent preference under the provincial legislation in question. All the relevant decisions of Canadian Courts deal with provincial or territorial legislation concerning assignments.

It seems to me that it is open to argument that sub-sec. (2) of sec. 31 of the Act does not enlarge or modify the preceding sub-section. When it says "if any such conveyance, etc.," it refers to conveyances mentioned in the preceding sub-section, which are voluntary acts of the debtor intended to give a creditor a preference. To say, as sub-sec. (2) says, that conveyances made with a view of giving a creditor a preference shall, if they have the effect of giving a preference, be deemed *primâ facie* voluntary, whether voluntary or not, seems meaningless and inoperative. How can it be that a conveyance made to give a preference can have any other effect than that of giving a preference? If it be made for that purpose it comes within sub-sec. (1) and is therefore void and sub-sec. (2) is superfluous. It is, moreover, a singular kind of a rebuttable presumption when evidence to displace it is inadmissible and, if it does get in, avails nothing. I must confess I find it difficult to arrive at the precise meaning of this elusive subsection.

If the view that the sub-section is inoperative be ultimately adopted the law concerning pressure would be restored. It may be that the aim of Parliament in this enactment was to drive out that law because it has in some respects in various jurisdictions been excessively refined, as, for example, a mere demand by a creditor having been held a sufficient proof of pressure, and, perhaps, because it necessarily implied the consideration of "motives," "mixed motives," "views" and "intents," a difficult subject for analysis and determination. However that may be, the sub-section is there and it is at least questionable whether its meaning is to be gathered from anything other than the words used in it.

But if in the Supreme Court somewhat similar provisions in provincial and territorial legislation making conveyances "utterly void" have been given the meaning of at least eliminating the factor of pressure, it is hardly now open to question that sub-sec. (2) of this Act, when any conveyance is attacked as having had the effect of giving a preference, has the result of creating a rebuttable presumption that it was made with a view of giving a preference whether the conveyance was voluntary or not and of eliminating the factor of pressure from consideration. The transaction is then to be judged in other respects in regard to the question of preference "with a legislative

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declaration of an inference to be drawn from the effect of the transaction" as stated by Killam, C.J., in *Schwartz* v. *Winkler*, *supra*, at p. 502.

Duncan in his recent work on The Law and Practice of Bankruptcy in Canada states that in deciding whether a transaction can be impeached under sec. 31 of the Act two important matters have to be determined, namely, whether the section requires proof that: (a) the preferred creditor had knowledge of the fraudulent intent of the debtor; and (b) that the preferred creditor had knowledge of the insolvency of the debtor.

He observes that in the decisions in Ontario on the provincial legislation it was held that both were necessary, unless on proof of the first the conclusion was that the creditor must have had knowledge of the second.

He further points out that there are two points of distinction between the provisions in the Bankruptcy Act and the statutes and ordinances on which *Johnson* v. *Hope* (1889), 17 A.R. (Ont.) 10, and other cases were decided. The first is the provision in the provincial Acts that nothing in the fraudulent preference section shall apply to "any *bonâ fide* sale or payment made in the ordinary course . . . . to innocent purchasers or parties." This is comparable to the proviso to sec. 92 in the English Act of 1869, on which *Butcher* v. *Stead*, *supra*, was decided where it was held that the proviso protected a creditor ignorant of the fact that he was being preferred. The second point of difference is that the words "with intent" are used in the provincial Acts where the words "with a view" occur in sub-sec. (1) of the Bankruptcy Act, and it is to the word "intent" that the secondary meaning implying a concurrence has been attached by the Canadian decisions. No such secondary meaning has in England been grafted on the words "with a view of giving a preference."

The two subjects, that of concurrence of intent and that of knowledge of the debtor's insolvency are so implicit in each other that they cannot be considered as wholly separate and distinct. Can there be an intent on the part of a creditor to secure a preference over other creditors without his knowledge of the debtor's embarrassed circumstances being implied? It is difficult to conceive of such a case. Or can there be a knowledge of the debtor's insolvency by a creditor who is being given security by the debtor without an intent on his (the creditor's) part to obtain a preference? It is also difficult to imagine such a case as that. In *Gibbons* v. *McDonald*, *supra*, Ritchie, C.J., held that there was in that case no concurrence of intent as there was no knowledge on the part of the creditor of the debtor's insolvency. At any rate in the case before us the mortgagee

had no knowledge of Bell's insolvency and it is not contended that he had any of Bell's intention to give him a security which operated to the disadvantage of the other creditors.

The *Benallack* case is an express decision that concurrence of intent must be established to invalidate a transaction as a fraudulent preference under the territorial legislation there in question and similar provincial enactments.

Nevertheless that decision is not in accord with decisions of the English Courts in which those Courts deal with the section in the English Bankruptcy Act from which the section in our own Act is taken. And, in considering the section before us, we must direct our attention to the history of the corresponding section of the English Bankruptcy Act and the decisions of the English Courts upon it. In these decisions it is made clear that the mental attitude of the debtor is the dominant consideration and that the knowledge of the preferred creditor is not material. Since the amendment of the Act of 1869 to which I have referred the *bonâ fides* of the creditor is in England no longer a factor.

"The knowledge of the creditor preferred or his privity to the circumstances is not to be taken into consideration in estimating whether a transaction is or is not a fraudulent preference." Kerr on Fraud and Mistake, 1920 ed., p. 255.

What we have to consider is the true construction of sub-sec. (1), and, in doing so, it is a wise policy to go back in a humble spirit to the words of the statute, as Bowen, L.J., observed in *Ex parte Griffith; Re Wilcoxon, supra*, at p. 75. There is in it nothing whatever about knowledge by the creditor of the debtor's intention, or of concurrence of intent or of *bonâ fides* on the part of the creditor being necessary to avoid the transaction. Nor is there a word or a phrase in it from which anything of the kind can, by any indirection, be inferred. We have the decisions in the English Courts of the highest authority on the corresponding section in the English Acts and they are unequivocally to the effect that knowledge of the creditor to whom the conveyance was given is not to be taken into consideration. The test is, what was the predominant motive in the debtor's mind? The creditor's knowledge of the debtor's mind or insolvency is not a factor.

I think we are entitled to consider the decision in the *Benallack* case as confined to the facts there in evidence and to the interpretation and construction of the ordinance (differing in some important respects from the section in the Bankruptcy Act) by which the legal consequences of those facts were governed in accordance with the principles laid down by Lord Halsbury

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in *Quinn* v. *Leatham*, [1901] A.C. 495, at p. 506, 70 L.J. (P.C.) 76, and recently acted on by this Court in *St. Vital Investments* v. *Halldorson* (1920), 56 D.L.R. 418, 30 Man. L.R. 573. The decisions in the House of Lords and in other English Courts on the section in the English Act from which our section is taken are clear in ignoring the element of the creditor's knowledge as being a factor in constituting a preference fraudulent. Moreover, the Supreme Court has intimated that it will follow a decision of the House of Lords though inconsistent with a previous judgment of that Court (i.e., the Supreme Court), per Anglin, J., in *Stuart* v. *Bank of Montreal* (1909), 41 Can. S.C.R. 516, at p. 548.

I think, therefore, it must be held that neither concurrence of intent nor knowledge of the debtor's circumstances on the part of the creditor is a factor in constituting a fraudulent preference under sub-sec. (1) of sec. 31.

The evidence on the motion before Macdonald, J., was all on affidavit. Boyd, an officer of the Traders Trust Co., the trustee, says in his affidavit that "the said debtor, with the view of giving the said Percy J. Procter a preference over the other creditors of the said debtor executed" the mortgage in question. Procter in his affidavit says that, in response to a request from him, Bell "came to my office and I told the said Bell that he had promised to give me security on the house in question in these proceedings and he stated that he was willing to do so and was very sorry he could not make good on the cheque."

Further on he states:—

"I say that the said mortgage is not preferential within the purview of the Bankruptcy Act" and that at no time was he aware of Bell's insolvent circumstances until "the latter part of July." In a second affidavit by Procter he states:—

"5. Looking back on the conduct of the said Bell at the various times that I saw him in connection with this transaction after giving him the said sum of $1,200.00 I now realise that the said Bell was afraid of the consequences of his act, and I verily believe that such was his condition of mind when he gave me the security in question in these proceedings."

As to this last statement Bell says in his affidavit: "I say that I had no apprehension as to the possible consequences referred to in the said affidavit but my only desire and intention was to give security to the said Percy John Procter for the payment of his claim against me," and that his only intention was to give Procter security for his claim. He admits the substantial correctness of the charge of false pretences made against him by Procter in his affidavit of October 7, 1921.

It will be observed that the above statements by Procter, so far as they are relevant to the question of intent, are general, founded on no specific source of information and therefore in themselves of doubtful admissibility as evidence. They are also met by the statement of Bell who denies that he was acting under apprehension. But, in view of Bell's admission as above, only the most tenuous consideration can be given to his assertions. In my opinion, however, it must be said that there is nothing before the Court on which to find that the presumption raised by sub-sec. (2) has been answered or even attempted to be answered. There cannot be said to be any evidence of pressure and, under that sub-section, if there were, it must be held inadmissible, and, if admitted, of no consequence whatever.

In my judgment the trustee is entitled to succeed on this appeal and the mortgage in question must be held fraudulent and void within the provisions of sec. 31 of the Bankruptcy Act and set aside accordingly.

On the other question argued arising from the application of the facts of this case of our provincial laws respecting exemptions I agree with the reasoning and conclusions of Dennistoun, J.A., whose judgment I have read.

Undeniably the result of the view I take is, so far as Procter is concerned, unfortunate. He acted throughout with the best motives and in entire good faith. But his legal rights are to be determined according to the provisions of the Act, which it is the duty of the Court to enforce without regard to extrinsic considerations.

I think the appeal of the trustee should be allowed.

DENNISTOUN, J.A.:—Bell, to whom I will refer as the debtor, has made an assignment under the Bankruptcy Act, 1919, ch. 36, to the Traders Trust Co., hereinafter called the trustee.

The debtor has an urban homestead which has been sold by the trustee for $7,250. There is an undisputed first mortgage on the property for $3,000, which the trustee is prepared to pay in full. There is a second mortgage to Procter for $1,200, which the trustee is attacking in these proceedings as a fraudulent preference and which the trial Judge has held to be valid. Hence this appeal.

The trustee has in his hands over and above the $4,200, which represents the mortgages, the sum of $3,050, out of which he is prepared to set aside $1,500 to satisfy the debtor's claim for his statutory exemption, and a balance of $1,550 for general creditors.

If the trustee can reverse the judgment appealed from he will have $1,200 to add to the $1,550 mentioned for general

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creditors. Procter claims that if his mortgage be set aside he is entitled to receive $1,200 of the $1,500 which the trustee is holding to satisfy the debtor's claim to exemption. The trustee, in effect, says he is obliged by the statute to pay the exemption money to the debtor.

The matter, therefore, narrows down to a contest between Procter and the debtor as to which of them shall have the money in the event of the mortgage being set aside.

Counsel for Procter argue that a conveyance fraudulent and void as against creditors is not void but voidable, and it is well settled that it is good as between the parties to it.

In *Curtis* v. *Price* (1805), 12 Ves. 89, at p. 103, 33 E.R. 35, the Master of the Rolls said:—

"A settlement of this kind is void only as against creditors; but only to the extent, in which it may be necessary to deal with the estate for their satisfaction, it is as if it had never been made. To every other purpose it is good."

Tanqueray v. *Bowles* (1872), L.R. 14 Eq. 151.

They urge further that the security mortgaged to Procter never was available to creditors.

Roberts v. *Hartley* (1902), 14 Man. L.R. 284, at p. 290:—

"It has long been established that the 13 Eliz. c. 5, applies only to the various kinds of property, real and personal, that at the time of the conveyance were subject to the payment of the grantee's debts or that could be reached by execution or otherwise; for a conveyance that disposes of property that creditors could never reach cannot be said to defeat, hinder, or defraud creditors."

Robin Hood v. *Maple Leaf* (1916), 26 Man. L.R. 238, at p. 250.

Procter contends that his mortgage being good against the debtor, the latter cannot have his exemption money until it has been first applied *pro tanto* in satisfaction of the mortgage debt by the trustee in bankruptcy.

This leads to a consideration of the point whether the claim to exemption is one which is personal to the debtor, or is one which he can alienate in favour of a creditor, and whether the making of the mortgage in question operated so as to bind the exemption money in the hands of the trustee in favour of Procter, the mortgagee, to the exclusion of the debtor.

The trustee in this case takes under an authorised assignment made under the provisions of sec. 10 of the Bankruptcy Act, 1919, ch. 36:—

"10. Every authorised assignment shall be valid and sufficient if it is in the form provided by General Rules or in words to the like effect; and an assignment so expressed shall, subject to

the rights of secured creditors, vest in the trustee all the property of the assignor at the time of the assignment excepting such thereof as is held by the assignor in trust for any other person and such thereof as is, against the assignor, exempt from execution or seizure under legal process in accordance with the laws of the province within which the property is situate and within which the debtor resides."

The trustee therefore can have no title to the exemption rights which pertain to this property. If this had been a homestead farm or an urban homestead of less than $1,500 in value the trustee would have taken nothing, and what he does take he can obtain only as the provincial statutes give it to him. Reference must therefore be made to those Acts, which are the Executions Act, R.S.M. 1913, ch. 66, and the Judgments Act, R.S.M. 1913, ch. 107.

Those statutes indicate the method by which the exemption right of the debtor in an urban homestead exceeding $1,500 in value can be separated from the property which is available for creditors.

The trustee must follow the procedure laid down by those Acts, and the power of sale given him by the Bankruptcy Act, sec. 20, can only be exercised in conformity with the procedure prescribed by the provincial statutes.

When the trustee undertakes to sell a debtor's urban homestead he must do so in the manner indicated in sec. 9 of R.S.M. 1913, ch. 107. He may offer it for sale, and provided a greater sum than $1,500 be offered, such property may be sold, but the amount to the extent of the exemption shall at once be paid over to the said debtor; and such sum until paid over to the debtor, shall be exempt from seizure under execution, garnishment, attachment for debt, or any other legal process. Provided that no such sale shall be made unless the amount offered shall, after deducting all costs and expenses, exceed $1,500, and that *no such sale shall be carried out or possession given to any person thereunder until the amount of the exemption shall have been paid over to the debtor entitled to such exemption.*

This leads to an enquiry as to what rights the debtor has over his claim to exemption. Can he sell it or mortgage it? Can he pledge it to a creditor? When he places a mortgage of ordinary type upon his homestead does he thereby agree to waive or abandon his exemption privileges in the event of the mortgage being declared void as against general creditors?

The cases, in my humble judgment, shew that the debtor is free to part with or restrict his interest in the property by sale or mortgage; that his exemption right is confined to the interest

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which remains to him. When he sells, his interest is gone, and there is nothing to which an exemption claim can attach; when he mortgages, his interest is reduced to the equity of redemption and his exemption right attaches to that alone.

I will refer as briefly as possible to a few of the cases which are authority for this proposition.

The owner of a homestead may alienate it at his pleasure. He is entitled to dispose of it as he sees fit, and may convey free from the operation of writs of execution which have been registered against it while it was his homestead: *Northwest Thresher Co.* v. *Fredericks* (1911), 44 Can. S.C.R. 318.

The owner of an urban homestead may mortgage it if he so desires. If he do so his interest in the property is confined to the equity of redemption. It is the equity of redemption only which is available to judgment creditors and the exemption rights of the owner are likewise confined to that equity of redemption: *Hockin* v. *Whellans* (1890), 6 Man. L.R. 521; *Purdy* v. *Colton* (1908), 1 S.L.R. 288; *Love* v. *Bilodeau; In re Exemption Ordinance* (1912), 7 D.L.R. 175, 5 Alta. L.R. 348; Scott on Homesteads and their Exemptions, p. 23.

In *Ontario Bank* v. *McMicken* (1890), 7 Man. L.R. 203, Killam, J., says at p. 221:—

"Where the property is mortgaged it is necessary that the equity of redemption should be above the prescribed value to make it chargeable with a judgment debt. It is only the interest of the debtor that is charged. It is only a question of the value of his interest and not of the value of the entire fee simple. It is only to be sold if more than $1,500 be offered for it, which cannot be expected if the equity of redemption be not above $1,500 in value and the onus of shewing that is on the plaintiff."

The giving of a mortgage on property which is subject to homestead exemption rights operates merely as a postponement of those rights to the rights of the mortgagee. The mortgagor in effect says: "Take my property as security for your debt and I will look to the equity of redemption for the satisfaction of my claim for exemption."

In *Hockin* v. *Whellans, supra,* it is stated, at p. 526:—"As to the third point, that the defendant has lost his homestead right by alienating his property in favour of Alloway and Champion, the evidence shews that it was not a complete and absolute conveyance, but only a security given by way of mortgage. The defendant retains still the equity of redemption and may redeem at any time to save his homestead. He has not, therefore, parted with his property, nor evinced any intention

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to do so. That does not deprive him of his homestead exemption right."

So long as the debtor remains in occupation of his homestead no question of exemption arises. It is only when some person comes forward to dispossess or eject him that the rights of all parties must be ascertained and adjusted under the statute.

In this case it is the trustee in bankruptcy who is about to dispossess the homesteader. He has arranged a sale of the property for $7,250. He proposes to pay the first mortgagee $3,000 in full settlement of his security. He is prepared to pay the debtor $1,500 in cash in satisfaction of his exemptions; and he attacks the second mortgage for $1,200 as void against creditors. The second mortgagee says in effect: "It is useless to attack my security for if you succeed in having it declared void as against creditors it is nevertheless good as between the debtor and myself, and as you admit you have $1,500 to give him in lieu of his exemption rights in the homestead you must give $1,200 of that money to me, for I stand in the debtor's shoes so far as it is concerned."

With respect I am unable to agree with the view of the trial Judge on this point. The $1,500 exemption is not designed for any purpose other than to provide shelter for the debtor and his family as a matter of public policy, and while it retains its characteristics is never available for the payment of debts. It is a right personal to the debtor. The debtor cannot assign or transfer it *qua* exemption. It is only after he has received it in cash that he is free to determine that he will pay it over to a creditor.

By sec. 41, ch. 66, R.S.M. 1913, the Executions Act:—

"Every agreement to waive or abandon an exemption from seizure or a benefit, right or privilege of exemption from seizure under this Act and every arrangement, contract, or bargain, verbal or written, under seal or otherwise, made or entered into with or without valuable consideration, whereby an attempt is made to prevent any person from claiming the benefit, right or privilege of exemption under this Act, shall be absolutely null and void."

Assuming that the mortgage to Procter be set aside as void against creditors, the trustee in bankruptcy is entitled to realise upon the property which was the subject of that charge as freely as if it had never been created.

If he can arrange a sale of the equity of redemption in the property for more than $1,500 and proposes to eject the debtor from his homestead, then for the first time the right to exemption arises, and before the trustee can carry out the sale, or

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give possession of the property he must pay over to the debtor the full amount of the exemption, R.S.M. ch. 107, sec. 11.

Such payment must be made to the debtor personally for the statute says so, and only by following its provisions strictly can the trustee give title to his purchaser. The right (if any) of the mortgagee to be recompensed for the loss of his charge on the land out of the exemption money is one which does not concern the trustee, or the general creditors, whom he represents. The dispossessed mortgagee must enforce that claim (if at all) against the debtor personally.

The debtor on receipt of his $1,500 may forthwith invest it in another homestead for, as previously stated, it is part of public policy which underlies exemption law that he and his family be provided with shelter rather than become a charge on the public through destitution. *Re Demaurez* (1901), 5 Terr. L.R. 84; *Osler* v. *Muter* (1892), 19 A.R. (Ont.) 94; *Re Hetherington Interpleader* (1910), 3 S.L.R. 232.

"The leading and fundamental idea connected with a homestead is unquestionably associated with that of a place of residence for the family, where the independence and security of a home may be enjoyed without danger of its loss or harassment or disturbance by reason of the improvidence or misfortune of the head or any other member of the family. It is a secure asylum of which the family cannot be deprived by creditors." Thompson on Homesteads, pp. 85-6.

Assume for the moment that the debtor has given Procter an absolute conveyance of his equity of redemption and not a mortgage. Will it not be admitted that Procter must be in a stronger position than if he had contented himself with a mortgage charge upon the land?

Roberts v. *Hartley, supra,* deals with this point and decides that when a debtor has absolutely conveyed all his interest in the land on which he resides by a conveyance valid and binding on him, even when set aside by the Court as against creditors, the claim that the land is an exemption can no longer be maintained. This confirms the conclusion previously reached that the grantee takes only the interest in the land which the debtor can give him, and the grantee has acquired nothing of the debtor's right to exemption. It does not run with the land but is personal to the debtor alone.

If that be the case when the debtor by a transfer in fee simple gives the largest grant of his interest known to the law, it seems to follow beyond doubt that a mortgagee can stand in no better position than a grantee.

It is true that when a mortgage is given the exemption right

has not been abandoned, for in such case the land still remains the debtor's homestead, but the right to claim the benefit of that exemption is affected no more by the one form of alienation than it is by the other.

The only remaining point is that by some marshalling of interests the right of exemption may be shifted backwards and forwards upon the equity of redemption so that when the trustee comes to take Procter's security he will find substituted for it the debtor's right to exemption.

But that cannot be, for the method of ascertaining and segregating the exemption right is clearly defined by the statute. There must be a sale and a setting aside of $1,500 in money which must be paid to the debtor and until that payment be made the debtor can retain possession of the homestead and defy the trustee.

The exemption rights considered by Mathers, C.J. in *Robin Hood* v. *Maple Leaf, supra,* are, in my judgment, different from those which pertain to an urban homestead in so far as general creditors are concerned.

The tools of a debtor and his farm homestead are exempt from execution. General creditors cannot touch them, and there can be no fraudulent preference given in respect to them for they could not have been taken in execution even if the conveyances or charges placed upon them had never been made. But an urban homestead is in a different position. When it exceeds $1,500 in value, general creditors have a right to sell and realise under execution—provided a sum of money taken from the proceeds of the sale is given to the debtor.

The principles which underlie the decision in *Robin Hood* v. *Maple Leaf, supra,* do not apply, in my opinion, and the cases are clearly distinguishable.

The urban homestead exemption right is dependent upon the wording of the statute and the strictest compliance with its terms is imperative.

That the preferred creditor has no control over the right *qua* exemption is demonstrated by the fact that it exists only so long as the debtor is willing to have it so. The moment he abandons his homestead, the right to exemption is gone. It is the debtor's occupation to which the right is attached and, in my view, it can never be severed therefrom. It is never open to a creditor to assert a right to receive the debtor's exemption money, the land having been disposed of by creditors, for there is no way such creditor can shew title to it, it must go to the debtor in satisfaction of his right of occupation of which he is deprived *in invitum.*

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In this case Bell, the debtor, is opposing the claim of Procter for he has assumed to give a power of attorney to the trustee to receive his exemption money and distribute it among general creditors. Procter is endeavouring to obtain the money against the claims of the trustee and the debtor. With regret I arrive at the conclusion that he cannot do so for he has acted honestly and generously and has been cruelly defrauded. With much respect I am unable to uphold the judgment appealed from on this point.

I will now attempt to deal with the other branch of the case on which it was held by Macdonald, J., that this mortgage does not create a fraudulent preference within the meaning of sec. 31 of the Bankruptcy Act.

This involves a consideration of the question, is this Court to follow the decisions of Canadian Courts including the Supreme Court of Canada, pronounced prior to the passage of the Bankruptcy Act in cases under provincial laws relating to assignments and preferences, or is this Court to follow decisions of the House of Lords upon sec. 48 of the English Bankruptcy Act of 1883, ch. 52, which is for all practical purposes, identical with sec. 31 of the Canadian Act, with one important exception, to which I will refer? *New, Prance & Garrard's Trustee*, v. *Hunting, supra*, affirmed *sub nom. Sharp* v. *Jackson, supra.*

The English Act does not contain sub-sec. (2) as we have it.

It is difficult to say what this sub-section means as pointed out by my brother Cameron, but it seems in any event to prohibit Canadian Courts from taking into consideration the doctrine of pressure which has been, and still is, the deciding factor in many English cases. *Benallack* v. *Bank of B.N.A., supra.*

If the case at Bar had come up for decision under the English Act, I think the mortgage attacked would have been declared valid, for there was here the pressure upon the consciousness of the debtor, the fear of criminal proceedings, and of disbarment as a barrister which has been referred to as the "heaviest pressure to which a defaulter can be subjected." *Molsons Bank* v. *Halter*, 18 Can. S.C.R. 88, at p. 95.

In *Sharp* v. *Jackson*, [1899] A.C. 419, at p. 426, Halsbury, L.C. says:—

"Can it be said that it was a mere voluntary decision on the part of this particular bankrupt that he would favour one set of creditors rather than the other, when in truth and in fact it was an endeavour to save himself from a criminal prosecution which induced him to do the act in question? It becomes then no longer a voluntary act, but an act under pressure—pressure not the less because it is pressure upon his own mind and his own

consciousness—from an apprehension of what will happen if bankruptcy takes place; not a pressure by threats of creditors to assert their rights."

In *Molsons Bank* v. *Halter, supra,* a judgment pronounced when pressure was recognised as depriving a transaction of its voluntary character in Ontario, Strong, J., says, at p. 95, and Taschereau, J., concurs at p. 96:—"It is held that a mere demand is sufficient pressure by a creditor to take away from a conveyance, transfer, or mortgage the character of an unjust preference, and if the pressure of the creditor is thus sufficient to shew that such a transaction is not a voluntary preference, how much more effectual for that purpose should be the pressure caused by the consciousness of the trustee, that if he fails to make good his abstractions from the fund he will subject himself to penal consequences. In such a case it could never be said that the act of restoration, if impeached as a preference, was voluntary or spontaneous, or made otherwise than under the weight of the heaviest pressure to which the defaulter could be subjected."

It may well be that the abolition of the doctrine of pressure in Canada and its retention in England is so material a difference in the legislative policy underlying these statutes that the Supreme Court of Canada when called upon to consider this section will prefer its own reasoning in the *Benallack* case, *supra,* and hold that the substitution of the word "view" in the Bankruptcy Act for the word "intent" in the Yukon Ordinance, is not a sufficient ground for reversing a legislative policy which has been upheld in a "long line of decisions upon which the commercial world has had a right to act for a long time past." Idington, J., at p. 129 (36 Can. S.C.R.).

That Judge gave the judgment of the Court to the effect that both assignor and assignee, that is, the debtor and the preferred creditor, must have "a concurrence of intent on the one side to give, and on the other to accept a preference over other creditors," and he proceeds to say at p. 129: "Until the legislature obliterates the element of intent in such legislation and clearly declares that, quite independently of intent, the preferential result or effect of the transaction impeached is to govern, it will be exceedingly difficult to arrive at any other conclusion in cases of this kind."

The Legislature may have attempted to make the *result or effect* of the transaction impeached the sole criterion by sub-sec. (2), but, in my view, the introduction of the word "such" has rendered that attempt futile, and we are thrown back upon sub-sec. (1) to pass upon the "view" which governs the transaction. If there was a view of giving a preference the transfer is a fraud

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on creditors. If there was no such view the transfer may be held valid and sub-sec. (2) will not apply.

I am not prepared to take the responsibility of saying that by the substitution of the word "view" for the word "intent" the Legislature has made a clear declaration of a fundamental change of policy, and has intended that hereafter following the English cases "view" is restricted to that of the debtor alone, and the "view" of the creditor is not to be taken into consideration.

Lord Halsbury seemed to think that in legislation of this kind several words may be synonymous for in *Sharp* v. *Jackson, supra,* at p. 421 ([1899] A.C.) he says: "It depends on what was in his mind. Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much," and again at p. 422, he says: "It seems to me clear, therefore, that he made this conveyance not with the 'intention' or 'view' or 'object' or whatever it may be called of preferring these persons, but for the sole purpose of shielding himself. Under these circumstances what he did is not a fraudulent preference under the Bankruptcy Act."

Lord Esher expresses the same opinion in almost the same words in *New, Prance & Garrard's Trustees* v. *Hunting, supra,* at p. 27.

It appears from the evidence in this case that Procter had no knowledge of the impending bankruptcy of Bell and had no "intention," or "view," or "object," of obtaining a preference over other creditors when he took the security in question. That being so the judgment of the Supreme Court of Canada in the *Benallack* case is in point unless the substitution of "view" for "intent" has entirely changed the well settled law.

This point was before Orde, J., in *Re Webb, supra.* At p. 636 (64 D.L.R.) he says:—

"It seems still to be necessary, in order that the transaction may be held to have been entered into 'with a view of giving such creditor a preference' that the creditor was aware of the insolvent condition of the debtor. There must still, as held in *Gibbons* v. *McDonald* (1892), 20 Can. S.C.R. 587, and in *Benallack* v. *Bank of B.N.A.* (1905), 36 Can. S.C.R. 120, 'be a concurrence of intent on the one side to give and on the other to accept a preference over other creditors.' "

Orde, J., does not deal with the point which has been so strongly pressed in argument upon this Court, that the decisions on the English Bankruptcy Act have now displaced the authorities upon which he relies, and that it is the "view" of the debtor alone which is to be ascertained, the "view" of the creditor having no effect whatsoever upon the transaction.

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It may well be that when this point reaches the Supreme Court of Canada that Court will distinguish it from the *Benallack* case and adopt the view of Sir Montague E. Smith in *Trimble* v. *Hill* (1879), 5 App. Cas. 342, at p. 344, 49 L.J. (P.C.) 49:—

"Their Lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in *England* are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it."

See also *Stuart* v. *Bank of Montreal* (1909), 41 Can. S.C.R. 516, per Anglin, J., at p. 548; also *Quinn* v. *Leatham, supra.*

Stare decisis is a duty which devolves upon all Courts in order that the business of the country may be carried on with confidence and certitude. Bankruptcy law now runs throughout the Dominion and uniformity of decision is essential; nevertheless there will be great differences in the results which are to be recorded in England and in Canada so long as the English law retains the doctrine of pressure and the Canadian law discards it, and the Canadian law retains the doctrine of common or concurrent intent to prefer, and the English law discards that.

In the meantime and until some higher Court settles the point, I prefer to hold with the decision quoted from Ontario upon sec. 31 of the Bankruptcy Act, and the long line of cases upon the Assignments and Preferences Acts, that there must be a common or concurrent view on the part of the debtor and the creditor to create a preference, before sec. 31 (1) of the Bankruptcy Act applies.

On this ground I would dismiss the appeal with costs.

Appeal dismissed.

Re McCLURE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Hodgins, J.A., and Latchford and Lennox, JJ. November 18, 1921.

WILLS (§IIIA—75)—DIRECTION TO EXECUTORS TO SELL FARM AND DIVIDE PROCEEDS—TESTATOR HIMSELF SUBSEQUENTLY SELLING FARM AND TAKING MORTGAGE — CONSTRUCTION—REVOCATION—DISTRIBUTION UNDER WILL.

By his will a testator directed that his executors should sell his farm and divide the proceeds between his sons as directed; after the date of his will the testator himself sold the farm, part of the purchase price being secured by a mortgage. The Court held that the sale merely anticipated the conversion which the will directed and was in no way a revocation of the will, but only made the proceeds more ready for distribution in accordance with its terms.

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APPEAL by executors from a judgment of Middleton, J., on a motion, upon originating notice, for an order determining a question arising upon a will.

The judgment appealed from is as follows:—

"The testator died on the 7th August, 1921, having first made his will, which bears date the 22nd May, 1919, and which has been duly admitted to probate.

By this will the testator directed that his executors should sell his farm, lots 14 and 15 in the 8th concession of Vaughan, and divide the proceeds into two parts, five-sevenths and two-sevenths respectively, the five-sevenths to be paid to his son George and the remamining two-sevenths to his son William.

After the date of his will, the testator himself sold the farm; part of the purchase-price, $4,100, being secured by a mortgage thereon The only asset which has apparently come to the hands of the executors is this mortgage. The applicants contend that the will of the testator, as to the property dealt with by it, must be interpreted as though executed immediately before his death, and that, therefore, the devise fails because the farm had already been sold and the will could not operate upon it. The mortgage was personalty and passed as personalty. In support of this reliance is placed upon *Re Dods* (1901), 1 O.L.R.. On the other hand, Mr. Wallace relies upon the case of *Re Graham* (1915), 8 O.W.N. 497, where Mr. Justice Clute dwelt with a will which I cannot distinguish from the will now before me. He there distinguished *Re Dods*, and determined that, where the devise is not of the lands but of the proceeds of the lands, the fact that the testator subsequently sold the lands does not cause the legacy to fail, but the proceeds of the lands in the executors' hands, as the result of the testator's own conversion of the farm, pass in the same way as the proceeds of conversion would have gone if the executors had themselves been able to convert.

Apart from this case, I should have followed what I believe to be the law as expounded in *Re Dods*, but it is my duty under the statute (Judicature Act, R.S.O. 1914, ch. 56, sec. 32) to follow my late brother in the decision which he has made, and I think it wise to do so rather than to attempt to create any merely artificial distinction, leaving it to an Appellate Court to review the situation if the parties think the decision ought to be reconsidered.

I, therefore, declare that the mortgage, which is part of the proceeds of the land, passes in the same way as if the executors had sold the land and the money secured by this mortgage had been received by the executors as part of the proceeds of a sale

made by them. Costs of all parties should be paid out of the estate."

William Proudfoot, K.C., for appellants.

J. H. G. Wallace, for respondents.

HODGINS, J.A.: — The learned Judge appealed from a decision of the late Mr. Justice Clute in *Re Graham*, 8 O.W.N. 497, but referred to a decision to the contrary effect of Boyd, C., in *Re Dods*, 1 O.L.R. 7, followed in *Re Beckingham* (1913), 5 O.W.N. 607. These are both cases in which the property had been directly devised, and were based upon English decisions, of which *Farrar* v. *Winterton* (1842), 5 Beav. 1, and *Gale* v. *Gale* (1856), 21 Beav. 349, are examples. The last mentioned case has been finally disengaged from the criticism of Lord St. Leonards and Malins, V.-C., and is firmly established by the House of Lords in *Beddington* v. *Baumann*, [1903] A.C. 13. Consequently, if this case falls within that decision, the *Graham* case was wrongly decided. I think that case is distinguishable. In it the testator directed his executor to sell and gave the proceeds to his son and three daughters.

It is important to know exactly what the *Gale* case decided. The principle upon which it proceeds is, that there was a devise of a particular property which, by the act of the testator subsequent to the making of his will was so changed or destroyed that it ceased to exist, and that he thereby worked a revocation of his will in respect thereto.

The argument in that case and in the earlier case of *Moor* v. *Raisbeck* (1841), 12 Sim. 123, was that, while the testator had changed the character of the devised property, he still retained an interest in it, different in kind, namely, the proceeds thereof, which, having regard to sec. 23 of the English Wills Act, 1 Vict. ch. 26 (identical in terms with sec. 26 of our Wills Act, R.S.O. 1914, ch. 120), would properly pass to the devisee. That argument was rejected in those cases, as it was by Sir G. Jessel in *Blake* v. *Blake* (1880), 15 Ch. D. 481, and by Lindley L.J., in *In re Clowes*, [1893] 1 Ch. 214, because there was nothing in the will to indicate that the proceeds and not the thing itself were included in the subject-matter of the devise.

The will here does not devise the farm, but the proceeds thereof, and as at the date of the testator's death those proceeds were *in esse*, though not produced by a sale by the executors, but by the testator's intermediate act, there is, in my opinion, an essential difference between this case and the case of *Gale* v. *Gale* (*ante*) and those decisions which followed it.

Lord Halsbury, L.C., in the *Beddington* case, has, in my humble judgment, expressed this difference in such a way as to

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enable this case to be decided without in any way impugning the earlier authorities. In dealing with the real question to be decided he proceeds ([1903] A.C. at pp. 15 and 16):—

"Practically, therefore, it comes to this, whether apart from any special direction or language in the instrument—whether it was a disposition of the man's own property or whether it was an appointment, seems to me to be for this purpose perfectly immaterial—you can find in the instrument that the person who made that testamentary instrument has made a disposition, if it was property, or executed a power of appointment, if it was a power of appointment, in such words and under such circumstances as to shew that he was not devising the particular property alone but that he was intending that something which should represent that property, if it had undergone a change between the two periods—the time of the death and the time of the making of the instrument—should nevertheless pass to the person whom he had made his devisee or appointee."

Lord Shand also deals with this aspect of the subject when he says (pp. 17 and 18) of the property affected by the will in that case:—

"On the other hand, the appointment in its terms relates to the property only; it does not affect or refer to the money which has been realised from part of the property having been sold; it does not in its terms in any way deal with the proceeds that have been received from that sale. It appears to me, my Lords, that under those circumstances the general principle ought to receive effect that, where a subject which has been given by the terms of the appointment is gone in part or in whole, the appointment cannot take effect upon the money which has been received as a substitute. The appointment does not bear to include or to refer to money which might be received if the property should be sold or converted in any way in future; and there is no deed subsequent to the appointment after the change had taken place declaring that the moneys which the trustees had received were to go in the same way as the property appointed. In the absence of anything of this kind, I cannot proceed on a conjectural view as to what may have been intended, but certainly not expressed in the terms used. I do not think the testator can be held to have given an appointment which relates to that money."

Lord Davey, too, puts the question, which he thinks must be answered in dealing with the will, in these words (p. 20):—

"Is Mr. Beddington's will expressed in such language and in such large terms as to carry not only the property as it then

existed, but also this property which has arisen from the particular dealings with it?"

These observations are only an amplification in clear terms of what was said in previous cases. An example of these is *In re Dowsett* [1901] 1 Ch. 398. Farwell, J., there said (p. 401):—

"In cases of this sort the question appears to me always to be one of construction. Has the testator . . . expressed his intention to give the particular property, or the property which may from time to time represent the particular property . . .?"

Applying the principle which the learned Law Lords enunciated, I think there should be no difficulty in deciding that the words of this will, so far as they give anything to the respondents, shew that the testator was intending to give, not the farm itself, but what its sale produced, the "proceeds," as the will expresses it. The change in the lifetime of the testator did not alter the character of what he devised to his sons, but merely anticipated the conversion which the will directed, leaving as the result that which he, in terms, dealt with.

Attention may be directed to a recent judgment of P. O. Lawrence, J., *In re Bick*, [1920] 1 Ch. 488, in which the view is expressed that the effect of sec. 23 of the English Wills Act (*ante*) is merely to repeal the old law under which a change of interest in itself revoked a gift and to leave the Court free to construe the will in such a way as to carry out the testator's intention.

In the result I would affirm the judgment, and dismiss the appeal.

LATCHFORD and LENNOX, JJ., agreed with HODGINS, J.A.

MEREDITH, C.J.C.P.:—This case seems to be a simple and plain one, that is if we do not let it get mixed up with other cases that really have little if any bearing upon the real question for consideration.

The testator bequeathed to the respondents the proceeds of certain lands which he directed his executors to sell: but before his death he sold the lands himself and took a mortgage of them from the purchaser securing payment of the price of the lands or the greater part of it.

It is contended for the appellants that that sale was a revocation of the will to the extent of the gift in question, or an ademption of it.

But why so? It, in effect, merely made unnecessary a sale by the executors: the same proceeds go to the same beneficiaries, by one step less: the sale step, which the testator chose to take himself in his lifetime, an opportunity, no doubt, presenting itself

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which enabled him to do so, and so relieve the executors from taking it.

The proceeds have in no sense lost their identity; nor have they been in any way mixed with other money or property: they are only more ready for the hand of the beneficiary to receive them.

The case of *In re Clowes*, [1893] 1 Ch. 214, and the case in this Province in which Boyd, C., seems to have followed *In re Clowes*, whether rightly or wrongly decided, are not in point: they were cases of devises of land, in which a wide effect was not given to the great change in law and in equity effected by the legislation contained in the Wills Act, sec. 26—sec. 23 of the Imperial enactment; see *In re Carter*, [1900] 1 Ch. 801; *Morgan* v. *Thomas* (1877), 6 Ch. D. 176; and *In re Bick*, [1920] 1 Ch. 488.

I am in favour of dismissing the appeal.

Appeal dismissed with costs.

CANADA LIFE ASSURANCE CO. v. McHARDY.

Alberta Supreme Court, Appellate Division, Scott, C. J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 9, 1922.

MOTIONS AND ORDERS (§ II—10)—MASTER IN CHAMBERS—CONDITIONAL ORDER—DIFFERENT VIEWS OF BY PARTIES TO ACTION—APPEAL FROM—EXTENSION OF TIME FOR APPEALING—DISCRETION OF JUDGE—ALTA. RULE 313 (2)—CONSTRUCTION.

Where a master does not unconditionally and finally dispose of the matter, but states orally in Chambers what the order is to be, but attaches a string to the decision so that in a certain event referred to orally by the Judge, the order will not be issued, there is no "order made" or "decision given" within the meaning of Rule 313 (2) Alta., except as a conditional one, and where the parties to the action take different views of what the master says, upon which the time for appealing from the order depends, the discretion of a Judge in extending the time for appealing will not be interfered with.

APPEAL from an order of Harvey, C.J., granting the defendant an extension of time for appealing from an order of the Master in Chambers made in a vendor's action for specific performance of an agreement of sale. Affirmed.

A. L. Smith, K.C., for appellant.

Gerald Costigan, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—The action had been undefended, an order *nisi* had been made and not complied with, a sale had been ordered and held and had been abortive. The Master then had, on the plaintiff's application, made an order permitting the plaintiff to purchase the land at $22,400 and giving the plaintiff a de-

ficiency judgment for the sum of $2,058.46 against the defendant. The decision that such was or would be his order was made by the Master on December 30, 1921, but he directed, in language which, in its exact terms, is not before us, that the order was not to issue for one month so as to give the defendant an opportunity to find a purchaser for the lands. As the defendant did not find such purchaser the order issued as of the original date, December 30, but was not signed and entered until March 8, 1922. On March 11, the defendant served a notice of motion returnable before the presiding Judge in Chambers on March 20 for an order extending the time for appealing from the order of December 30. On March 20, Harvey, C.J., heard the motion and made an order extending the time for service of a notice of motion by way of appeal until that very day, March 20. From this order, the present appeal is brought.

Rule 313 (2), referring to appeals from the Master, says:—

"The appeal shall be by motion on notice setting out the grounds of appeal served within four days and returnable within fourteen days after judgment is pronounced order made or decision or certificate given."

It was assumed upon the hearing of the appeal that if the order actually signed on March 8, had been made unconditionally though only verbally on December 30, the time thus limited would have begun to run on about January 7 or the first day after vacation, and that the time for appealing would have expired about January 11. This is, no doubt, in general, the proper interpretation to put upon the rule which, in this respect, differs from Rule 321 with respect to appeals to the Appellate Division.

But the fact is that the Master did not finally dispose of the matter on December 30. It is not proper, in my opinion, to take the order as eventually signed, and entered, as being the order made on December 30. Both parties agree that the Master did not then unconditionally and finally dispose of the matter. I know that there is a common practice of stating in Chambers orally what the order is to be, but of attaching a string to the decision so that in a certain event, referred to orally by the Judge, the order will not be issued. But, in my opinion, in such a case, it is improper to say that there has been either an "order made" or a "decision given" within the meaning of Rule 313 (2) except, of course, as a conditional one. In the present case I think the real order made by the Master on December 30 was probably of this nature, viz., that unless the defendant found a purchaser within one month, the plaintiff would be entitled to get an order such as it had asked for. In other words, I do

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not think it is proper to treat any decision whatever of the Master as something in the way of an aside, or as something *sub rosa* that is not to be considered as formal or as part of the proceedings but is to be treated as if it had never occurred at all. For that is not the fact. The thing *did* occur. The Master did say something which was effective at the time and I think no one has a right to treat it as non-existent, for that is not true.

We have before us no record of what the Master said orally, and I find that there is no memorandum in the Clerk's Chamber Book, no doubt because of it being during legal holidays, of what was said. But it is uncontroverted that the Master did, on December 30, refuse to make the order as it now appears in the Appeal Book. In substance, he either said "If you do not find a purchaser within a month the order will be made as the plaintiff asks," or, he said "I make the order now as the plaintiff asks but if you find a satisfactory purchaser within a month I will rescind it at your request and in the meantime the order will remain merely oral."

Now the attitude of the two parties in this appeal arises partly from their taking the one, the former view, of what the Master said, the other, the latter view. If the former view was the correct one in fact, then the defendant had a right to wait until the plaintiff went back to the Master, shewed that no purchaser had been found and had obtained the order, and had a right to consider that that would then be the order from which he might appeal. In that case, the order to be appealed from would not have been made till March 8, and the defendant would have needed no extension of time if he had appealed on March 11.

On the other hand, if the plaintiff was right as to what the Master actually did say orally, and as to the proper interpretation of it, then there is no doubt that the time for appeal began to run at once after vacation.

We have before us the affidavit of the solicitor who appeared before the Master on behalf of the defendant on December 30, in which he states that he understood what the Master had said in the former sense and the inference from what he says is that he understood that it would still be necessary for the plaintiff to go back to the Master not merely for the formal signature of the order but to get his unconditional decision that the order should go so that it would only be then that there would be a "decision made" within the meaning of the rule.

There is no affidavit contradictory of this except that of the plaintiff's manager, who, of course, was not present and who speaks only as to what he was advised by the plaintiff's solicitor.

Enquiry of the Master does not throw much light on the matter, although his memory of his intention was rather adverse

to the interpretation of what he said which is suggested by the defendants' solicitor.

The whole point, very technical in itself, is only relevant as shewing that there was some not unreasonable ground for the defendant's solicitor to assume that the time for appealing would not begin to run until the plaintiff's solicitor went back to the Master and got his order.

It is to be observed that the affidavit of the defendants' solicitor above referred was not before the Chief Justice but was presented to us on the appeal without serious objection on the part of the plaintiff. In this affidavit, the solicitor states that about the last of January he communicated with the plaintiff's solicitor asking when they intended to "enter" the order and expressing his intention to appeal. To this the solicitor for the plaintiff replied that he thought he was too late as the time had expired. Then neither side acted for over a month, the defendant apparently waiting for the order to be entered, and either resting on the false assumption that he would have his four days from the date of entry or recognising that he would have to apply for an extension in any case. If the defendant had not made this last delay after he was told of the real situation and had been warned, there is no question that he would have been entitled to his extension if he had then applied for it promptly. The plaintiff could then have made no complaint of prejudice because it had already been informed verbally, at least, of the intention to appeal.

But the defendant waited from the end of January until after the plaintiff entered its order on March 8 before applying for the extension.

Substantially, therefore, the only question is whether the plaintiff did anything in the interval in the way of acting upon an order which it had not got signed and entered, and as to which its solicitor had been told of an intention to appeal, so as to give it a right to object to the extension of time because it would be prejudiced. I doubt very much whether a party to whom an order has been granted orally but who omits to get it formally signed and entered has very much right to claim to have acted upon it and so to be liable to prejudice if it be reversed, especially where it is so serious an order as the final wiping out of a purchaser's right under an agreement of sale which is the subject matter of the action.

But if we examine the affidavit of the plaintiff's manager, it will be seen, I think, that the prejudice is by no means so serious as was suggested on the argument.

It seems that the plaintiff had agreed to sell the land to the

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defendant McHardy in 1916 for the sum of $16,640, that, the defendant becoming in default, the action was begun on 17th January, 1921, that an order *nisi* was made on February 15, 1921, giving the defendant one month to pay, that payment was not made; that on March 24, 1921, an order for sale was made, that before the sale was held, viz., on April 20, 1921, an order was made giving the plaintiff possession on account of the condition of the land which was overgrown with weeds and giving it the right to spend money on the destruction of the weeds and to put in a crop, that the only arrangement the plaintiff could make was to give one Clarke $5,000 for clearing the land of weeds, the same Clarke only agreeing to do so on condition of being given a lease for 3 years, and that plaintiff paid Clarke the said sum for clearing the land and granted the said lease for 3 years.

All this is set forth with many other facts in the affidavit of the plaintiff's manager. The lease to Clarke was not produced, but the affidavit says that "it was always understood and agreed between the said Clarke and myself that in the event of the land being sold or in the event of the defendant paying the amount due prior to the completion of the action the lease would forthwith be cancelled and of no effect." It also appeared that the sale was held on May 17, 1921, and proved abortive. Then on November 28, 1921, the plaintiff made the application upon which the order of December 30 was made. The plaintiff's manager states that he was informed by his solicitor that the time for appealing from the order of December 30 had elapsed and that "upon the necessary registration" the plaintiff would become the owner of the said lands and that "deeming the plaintiff to be the sole legal and equitable owner of the lands" he proceeded to make arrangements with Clarke for putting the land in crop for the season of 1922 and had advanced him the seed grain at an expense of $945 and that Clarke had gone on and seeded the land.

Just exactly what the deponent meant by "the necessary registration" is not very clear, as the plaintiff would appear to have been already the registered owner. But, if any registration was necessary, it certainly could not have been made until the order of December 30 was signed and entered, which was not until March 8, 3 days before the application was made for an extension of time. Nor does the deponent say when exactly it was that he had made his arrangements with Clarke, although the inference would naturally be that he had done so before March 11.

In my opinion, it would appear from the plaintiff's own shew-

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ing that it did not consider that it would have absolute control until some "registration" was made. I also think that there were no arrangements made with Clarke that cannot be allowed for and adjusted without injustice to the plaintiff, even if the proposed appeal should succeed. The Judge hearing the appeal would have every right to impose terms.

I do not think it proper to express any opinion as to the merits of the proposed appeal because that will be a matter for the Judge in Chambers to consider.

For these reasons, I think we should not interfere with the discretion exercised by Harvey, C.J., in extending the time, and that this present appeal should be dismissed.

In the circumstances I think there should be no costs of the appeal.

Appeal dismissed.

Re OLIPHANT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Hodgins, J.A., and Latchford and Lennox, JJ. November 18, 1921.

DESCENT AND DISTRIBUTION (§IE—20)—DEATH OF HUSBAND INTESTATE—WIDOW MAKING NO ELECTION UNDER DEVOLUTION OF ESTATES ACT—WIDOW EXHAUSTING DOWER BY REMAINING IN POSSESSION—RIGHT OF REPRESENTATIVE TO THE $1,000 UNDER SEC. 12 OF THE ACT.

Where a husband dies intestate leaving a wife and no children, and the widow makes no election under sec. 9 of the Devolution of Estates Act (Ont.), but exhausts her dower by remaining in possession of the real estate of her intestate husband until her death, all her right, title and interest in her husband's estate is at an end, and her representative is not entitled to the $1,000 which by sec. 12 is given to the widow if the whole estate is under that sum.

AN appeal by Robert Oliphant, administrator of the estate of Maria Oliphant, deceased, from the judgment of MIDDLETON, J. Affirmed.

W. S. McBrayne, K.C., for appellant.

W. M. McClemont, for respondents.

MEREDITH, C.J.C.P.:—The single question involved in this appeal is: what interest did the widow take in her husband's land at his death?

And the answer, I should have thought, must, manifestly, be: dower only: because she did not "elect to take her interest under "the Devolution of Estates Act" in her husband's undisposed of real property in lieu of all claim to dower . . . " (sec. 9).

It is true that that enactment provides generally for the disposition of undisposed of real property as if it were personal property: but it also provides in the plainest terms for the particular case of dower, and those provisions must prevail.

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The section of the Act which gives the widow the right of election to which I have referred—sec. 9—provides that: "Nothing in this Act shall take away a widow's right to dower:" it then gives her a right to elect to take under the Act in lieu of dower, and then provides that: "unless she so elects she shall not be entitled to share in the undisposed of real property."

Section 12 was also relied upon in support of this extraordinary claim, made by the personal representative of the widow, she being now dead also; but it, too, is, in equally plain words, applicable, in such a case as this, only "if the widow elects under section 9" to take under the Act, "in lieu of dower:" sub-sec. 4.

The appeal must be dismissed.

HODGINS, J.A.:—The Devolution of Estates Act has assimilated the distribution of the real estate to that of personal property. It has, however, respected the dower interest, so that the widow retains it unless she elects not to do so. In the case in hand she remained in possession of the real estate of her intestate husband until her death. The sole claim made by her personal representative is to the $1,000 which, by sec. 12, is given to the widow if the whole estate is under that sum,, or is made a charge thereon in her favour if over that amount.

The debts of the estate absorbed the personal estate.

Under sec. 12, if the estate consists of personalty, and is not of the value of $1,000, the whole of it goes to the widow. If over that amount, the $1,000 becomes a first charge, and the Statute of Distribution (now sec. 30—*et seq.* of the Devolution of Estates Act), applies to the balance. But, if the estate or any part of it consists of real property, the widow's dower and her interest in the personalty under the Statute of Distributions is, *primâ facie*, what she takes as her share. If she prefers the $1,000, she must elect to abandon her dower, as, on her choice being so made, the whole estate is governed by sub-secs. 1 and 2 of sec. 12. And she must indicate her choice by a formal document. Unless she does this, she remains entitled to her dower in the lands, and the section does not operate to increase her rights as to the personalty. As the appellant not only did not elect against dower but has enjoyed that right and interest in specie, her estate is not entitled to anything further under sec. 12.

The conclusion of the learned Judge is correct and should be affirmed.

LENNOX, J.:—Emancipated from the spell of Mr. McBrayne's ingenious argument, I can find no reason to doubt the correctness of the judgment in appeal.

Isaac Oliphant, whose estate is being administered, died with-

out issue and intestate on the 20th January, 1916, leaving real and personal estate. His widow, Maria Oliphant, obtained administration and remained in possession of the real estate until her death. The personal estate was exhausted in payment of debts.

The widow did not, in pursuance of sec. 9 of the Devolution of Estates Act, R.S.O. 1914, ch. 119, elect to take an interest under sec. 12 of the Act, in her husband's undisposed of real estate, in lieu of dower; and I suppose it may be inferred that she did not, as personal representative, give notice in writing requiring the widow to make her election under sub-sec. 2 of sec. 9.

There being real estate, she could take under the statute only by a formal election in writing duly attested; sec. 9 and sub-sec. 4 of sec. 12. Instead, she took and exhausted her estate of dower, and all her rights in her husband's estate terminated at her death.

There is very little room for argument. The widow was not deprived of dower (sec. 9), and she could, if she liked, have a statutory share in lieu of it (sec. 9 and sec. 12, sub-sec. 4). She could not have both; she did nothing beyond taking and enjoying her dower, and sec. 9 expressly provides that "unless she so elects she shall not be entitled to share in the undisposed of real property."

The appeal should be dismissed.

LATCHFORD, J.:—I agree with the result.

Appeal dismissed with costs.

MARCHAND v. S.S. "SAMUEL MARSHALL."

Exchequer Court of Canada, Quebec Admiralty District, Maclennan, D.L.J.A. January 21, 1922.

SEAMEN (§ I—4)—WAGES—CONTRACT OF HIRING IN QUEBEC—ENFORCEMENT OF CLAIM BY MINOR—CIVIL CODE OF LOWER CANADA—RIGHT OF MINOR TO SUE FOR RECOVERY OF WAGES—ARREST OF SHIP FOR DEBT—NO EFFORT BY OWNERS TO OBTAIN RELEASE—CONSENT TO OPERATIONS ENDING BEFORE END OF SEASON—RIGHT OF SEAMAN TO RECOVER FULL SEASON'S WAGES.

A minor who has engaged in Quebec to serve on a vessel plying between the Great Lakes and the St. Lawrence river has the status and capacity to sue for wages in the Quebec Admiralty District of the Exchequer Court, the Quebec law being that a minor over 14 may sue in his own name to recover wages due him. The rule being that whatever relates to the remedy to be enforced should be determined by the *lex fori*.

Where a ship has been arrested on a claim for wages, and the owners do nothing to obtain the ship's release from the arrest and the further employment becomes impossible, such owners clearly contemplate the termination of operations before the close of the season of navigation, and, in fact, consent to her being laid up, and a seaman who has hired for the season with a monthly bonus, is entitled to the full season's pay and the amount of such monthly bonus remaining unpaid.

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Maclennan, D.L.J.A.

ACTION by several seamen under 21 years of age to recover wages. Judgment for plaintiffs.

Harold Walker, for plaintiff Marchand.

T. M. Tansey, for defendant.

MACLENNAN, D.L.J.A.:—These are all actions for wages and some questions arise which are common to all of the four cases. The plaintiffs Marchand, Leblanc and Lehouillier were seamen aboard the ship "Samuel Marshall," and the plaintiff Trepanier was the assistant cook. Leblanc and Trepanier signed articles of engagement dated at Sorel, May 7, 1920, to serve on board the ship between Montreal and the Great Lakes and on the river St. Lawrence as far as Father Point for a period not to exceed 8 months, the ship to be used as freight boat. The articles contained an agreement that 15 days' notice must be given before leaving the vessel and "in case of the ship being laid up, the crew to be paid without extra wages." Under the heading of "Particulars of Engagement" there is a column headed "Amount of wages per week of calendar month," in which it is mentioned that the monthly wages of each member of the crew who signed the articles, and there is also another column headed "Bonus at the end of the season," but no amount is entered in the latter column opposite the names of the crew.

Each of the above plaintiffs is a minor, and the owners of the ship at the trial objected to each action on the ground that the plaintiff being a minor was incompetent to sue for his wages. This is the first question to be decided and it applies to the four cases. Counsel for defendant submitted that the Exchequer Court in Admiralty administered the Marine Law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty and that by the English Maritime Law a minor seaman under the age of 21 years could not sue in his own name but through a curator or guardian; MacLachlan, Merchant Shipping (5th ed.) 263 and *Albert Crosby* (1860), 1 Lush. 44. Counsel for plaintiff relies upon art. 304 of the Civil Code of Lower Canada, which provides that a minor of 14 years of age may alone bring action to recover his wages.

The question to be decided here is what law applies. These plaintiffs were all engaged in the Province of Quebec and the actions were entered in this province. Article 6 of the Civil Code provides that an inhabitant of Lower Canada is governed by its laws respecting the status and capacity of persons, and C.C. 304 gives a minor 14 years of age a right of action to recover his wages. Many years ago the House of Lords, in *Don* v. *Lippmann* (1837), 5 Cl. & Fin. 1, 7 E.R. 303, laid down the

rule, that whatever relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. This rule was followed by Dr. Lushington in *The Milford* (1858), Swabey 362, 4 Jur. 417, 6 W.R. 554, and by Phillimore, J., in *The Tagus*, [1903] P. 44, 72 L.J., P. 4. In *The Minerva* (1825), 1 Hagg. 347, 9 W.R. 81, Lord Stowell at p. 358 said: "Seamen are the favourites of the law . . . . and placed particularly under its protection." In view of these authorities, I came to the conclusion that the remedy of the plaintiffs being invoked in the Province of Quebec must be governed by the provisions of the law of this Province which gives a minor a right of action to recover his wages. Had these plaintiffs taken proceedings before a Judge of the Sessions of the Peace or Police Magistrate, as they were entitled to do under the Canada Shipping Act, the objection to their actions on the ground that they were minors could not have been raised. In my opinion, this objection should not prevail in the Admiralty Court, and I, therefore, hold that the plaintiffs had the capacity and status which justify them in entering their actions in this Court.

Another question of importance relates to the right of the plaintiffs to claim a bonus. It is established by the evidence that each member of the crew, with the exception of the captain who had a special agreement in that connection, was to be paid a bonus of $10 per month at the end of the season. This bonus was in reality part of the wages of the crew and they all received a bonus for the previous season and, in my opinion, the plaintiffs established their right to receive such bonus; *The Elmville*, [1904] P. 422. The defendant submitted that the end of the season had not arrived when these actions were instituted. This ship had been engaged during the season of 1920 in carrying coal from Lake Erie ports to the port of Montreal and arrived in Montreal on its last trip down on Sunday, November 14, at 10 a.m., with a cargo of coal aboard, which was discharged on the following day. On November 16, a cargo of liquor consigned to Windsor, Ontario, was placed aboard the ship, but was removed by seizure in revendication against the owners on November 17. On the latter date, the ship was arrested by one McCullough on a claim for wages. The owners did not take any steps to secure the ship's release from that seizure, but very improperly, on November 18, induced the Master to leave the port of Montreal for Cornwall, Ontario. The Marshall of the Court who had arrested the ship and was in custody thereof having obtained information of the attempt to remove the ship from this jurisdiction, succeeded in stopping her at the Soulanges

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Canal and compelled her to return to Montreal. In the meantime further arrests were made of the ship at the instance of divers members of the crew. As the owners did nothing to obtain the ship's release from the arrest by McCullough, the further employment of the ship became impossible. The season's operations were ended and the crew became entitled to their wages and bonus. The articles expressly provided, that in case the ship is laid up the crew is to be paid without extra wages. This clearly contemplated the termination of the operations before the close of the season of navigation and when the owners failed to obtain the ship's release from arrest they, in fact, consented to her being laid up from that date; Viner's Abridgement, Verbo Mariners, p. 235; *The Malta* (1828), 2 Hagg. 158, Maclachlan (5th ed.), Merchant Shipping, 247. It has been an immemorial and benevolent practice of the Court, if there is any doubt about a contract, to give the seamen the benefit of it; *The Nonpareil* (1864), Br. & L. 355; Roscoe's Ad. Practice (4th ed.) 251.

Armand Marchand joined the ship in September; his wages were $65 per month and he claims $20 for 2 months' bonus. He was paid wages to the end of October and I find that he is entitled to $41.17, being wages from 1st to 19th November, 1920, at $65 per month, and a further sum of $20 being 2 months' bonus, in all $61.17 for which there will be judgment in his favour against the ship with costs.

Florence Trepanier was the second cook on the ship; her wages were $45 per month with a bonus of $10 per month, and she had served on the ship during the whole season. She has proved her claim of $28.50 for the first 19 days in November and $70 being 7 months' bonus, in all $98.50, for which amount there will be judgment in her favour against the ship and costs.

Paul Leblanc had served the whole season; his wages were $75 with a bonus of $10 per month. He made a claim of $5 for some extra services but this item is not proved or allowed. He has established his right to $47.50 being wages from 1st to 19th November, 1920, and $70 bonus, forming a total of $117.50 for which there will be judgment in his favour against the ship with costs.

Xavier Lehouillier began on August 1, 1920, and was paid to the end of October; his wages were $65 per month and he has proved his claim for wages from 1st to 22nd November, $47.67, and his right to a bonus for 4 months, $40, forming a total of $87.67, for which amount there will be judgment in his favour against the ship with costs. *Judgment accordingly.*

Re TORONTO METAL AND WASTE Co.

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Ontario Supreme Court in Bankruptcy, Orde J. November 24, 1921.

BANKRUPTCY (§IV—40)—AUTHORISED ASSIGNMENT UNDER BANKRUPTCY ACT—CLAIM OF CROWN FOR TAXES — PRIORITY OF CLAIM OF TRUSTEE FOR FEES—PRIORITY OF CLAIM OF AUTHORISED TRUSTEE WHO HAS RELINQUISHED TO TRUSTEE APPOINTED ON MAKING OF RECEIVING ORDER—PRIORITY OF CLAIM FOR SHERIFF FOR POUNDAGE AND EXPENSES.

The Crown's priority for taxes which is preserved under sec. 51 (6) of the Bankruptcy Act, does not entitle the Crown to rank ahead of the trustee's fees and expenses. Also fees payable to an authorised trustee, to whom an assignment was made by the insolvent before the making of the receiving order but after the petition in bankruptcy was filed, who relinquishes possession of the estate to a trustee appointed when the receiving order is made are payable in priority to the Crown's claim. The sheriff's claim for poundage and expenses are also payable in priority to the Crown's claim where the petitioning creditors issued an execution against the insolvents, on a judgment recovered against them under which the sheriff seized the goods of the insolvents, the available act of bankruptcy being the failure to satisfy such execution.

[*Re Auto Experts Ltd.* (1921), 59 D.L.R. 294; *Re Croteau and Clarke Co. Ltd.* (1920), 55 D.L.R. 413, 48 O.L.R. 350, referred to. See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

MOTION by George A. Stephenson, an authorised trustee in bankruptcy, appointed trustee of the estate of the above named company, under a receiving order, for directions as to questions arising in regard to the disposition of the estate.

L. M. Singer, for the applicant.

W. G. Thurston, K.C., for the Attorney-General for Canada.

B. Luxenberg, for the Sheriff of Toronto.

P. E. Smily, for John L. Toorne.

ORDE, J.:—This motion raises directly the question upon which I touched in my judgment in *Re F. E. West & Co.* (1921), 62 D.L.R. 207, namely, whether the Crown's priority for taxes, which is preserved under sub-sec. 6 of sec. 51 of the Bankruptcy Act, entitles the Crown to rank ahead of the trustees's fees and expenses. I suggested there that, as the collection of the taxes of which the Crown reaps the benefit must under the circumstances be made through the medium of the bankruptcy, it would seem to be wholly unreasonable and unfair that the Crown should be entitled to take advantage of the administration of the estate by the trustee without being subject to the expense incidental to such administration.

There is no parallel between the position of the Crown under sub-sec. 6 of sec. 51 and that of the landlord under sec. 52. The landlord's right to priority depends upon the right of distress, a right in the nature of a lien; and, as already held in *Re Auto Experts Limited* (1921), 19 O.W.N. 532, 20 O.W.N. 2, 59 D.L.R.

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294, that right is superior even to the trustee's fees and expenses. But the claim of the Crown does not depend upon any lien or charge upon the bankrupt estate; the Crown has a prerogative right to be paid upon a distribution in bankruptcy in priority to other unsecured creditors. As pointed out in the *West* case, this prerogative is quite distinct from that which, prior to the adjudication in bankruptcy or to the making of an authorised assignment, might have been exercised by the process of a writ of extent; *Commissioners of Taxation for New South Wales* v. *Palmer*, [1907] A.C. 179. The prerogative is one which the Crown is entitled to assert in the bankruptcy proceedings. But, in bankruptcy (whether the administration is under a receiving order or under an authorised assignment) the property in the debtor's estate has passed to the trustee; the right to issue a writ of extent is gone; and the only prerogative left to the Crown is that already mentioned. The prerogative is, therefore, merely a right of preference in the administration of the estate.

No authority was cited for the contention that this prerogative went the length of depriving the trustee of his fees and expenses. And I see no ground whatever for holding that it does so. Mr. Thurston argued that the words in sub-sec. 6, "Nothing in this section shall interfere with the collection," etc., must be construed to mean that the priority given to taxes, rates, and assessments coming within its provisions, is superior to any of the payments mentioned in sec. 51, and consequently superior to the trustee's fees and expenses. There may perhaps be cases where the right to collect taxes, etc., is such as to be superior to the trustee's fees and expenses. If there are, I think it will be found that the right is in the nature of a charge or lien upon the bankrupt estate existing at the time of the bankruptcy, or continuing, or perhaps even attaching afterwards. But it would be most unjust to hold that a right to preferential payment in the administration of the bankrupt estate, based merely upon the prerogative right of the Crown to be paid its debts before that of a subject—see the *Palmer* case at p. 185—is really more than a right to be paid preferentially out of the fund realised by such administration for distribution among the bankrupt's creditors. I have been unable to find any English decision directly in point, but I cannot believe that it would be held that the Crown could reap the benefit of the trustee's services without being subject to the payment of his fees and expenses. To hold that the prerogative right is thus limited does not, in my judgment, in any way conflict with the opening words of sub-sec. 6. If the right is as I hold it to be, then nothing in the section does interfere with it.

I hold, therefore, that the trustee is entitled to retain his fees

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and expenses out of the estate in priority to the Crown's claim for sales taxes.

Another question raised on this section is as to the fees and expenses of John L. Thorne, to whom the insolvent made an assignment before the making of the receiving order. The petition in bankruptcy was filed on the 16th March, 1921. On the 24th March, 1921, the insolvent made an authorised assignment to Thorne, an authorised trustee. On the 29th March, 1921, a receiving order was made upon the petition of the 16th March, George A. Stephenson being appointed trustee. On the 6th April, 1921, the assignment was registered in the office of the Registrar in Bankruptcy. Whatever knowledge of the bankruptcy petition the insolvent may have had when the assignment was made on the 24th March, it seems to be clear that the trustee Thorne knew nothing of it; and, on the other hand, the petitioning creditor was likewise unaware, when the petition came on before the Registrar for adjudication on the 29th March, that an assignment had been made. Upon discovering that a receiving order had been made, Thorne relinquished possession of the estate to Stephenson, the latter undertaking to pay Thorne's fees, amounting to $130, if approved by the Court. To the extent that Thorne's fees are properly payable out of the estate, they must necessarily be treated as an item in the expenses incurred by the trustee, and so ranking ahead of the Crown's claim for taxes. It will be unfortunate if the execution of an assignment and the consequent incurring of expense by one trustee thereunder, however innocent he may be, should increase the expenses of administration. But the Act contemplates the possibility of an assignment being made before the making of the receiving order: see sec. 9. I consented upon this feature of the Act in *Re Croteau and Clark Co. Limited* (1920), 48 O.L.R. 350, 55 D.L.R. 413.

If there were evidence to shew that Thorne had accepted and acted upon the assignment with notice of the pending petition in bankruptcy, I would hold that he had disentitled himself to any fees. But, having acted innocently, he ought, to the extent that his work helped to preserve the assets for the trustee under the receiving order, to receive some remuneration. The general costs of the administration ought not, however, to be substantially increased by any such allowance. Strictly speaking, in cases like the present, there ought to be some method whereby the fees ordinarily payable to one trustee should be equitably apportioned between the two trustees. It seems hardly proper that the estate should be called upon to pay full fees to the present trustee and in addition a substantial sum to Thorne. Perhaps an abatement on both sides may bring about a satisfactory result. I leave the

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matter with this suggestion to those interested, including of course the Crown, which is entitled to see that the expenses are kept as low as possible. If the matter cannot be adjusted, then the parties may speak to me again. But the amount of Mr. Thorne's fees, when settled, must be treated as an expenditure of the trustee, ranking ahead of the claim of the Crown.

There was also a third question as to the sheriff's claim for poundage and expenses. The petitioning creditors were a firm of Baker & Becherman. They had issued an execution against the insolvents, directed to the Sheriff of Toronto, upon a judgment for $1,359.03 recovered against the insolvents. The sheriff seized goods of the insolvents of the value of $1,000 and upwards; and, the execution not being satisfied within 14 days thereafter, the petition in bankruptcy was filed, the available act of bankruptcy being the failure to satisfy the execution, under sec. 3 (c) of the Act.

Section 11, as amended by sec. 6 of 10 & 11 Geo. V. ch. 34 (1920) and sec. 10 of 11 & 12 Geo. V. ch. 17 (1921), makes provision for the protection of the sheriff and of the execution creditor as to their respective costs and fees, when the sheriff is obliged by virtue of the proceedings in bankruptcy to deliver the goods taken in execution to the trustee, and sub-sec. 3 entitles the sheriff to be paid his fees and charges and the costs of the execution creditor upon delivering the goods to the trustee. This right is given by way of a lien upon the goods, which lien is preserved by sub-sec. 1 (as enacted by the two amending Acts mentioned above). This charge or lien necessarily depreciates the value of the estate available for distribution among the creditors to that extent; and, for the reasons already given, I see no ground for holding that the Crown's prerogative right to be paid its taxes out of the fund available for distribution among the creditors can in any way deprive the sheriff and the execution creditor of the benefit of their lien.

It is true that sub-secs. 1, 2, and 3 of sec. 11 seem particularly designed to protect an execution creditor who, because of the supervening bankruptcy, whether at the instance of some other creditor, or by virtue of an authorised assignment, is suddenly deprived of the prospective fruits of his judgment and execution, but I see no reason why they should not extend to cases where the execution creditor himself becomes the petitioning creditor. The sheriff should not be affected by any distinction between the case of a receiving order made on the petition of the execution creditor and that of an order made on the petition of some other creditor. And, if the costs of the first execution creditor are to be paid by virtue of his lien where such execution credi-

tor is other than the petitioning creditor, I can see no reason why, because the execution creditor follows up his seizure by a petition in bankruptcy, he should be in any inferior position. I am, therefore, of the opinion that the sheriff's fees and expenses and the costs of the execution creditor are to be paid by the trustee in priority to the Crown's claim.

Some question was raised as to the amount to which the sheriff is entitled. In addition to his fees for receiving and filing the writ of execution and the "expenses paid" (presumably for a man in possession and other like expenses), he claims the sum of $60 for poundage. The Act makes no express mention of poundage. The question of the allowance of sheriff's poundage under this section was recently before the Court in Saskatchewan in *Moroschan* v. *Moroschan* (1921), 59 D.L.R. 353, 14 S.L.R. 233, but the points involved were really matters of procedure.

Section 11 recognises and preserves the lien of the sheriff for his fees and charges, and also that of the execution creditor for his costs. So far as the execution creditor's costs are concerned, the section really has the effect of creating a lien, rather than of preserving a lien already existing, because, as pointed out by Osler, J.A., in *Ryan* v. *Clarkson* (1889), 16 A.R. 311, at p. 315, it is not strictly accurate to speak of the lien of an execution creditor upon goods seized by the sheriff. The only question which can arise here is whether or not the sheriff is entitled to poundage when the seizure has been made prior to the filing of the bankruptcy petition is, I think, clear upon authority and under the provisions of Consolidated Rule 686 (1). The Rule allows poundage where the goods are not sold "by reason of satisfaction having been otherwise obtained, or from some other cause." The stay in the sale under the execution by virtue of sec. 11 of the Bankruptcy Act is a "cause" within the meaning of the Rule. The sheriff here claims $60 for poundage. The principle laid down in the Saskatchewan case above mentioned seems sound, namely, that the taxation of the amount is a matter for the Court from which the execution issued. In the present case, if the trustees or the Crown thinks the amount claimed by the sheriff is too large he or it is at liberty to have it taxed or determined in the ordinary way. But, subject to such taxation, the trustee must pay the sheriff's fees and charges, including poundage, and the costs of the execution creditor, out of the estate, in priority to all other charges or claims.

There will be an order upon the three questions involved as indicated above.

The costs incurred by the sheriff, which I fix at $20, ought to be paid out of the estate.

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I make no order as to costs as between the Crown and the estate. The trustee will be entitled to his costs out of the estate, if there are sufficient assets left after satisfying the claim of the sheriff and the costs of the execution creditor.

GRAYDON v. GRAYDON.

Ontario Supreme Court, Middleton, J. November 28, 1921.

DISCOVERY AND INSPECTION (§ IV—20)—ACTION AGAINST THREE DEFENDANTS—SEPARATE SOLICITORS—EXAMINATION OF PLAINTIFF FOR DISCOVERY BY ONE DEFENDANT—RIGHT OF THE OTHERS TO EXAMINE—PRACTICE.

In the case of several defendants, one of which has examined the plaintiff for discovery, the others are not precluded from examining the plaintiff, but the examination should deal with matters which have not yet been touched upon, and not go over the ground already covered.

APPEAL by plaintiff from an order of the Master in Chambers, directing the plaintiff to submit to further examination for discovery.

W. D. McPherson, K.C., for plaintiff.

G. M. Willoughby, for Graydon the younger.

MIDDLETON, J.:—The fundamental question arising upon this motion is of importance as a matter of general practice.

Graydon in this action sues two daughters and a son, issue of his first marriage, alleging that, after his second marriage, these defendants conspired together to poison his mind against his second wife and to procure him to make conveyances to them of all his property; that this conspiracy succeeded, and the seeds of distrust bore fruit in the way contemplated, and as the result of the conspiracy he divested himself of all his property by divers conveyances to the defendants. Now awakening to the truth of the situation, and finding that there was no ground for suspecting his second wife, he seeks to have these conveyances set aside as having been obtained from him by the fraud and undue influence of the defendants.

The defendants have severed in their defences—the daughters are represented by one solicitor and the son by another. The plaintiff has been examined for discovery at great length by counsel representing the daughters. Counsel representing the son was not present upon this examination, and apparently had no notice of it. He, however, procured a copy of the examination, and obtained an appointment for the examination of the plaintiff for discovery, and upon the plaintiff attending he proceeded to read to the plaintiff the questions asked upon the former examination, expecting him to repeat the information already given. The matter did not proceed very far before counsel for the plaintiff objected, and the examination was discontinued, the motion before the Master resulting. According

to the record of the examination, the plaintiff's counsel based his objection upon the idea that the questions were irrelevant. Before me he says that this was only one of his objections, and that his main objection was that the plaintiff was not obliged to repeat all that has already been sworn to. The first examination was not before me, but I am told it covers 97 pages of typewriting.

Upon the argument of the motion I suggested to counsel for the son that he should confine himself to matters that had not already been touched upon in the examination had, but this was not agreeable to him, as he said his intention was to cover the whole ground in such way as appeared to him to be most expedient. I have, therefore, to face the question whether, where an action is brought against several defendants, and these defendants sever in their defences, the plaintiff is liable to be examined for discovery, not once, but many times.

It is of course obvious that there may be some things which relate to one defendant alone, and which would in no sense be covered by or be adequately dealt with in an examination had at the instance of the co-defendants. On the other hand, where a plaintiff is under cross-examination at a trial, and there are several defendants separately represented, it is not the practice to allow each counsel to go over all the ground which is common to the defendants. The counsel who first cross-examines, examines at large, and if his cross-examination covers the whole field another counsel in the same interest is not allowed to traverse it again, but must confine himself to new matter or matter which relates particularly to the client whom he represents.

I think I am on solid ground when I say that the Rules contemplate only one examination for discovery of any party in the action. Any party adverse in interest may initiate such examination. Notice of it should be given to all the parties adverse in interest to the party to be examined, so that they may be present upon the examination. The counsel who first examines will then cover the common ground and deal with all matters which relate particularly to his client. Other counsel should then be permitted to deal with matters that have not yet been touched upon and to matters that relate solely to his own client. In this way, I think, justice will be done. The idea that there should be many examinations all covering the same ground is quite erroneous, and such a course is an abuse of the practice of the Court. It must always be kept in mind what the purposes of examination for discovery are. It is primarily for the purpose of enabling the opposite party to know what is the case he is to be called upon to meet, and

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its secondary and subsidiary purpose is to enable the party examining to extract from his opponent admissions which may dispense with more formal proof at the hearing. To illustrate: in this case the first inquiry upon the examination appears to have been into the date of the first marriage, the date of the death of his first wife, the date of the second marriage, etc. So far as discovery is concerned, the defendant can scarcely need this information, but for the secondary purpose of enabling these facts to be readily proved as against the plaintiff, if the defendants needed the proof in the course of their defence, the plaintiffs' admissions are of value, but the admissions once made are just as effectual as if made ten times, and there is no need of pursuing this inquiry at the instance of the son when the facts have been fully stated to counsel for the daughters.

No notice having been given to the solicitor for the son at the time of the examination at the instance of the daughters, I do not think it would be desirable to preclude him from now examining, but I think the examination should be strictly confined within the limits that I have indicated, and that the order of the Master requiring the re-attendance of the father for re-examination should be varied by providing that at such re-examination the examining counsel should not be at liberty to examine upon any matters dealt with upon the former examination, but should only be at liberty to examine as to new matters and as to any matter which may be set up, or intended to be set up, as against the son, and the son alone.

It is suggested that the son should not be precluded from examination merely because the father has been cross-examined at the instance of the daughters. I might agree were it not for the fact that an examination for discovery is not, and is not intended to be, a cross-examination at all. This seems to be forgotten in the conduct of most examinations, and has given rise to the extraordinary length to which these examinations are continued, which is recognised by all trial Judges as an alarming abuse of a practice which, when properly regulated, is most beneficial.

I realise that care must be exercised in any attempt to suggest any general principles, and I do not intend to lay down as a principle that in cases where a party is supposed to be seeking to conceal the truth, he might not in some actions be most rigidly cross-examined on the examination for discovery. Discovery is intended to be an engine to be prudently used for the extraction of truth, but it must not be made an instrument of torture, nor should it be regarded as a mere opportunity for solicitors to multiply irrelevant and impertinent questions. Intelligently conducted, an examination should eliminate much

waste of time at a hearing; unintelligently conducted and abused by being unduly read at a trial, it is a nuisance well-nigh past endurance.

Under the circumstances, costs may be in the cause here and below.

MILLAR v. THE KING.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Kelly and Lennox, JJ. November 18, 1921.

SOLICITORS (§IIC—30)—SERVICES RENDERED TO GOVERNMENT—GOVERNMENT REQUESTED TO FIX REASONABLE COMPENSATION—COMPENSATION FIXED—ORDER IN COUNCIL PASSED—PAYMENT OF ACCOUNT—SOLICITORS ACT, R.S.O. 1914, CH. 159, SECS. 34 AND 48 ET SEQ.

Where solicitors upon completion of services for the Government there being no denial of the retainer make a copy of their docket entries which shews no money charges for services rendered, but gives full details of all disbursements and forward it to the Minister of Lands, Forests and Mines in whose name the agreement to purchase in connection with which the services were retained was made, and who gave the instructions and suggest that he should submit it to some competent person to settle the fee which should be paid, and the Minister selects a proper and competent person who advises the Minister as to the proper fee, and an Order in Council is passed which is an approval of the adjustment of the account and an acknowledgment of a prior valid retainer and so amounts to an agreement to pay, the Court will order payment of the account, although no bill has been rendered under sec. 34 of the Solicitors Act, R.S.O. 1914, ch. 159,—the offer and the Order in Council being sufficient writing to satisfy sec. 49 of the Solicitors Act as to agreements between solicitor and client. [*In re Stuart*, [1893] 2 Q.B. 201; *In re Baylis*, [1896] 2 Ch. 107, followed; *Ray* v. *Newton*, [1913] 1 K.B. 249, distinguished.]

APPEAL by the Crown from the judgment of Middleton, J., (1921), 58 D.L.R. 585, 49 O.L.R. 93, on a petition of right by a firm of solicitors to recover from the Province of Ontario a sum of money for services rendered. Affirmed.

Edward Bayly, K.C., for appellant.

T. R. Ferguson, K.C., for respondents.

RIDDELL, J.:—The firm of Millar, Ferguson & Hunter had been employed by the Crown, through the former Minister of Lands Forests and Mines, in the investigation of titles, etc., in respect of the property acquired under 6 Geo. V. ch. 18 (Ont.)

The work being completed, a bill was sent in, but not in the usual form. Mr. Ferguson, the member of the firm who had most to do with the work, had become a Justice of Appeal, and he determined the form of the bill, for reasons which I give in his own words:—

"The Minister of Lands Forests and Mines has the same name as my own: the public think we are relatives. We are not rela-

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tives, but we have been very close personal friends, and I consulted very closely with him about this. I say I appreciated he was the Minister—I did not want to render him a bill and put him in the position of saying it was too large, or paying it, and having hin in the position of somebody else saying it was too large, so I sent it to him and asked him to have it fixed by somebody else, so there would be no question."

With this reasoning operating, the bill was sent in, in the form mentioned in the judgment appealed from—it should, however, be noted, that the bill was subscribed: "This is our bill herein," and signed by the firm. I am of opinion that, under all the circumstances, this was equivalent to saying to the client: "We are sending you the items of our bill—the amount of our bill is the amount which will be fixed by some independent person"—and, when the solicitors agreed to Mr. Kilmer as such independent person, it was equivalent to saying, "The amount of our bill is what Mr Kilmer will fix."

Except by the merest technicality, the case stands as though the bill was delivered with the amount fixed by Mr. Kilmer expressed as the amount of the bill. Of course, had it only been the gross amount to be fixed without regard to items, we could not hold this bill sufficient, in view of our decision in *Gould* v. *Ferguson* (1913), 29 O.L.R. 161, 12 D.L.R. 71, see also *Lynch-Staunton* v. *Somerville* (1918), 44 O.L.R. 575, 46 D.L.R. 748—but, considering what was intended, and, I may add, what was actually done by Mr. Kilmer, I think that the bill was, in effect, rendered with the fee for each item which Mr. Kilmer could fix. *Id certum est quod reddi certum potest*—and it seems to me that, when Mr. Kilmer went over the items and applied the County of York tariff of costs to these items, he was fixing the amount at which the bill was rendered as respects these items, and that he was doing precisely what the solicitors intended and expected.

The object of a bill of costs is "to secure a mode by which the items of which the total sum was made up, should be clearly and distinctly shewn, so as to give the client an opportunity of exercising his judgment as to whether the bill was reasonable or not:" *per* Archibald, J., in *Wilkinson* v. *Smart* (1875), 33 L.T. 573, 575; *Gould* v. *Ferguson* (1913), 14 D.L.R. 17, at 19, 29 O.L.R. at p. 163. This object was fully attained by the method adopted—and I think that what was done was a compliance with the Act.

In this view, it is not necessary to consider whether a petition of right is an "action" within the Solicitors Act—as at present advised I do not assent to the proposition that it is not,—but I give no opinion on the point.

With some hesitation, I think that the work done cannot be objected to as unnecessary—and there is ample evidence to support the judgment as to *quantum*.

I would dismiss the appeal.

KELLY, J.:—On a careful consideration of this case, I can see no sufficient reason for disturbing the judgment of the trial Judge: the appeal should, therefore, in my judgment, be dismissed.

LENNOX, J.:—I am of opinion that the judgment appealed from ought not to be disturbed. There was nothing shewn that would lead me to think that the work done was unnecessary; and, although the point was taken, it did not appear to me that counsel supporting the appeal had much faith in it. The real question for decision is: are the plaintiffs debarred from bringing an action, a petition of right in this case, by reason of non-compliance with sec. 34 of the Solicitors Act, R.S.O. 1914, ch. 159?

The bill rendered contained a full and explicit statement of the services, transactions, and items for which payment is claimed, the amounts disbursed set out in detail in every instance, and was subscribed and signed as required by the Act. The amounts claimed for the various services were not set out, but the bill was accompanied by a letter suggesting that instead of this the Minister should select and appoint an independent person to fix and determine the sums fairly and properly payable in respect of the services referred to and set out in the account, and the total amount payable in respect of the account.

The department was not bound to adopt this suggestion, but it was adopted. Mr. Kilmer was appointed, and, after a full and careful examination of the petitioners' books and records and full inquiry—in all of which he was facilitated and assisted by the petitioners—determined upon the fair and reasonable sums payable in respect of the various services, and the total of these sums, and reported this to the department. The petitioners stood by this determination, as they had agreed, and the department also adopted it, and it was accordingly approved by an order in council and payment directed.

It is idle to talk of the control and responsibility having passed into other hands. The control, responsibility and duty is still vested in the Crown, unaffected, unfettered, and unimpaired, and nothing has happened to detract from the force or effect of the order in council referred to.

I would dismiss the appeal.

MEREDITH, C.J.C.P. (dissenting):—In these proceedings, the respondents, a co-partnership firm of law solicitors, are seeking to enforce payment of a claim of $31,589.13 for professional

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services, mainly in searching a great number of titles—about 730—of different parcels of land comprised in that which is called the Central Ontario Power System.

The more substantial objection to the claim is: that the services said to have been rendered were unnecessary, and should not have been performed; and, therefore, that the solicitors have no legal claim, nor indeed any reasonable claim, in respect of them.

But that question has not been tried; and, if the judgment appealed against is not set aside, this Court will compel payment of this very large claim without having tried the case.

That would be objectionable enough under any circumstances, but would be exceptionally objectionable in this case, as those who must pay, if the judgment stands, are the public who are served by this power system; and they are not parties to this action, and have had no opportunity of being heard in it.

Throughout these proceedings Mr. Bayly, acting for the appellant, nominally the Crown, actually the Government of the Province, has consistently and persistently taken and held to the ground: that the solicitors must render a bill of costs and submit to a taxation of their bill in the ordinary way, as the law requires; and, upon the trial of this action, he refused to call witnesses, or to cross-examine witnesses, except for the purpose of making his position clear: and sought judgment, by way of non-suit, in accordance with his contention: and so too upon this appeal; even refusing to express any opinion upon the solicitors' claims until their bill should be rendered.

When these circumstances appeared upon this appeal, the impropriety of compelling payment without any real trial of the case, or any taxation of the bill, seemed to me to be so manifest that I at once proposed a taxation of the bill, deeming it of little or no importance who was right or who was wrong upon the question of rendering a bill before an action; and asked what possible objection there could be to that course being then adopted; but received no answer other than that the solicitors would not consent.

It was then, and still is, impossible for me to imagine any good reason why that course should not have then, or should not be now, adopted, and this avoidable litigation brought to an end.

If the solicitors' claim is lawful and right, they cannot lose, but must gain, by a taxation; their costs of it should be paid; and they should be saved from any possible imputations of having recovered that large amount of money by unusual methods—without rendering a bill and without a taxation, to which ordin-

arily all solicitors must submit, and without any real trial of the action.

Whilst, if it should be found that they are not entitled to that which they claim, either in whole or in part, no one should, and I am sure no one could, desire more than they to know it.

In the absence of any consent, I am in favour of directing that the solicitors bring in a bill, and that it be taxed in the usual way, this appeal being retained here until the result of the taxation is made known: that is the course which, in my opinion, the trial Judge should have taken; and the only reasonable and possible way of doing justice to those who have to pay, as well as those who are to receive, and a way in which no one has yet been able to shew any fault.

But if that is not to be done; if strict rights, better named sheer obstinacy, are to prevail, then, for more than one reason, this appeal should, in my opinion, be allowed and the action dismissed.

It ought not to be needful—but it seems to be—to say: that it is a plain and prime duty of a solicitor to save his client from needless litigation and needless costs.

The law is a *terra incognite* to the client; the lawyer is supposed to be familiar with it, and offers himself as a safe guide therein: the relationship of solicitor and client is necessarily of a very confidential character: the solicitor must take all reasonable means to guide his client safely; necessity compels the client to submit to the solicitor's guidance: care must be taken not to lead into pitfalls.

The duty of a solicitor to save his client from needless costs should be so obvious, to lawyer and laymen alike, that there should hardly be need for Rules of Court upon the subject, but there are Rules, confirmed by legislation, and they are quite in accord with that which every one's common sense should make plain.

Rule 667 provides that:—

"Between party and party the Taxing Officer shall not allow the costs of proceedings:

"(*a*) Unnecesasrily taken;

(*b*) Not calculated to advance the interests of the party on whose behalf the same were taken;

"(*c*) Incurred through over-caution, negligence or mistake; or

"(*d*) Which do not appear to have been necessary or proper for the attainment of justice or defending the rights of the party."

And Rule 668 provides that:—

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"Upon a taxation between a solicitor and his client, the Taxing Officer may allow the costs of proceedings taken which were in fact unnecessary where he is of the opinion that such proceedings were taken by the solicitor because, in his judgment, reasonably exercised, they were conducive to the interests of his client, and may allow the costs of proceedings which were not calculated to advance the interest of the client where the same wre taken by the desire of the client after being informed by his solicitor that they were unnecessary and not calculated to advance his interests. This rule shall not apply to solicitor and client costs payable out of a fund not wholly belonging to the client, or, by a third party."

And to these Rules may be added sec. 55 of the Solicitors Act, in these words:—

"A provision in any such agreement that the solicitor shall not be liable for negligence or that he shall be relieved from any responsibility to which he would otherwise be subject as such solicitor shall be wholly void."

Having this general view of a solicitor's relationship and duty to his client in mind, it is necessary that the material facts of this case be now stated and the law applied to them accordingly.

Unfortunately, the retainer of the solicitors is not in writing, though generally it should be, and in such cases as this, under provincial legislation, must be signed by the Minister of the provincial Government who made it: The Executive Council Act, R.S.O. 1914, ch. 13, sec. 6.

No defence, however, is based upon this enactment; on the contrary, a retainer is admitted: the difficulty is to find, in the absence of any such writing, just what the retainer was: but the solicitors, at all events, cannot object if their own statement in writing, at the time, as to it, be accepted as that which they understood it to be.

On the 1st April, 1916, they wrote to the Hydro-Electric Power Commission: that, "as the Commission knew," they had received instructions from the Government to search the real estate titles of the properties which were being acquired under the contract between the Electric Power Company and His Majesty the King, dated the 10th March: and, in the same letter, shews their appreciation of their duty in these words: "It seems to me that, with your knowledge and inventory, arrangements ought to be made to check off now with your list the properties and assets that are being handed over and that your officers or employees who made this list would be better able to do the checking than any person else. When this is done, or as it is

done the *persons doing the checking should send a particular description of each parcel of real estate of which the title requires to be searched and certified by me.*"

That is to say, that such titles as the Commission found it necessary to have searched, the solicitors were to search, on receiving a particular description of each parcel from the Commission.

It should have been impossible, even without this statement of the solicitors, to have believed that the retainer could have been any wider than to make all necessary searches: the Minister could not have meant, make searches whether necessary or not; nor could the solicitors, having regard to their duty, have accepted any such retainer, as it was not the Minister, but the ratepayers of the system, who must pay. It is obviously impossible that the solicitors had authority from the Minister to run up a bill of tens of thousands of dollars, if there were really nothing substantial to be gained by it: so it may be taken that the retainer was: to make such land title searches as should be necessary and proper: and, as I have stated, if extravagant and useless proceedings were authorised by the retainer, the solicitors could not recover the costs of them except under the provisions of Rule 668, that is, in this case, from the person who authorised them, and then, only if the solicitors had informed him that they were not necessary and not calculated to advance his interests.

It does not appear that the Commission ever sent to the solicitors "any particular description" of any parcel "of which the title requires to be searched:" and no reason has been given for going into the extremely unusual expense incurred in this case, without such an authorisation from them as furnishing such "description" might be. To the contrary of having received any such authorisation, the solicitors now take the extraordinary position that the Commission had no right to do, or to say, anything with regard to the matter except to pay their bill, and collect the amount of it from the ratepayers—that is, the public, who are now served through the Commission with electricity from the Central Ontario system.

The material circumstances affecting the case are few and unquestioned or unquestionable: the Government of this Province, pursuing the popular policy of public ownership of provincial water-powers suitable for generating electricity, and of the development and public distribution of electricity through the Hydro-Electric Power Commission, acquired, from private ownership, through a number of companies which had forestalled public ownership in the Trent district, all the property and rights of such companies, by contract; and thereupon, under

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powers conferred by legislation, granted to and vested in the Commission all of them, to be managed by them as a separate department or branch of the business of the Commission.

The contract to purchase was made by the then Minister of Lands Forests and Mines, and was signed by him representing His Majesty the King—in plainer language, this Province: and in and by that contract—which was, as the law before mentioned requires, in writing—it was agreed and provided that "The purchaser accepts the title of the vendor . . . . to all the said premises."

That contract was confirmed by legislation, 6 Geo. V. ch. 18, sec. 2, in these words: "The agreement . . . . which . . . is set out in schedule A to this Act, is hereby confirmed and declared to be legal, valid and binding upon the parties thereto."

The Act also, in sec. 3 vested in the Province, free from all liens, charges and incumbrances, save as provided in the contract of purchase, "All and every part of the property, assets, rights, contracts, privileges, licenses, franchises, undertakings and businesses dealt with or purported to be dealt with, or agreed to be purchased or sold under the terms of the said contract set out in schedule A."

This provision, plainly giving an absolute title to all the property bought, accounts for that which otherwise would be an extraordinary provision of the contract, that is, the provision accepting the title of the vendors: usually (need it be said?) the vendor must prove his title.

But it is contended, and has indeed been held by the trial Judge, that that which the Legislature so plainly said is not that which it really meant: that that which it meant was only to vest in the Province such titles, whether good or bad, as the vendors actually had.

That view seems to me to be plainly erroneous, for these reasons: it is contrary to the plain words of the Legislature, which no Judge or Court has any power to disregard or modify, however strong a feeling there may be that the Legislature should not have said them. We are all bound to treat the Legislature as a body quite able to express its meaning, and a body which means that which it says: and, without qualifications, it has given to the Province a clear title to all and every part of the property comprised in the agreement to purchase, and has directed that that title be registered against each parcel: sec. 8: it would be useless if it had no such meaning—if it meant only such rights as the vendors had in the property—for all that was comprised in the agreement to sell, and that agreement had already, in the Act, been declared legal, valid, and binding on the parties there-

to: if it were to be so limited, sec. 3 should, and would, have contained the usual, the invariable, words, "for all the estates, rights, titles, and interests of the vendors therein and thereto," or the like words: and it was necessary in the interests of this, "public utility," and could do no real harm to any one; it was necessary to save the system from interruption, from being "held up," as it is commonly called, by the cantankerousness or cupidity of some person who had, or pretended to have, some title to or interest in some of the property needed and used for the convenient working of the system; a person who might, either by injunction or by himself abating that which he deemed a nuisance as to his rights, interrupt the whole system, and in even a short time cause great and widespread injury: whilst, on the other hand, no harm could be done; the person, if he had a good claim, should and would be fully compensated for all that the enactment took from him; and that should and would be done, whether the Government were or were not bound by the law to make compensation: as to which *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co. Limited* [1919] A.C. 744, and *Attorney-General* v. *De Keyser's Royal Hotel Limited*, [1920] A.C. 508, afford much information: and it may be added that every one is familiar with and accustomed to such legislation as this, of which *Florence Mining Co. Limited* v. *Cobalt Lake Mining Co. Limited* 18 O.L.R. 275, and *Smith* v. *City of London* (1909), 20 O.L.R. 133, were the earlier popular lessons. So too it may also be added that the Nathans who resist confiscation for the benefit of another individual are of quite a different species from those who resist "confiscation" in order to "confiscate" from the public "three or four prices" for property, when without such an opportunity they would be glad to sell for "one price."

If the Province thus got a statutory title, there would be no need to go behind that, except in such cases, if any, in which compensation might be claimed, and no one has said that there have been any such.

But, even if the statute does not confer such a title, yet what need, for any practical purpose, could there be for searching any of these titles except for the purpose of dealing with a claim for compensation when it was made? And the simple and ordinary method in such a case would be to look at the books, deeds, and other papers which the Commission have, and, if any further search of title were necessary, obtain from the proper registry office such further information as might be needed, at a very small cost. It must be borne in mind that the companies from whom the Province bought had purchased and doubtless had investigated the titles, and had handed on to the Commission all

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the documents in connection with them: this is referred to in the solicitors' letter, from which I have quoted, in these words: "The purchase was recommended and your Commission spent thousands of dollars investigating the assets and properties of the vendors and have a list or inventory of the properties to be transferred."

It is idle to speak of liability incurred by the solicitors: they would be liable for negligence only; and, even if guilty of the greatest negligence, how could substantial damage be recovered against them? Their answer to such an action would be: "You have sustained no damages by our negligence, you did not accept title on our opinion. You had accepted title, whether good or bad, before you retained us."

The onus of proof of some reasonable need for this expenditure was manifestly upon the solicitors, but they made no attempt to meet it: their proof was that the prices charged were reasonable: so that the case, if the judgment stands, would be parallel to that of goods sold and delivered on a contract to supply only such goods as were necessary, the tradesman having alone knowledge of the quantity needed, met by a defence that the goods were not needed and were wasted, yet recovering in a Court of law upon a reply: that anyway the prices were right and he had proved it by three of his fellow-tradesmen. Even in such a case as *Godefroy* v. *Jay* (1831), 7 Bing. 413, the onus was held to be upon the solicitor, and he was obliged to pay £45 damages for not entering a defence to an action, though his client really had no defence to it; see also *Hill* v. *Featherstonhaugh* (1831), 7 Bing. 569; *Allison* v. *Rayner* (1827), 7 B. & C. 441; and also *In re Broad and Broad* (1885), 15 Q.B.D. 252; and *In re Allenby and Weir, Solicitors* (1891), 14 P.R. 227.

So upon the merits of the case, so far as they have been disclosed, the solicitors have no valid claim, in my opinion, but have a judgment for $24,589.33 with interest and costs of action after having received $7,000 before action. Under no circumstances should such a judgment stand upon the claim of solicitors, who are officers of the Court.

However, if the case is to be dealt with on the "strict rights" upon which the solicitors rely, it, in my opinion, also fails.

It is the duty of all solicitors imposed by statute: the Solicitors Act, sec. 34: to render a bill of their fees, charges or disbursements, subscribed by them, before action. No such bill was rendered, nor was anything like a bill of costs rendered. A copy of entries in the solictiors' docket was made out and sent to the Minister: no fees or charges were set out, no figures given except the total amount of disbursements. No one could reasonably call

that a bill of costs such as the Act requires: the solicitors could not, and did not, and so they said in their letter forwarding it to the Minister:— "Instead of preparing a long detailed lawyer's bill in the usual shape . . . we have prepared a memorandum of the nature of the work done . . . and following that have copied our docket entries.."

In that letter the solicitors asked the Minister to submit that which they sent "to some competent person to settle what fees we should receive." Upon that suggestion the Minister wrote to a solicitor for the Commission, but who in reality was not and if he had been could not have acted without their authority, saying that he should be glad if the solicitor would go carefully into the subject and advise the Department what he thought a reasonable allowance under all the circumstances.

The solicitor undertook the task, and reported to the Minister that a fair and proper value of the services rendered as shewn by the copy of the docket entries, is $25,900, besides $5,689.33 for disbursements. This solicitor did not, and could not, consider any question as to the need of any of the work set out in the docket: he was, and could be, only concerned in the question, what was a proper sum for each part and all of the work said to have been done?

Upon receiving that report, which was in the form of a letter to the Minister, the Minister wrote to the solicitor acknowledging the receipt of his letter, and saying: "As this account is chargeable to the Trent System, it should be paid through the Hydro and charged against the operation of the system. I am returning by messenger the bill of costs."

And thereupon the solicitor sent the "bill" to the Commission: and the Commission apparently refused to impose the claim on the ratepayers, because they thought the solicitors should not have searched the titles: see the reporter's notes of the trial, p. 21: and, upon the evidence as it now stands, I am unable to perceive how they could have justly and reasonably acted otherwise.

The Minister's letter returning the "bill," and in effect sending the matter over to the Commission as one to be dealt with by them, is dated the 21st October, 1918: and the papers seem to have been sent on to the Commission at once: yet, on the 4th November, 1918, the Minister was again dealing with the matter, having on that day made a report in which he recommended that the Lieutenant-Governor in Council should direct the Commission to pay the solicitors' claim and charge it against the funds belonging to the Central Ontario Power System.

There is nothing in the report, or order in council, to indicate that it was known that there was any question as to the solicitors'

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right to be paid, or that the matter had already been sent over to the Commission, and that the Commission refused to saddle the ratepayers or the "System," with a great debt for which they considered that neit... they nor it were or was liable.

Nothing further seems to have been done until these proceedings were commenced about a year afterwards: and they were not brought down to trial until more than a year after that: in the meantime the then Minister, and indeed the then Government, went out of office, and those in power now take the position which the Commission always took, and are firmly opposing the solicitors' claim.

What the solicitors urge now is: that the order in council is an agreement in writing to pay the solicitors, and so complies with the requirements of the Executive Council Act, sec. 6; and with the provisions of the Solicitors Act, sec. 48 to 66; compliance with each being necessary to give a right of action.

But one must be very hard pressed, must indeed be catching at straws, to contend that the order in council is a contract: it is entirely a unilateral proceeding, wholly within the discretion and control of the Government, which might change or rescind it at pleasure. It was never acted upon or given any effect: and the Government now considers that it was improvidently made; and that it would be improper to act upon it, as it provides for the imposition upon the Commission and through them upon the public of a burden to which they are not liable: that is their defence.

To be a contract enforceable by the solicitors in these proceedings, it should, for a good consideration, bind the Province—in the name of His Majesty the King—to pay to the solicitors the sum claimed: but it has no semblance of such a contract, or of any kind of contract. At most it is but a direction to the Commission to pay the claim: and one may be very willing to direct some one else to pay a bill which he himself would never pay. The order in council was a matter wholly between the Government and the Commission: the Commission refused to pay, and the Government now say that they were right; and are accordingly defending this action.

It has not the least semblance of an agreement: and so far as it may be treated as a confession it is not a confession of any liability on the part of the Crown or Province, and so could not aid the solicitors in any way in their action. If it could be proof of anything, it would be proof of no liability by the Crown, but liability by the Commission, who are not sued: and it may be added that it is easy to confess that some one else is liable.

It is said, however, that the Commission had no right to

refuse to pay, that they were merely the agents, that is the servants of the Government, and as such were bound to obey their master's order. But again I am obliged to say that the solicitors must be hard pressed for an argument in support of their claim to rely upon any such grounds: for, in the first place, what possible right can the solicitors have to interfere in a matter between master and servant, to which they are in no sense parties? The enforcement of the order was not committed to them; they knew nothing of it except from hearsay: it never passed out of the possession and control of the Government: it must not be treated as a bill of exchange, or other order to pay, given to the solicitors in payment of their claim: in the next place, the Commission is not a mere servant or agent of the Government: it is a distinct corporate body, given the control and ownership of such things as those in question for the public benefit, and for the safe-guarding of the public interests, by reason of their especial ability, skill, and experience in all "hydro-electric" matters. Their usefulness should be mightily impaired if their judgment could be overruled by, and if they were obliged to submit to, any order of a Minister, or a Government, of a day—here to-day and gone to-morrow: and, lastly, if they were merely servants, is a servant bound to do that which is not lawful or right, if his master orders him to do it? I can perceive no great difference between a servant compelling, or indeed even receiving, payment of a debt which is not really owed, and putting sand in the sugar to be sold. Everything is vested in the Commission: it may be taken away from him: but now it is theirs to manage as one of their departments.

Having regard to all the circumstances of the case, I can have no manner of doubt that the Commission were not only within their rights in refusing to saddle the ratepayers with this great debt, without the question of liability being first determined in the regular way, but that, if they had not done so, they should have been guilty of a grave dereliction of duty.

So, too, even if the law did not make an agreement in writing necessary, the solicitors could not recover on a verbal agreement, for there was none. The solicitors were not bound; they only asked the Minister "to submit it to some competent person to settle what fees we should receive." The Minister did that, but in no way bound himself or any one else to the result. They were following a course which, no doubt, both expected should end in payment of the amount which the one was willing to give and the other to receive: but they never reached that stage, and until reached either might withdraw, if indeed any withdrawal were necessary.

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It was never reached, for one reason, because neither the Minister, nor the Government, had the power, or the money, to pay. It could be paid by them only when the Legislature had authorised payment; and, although five years have elapsed, the Legislature has not apparently ever been applied to for authority to pay the bill. It seems hardly possible that the Legislature could authorise payment of it by the Province, because, if it should be paid by any one, it should be paid, as every one knows, but the customers of the Central Ontario System, through their light, heat, and power bills: and, that being so, what could any one say except that: it is a matter for the Commission, and all they ask is that the bills be brought in and taxed, as the law requires and as it generally done, when payment shall be made if anything is payable.

And yet another difficulty, and an insuperable one, stands in the solicitors' way.

Assuming that a most formal agreement had been made with them to pay the amount they claim, no action could be brought upon it.

Formerly solicitors were not permitted to make contracts for payment of lump sums for costs, but were obliged to render bills of particulars, and submit to taxation of them by officers of the Court appointed for that purpose, because of their especial knowledge of, and skill and experience in, such matters. That was considered necessary because, in such matters, for the reasons I stated at the outset, the solicitors have such an advantage over the client that, if disposed to make them, hard and unconscionable agreements might be obtained by them.

Sections 48 to 66 of the Solicitors Act modified that, permitting, with a good many safeguards, the making of such an agreement, but providing (sec. 56) that no action should be brought to enforce any such agreement, but that it might be enforced on a summary application, on which, any question respecting the validity or effect of it might be examined and determined: and that in certain cases the agreement must be submitted to the Senior Taxing Officer for approval before payment.

It was successfully contended before the trial Judge: that this case, being one against "His Majesty the King," is not an action, but is a petition of right, which is not an action: but the provisions of the Interpretation Act, sec. 30, were not brought to his attention: if they had been, I cannot but think that he must have been driven to the opposite conclusion: and have been obliged to dismiss the action if the appellant insisted upon it, as it did. That section of the Interpretation Act and sec. 2(*a*) of the Judicature Act together make it too plain to waste a word

over that this is an action within the meaning of that word in sec. 56, as well as elsewhere, of, and in, the Solicitors Act.

No action would therefore lie if the order in council were a bilateral agreement lawful under the provisions of the Solicitors Act: the solicitors could proceed upon it only in the special manner provided for in the Act: that is fatal to this action: and is but one of the "strict rights" fatal to it. Section 55 seems to me to be also fatal to it: for, if this agreement be enforced in the solicitors' favour, they are relieved by it from their negligence contrary to the provisions of this section.

There are two more points to which I must refer, so that it may be plain that they have not been overlooked, though they seem to me to be of no weight in the solicitors' favour.

Two letters were put in, at the trial, subject to objection, and were relied upon by the solicitors, for what purpose was not stated, the learned trial Judge having allowed them to go in *quantum valeat*, as he expressed it.

One is a letter from the secretary of the Commission to one of the solicitors: the other is a personal letter from a member of the Commission, who was also a member of the Government, to his brother Minister of the Lands Forests and Mines Department.

Neither is, in my opinion, evidence in any sense, in this case: it cannot be said that they authorised the work for which the solicitors seek payment, and if they did it would not help them if the work were unnecessary: one was written more than six months and the other more than nine months after the work began; neither is a letter of the Commission, nor does it appear that the Commission ever had any knowledge of either letter: the solicitors contend that the Commission cannot be heard to object to their bill, yet rely on these letters as authorising it: so, too, it should be obvious that the letters cannot be used as evidence of the need of services charged for: there is no reason why these gentlemen should be allowed to give evidence by letter, why they should not be sworn and examined as all witnesses must: they are not the Commission, and could not make admissions for the Commission: and, if they could, and had, the admissions should be inadmissible: the Commission are not parties to the action; and it may be taken for granted that if these gentlemen were called as witnesses they should not have been able to aid the solicitors, otherwise they should not be, as they are, determinedly opposing the solicitors' claim.

But in truth there is nothing in the letters that supports the solicitors' enormous claim in this action—more than over one-third of one per cent. of the purchase-money: eight and a half million dollars—which purchase-money may have been ten or

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twenty, or more or less, times the value of the lands the titles of which were searched: indeed it may be that some of the lands—"easements"—were not worth more than the sum charged for searching. All this should appear upon a regular taxation of the bill in the usual way. No weight should be given to taxations by gentlemen, however competent in their own calling, who are quite without experience as taxing officers, as they have made very plain in undertaking to "tax" without any inquiry into the facts or any attempt to learn what the objections to the bill were: and apparently assuming that the lands were worth the eight and a half millions, though that was plainly the price of all these companies possessed, of every nature and kind. To attempt to determine anything as to what—if anything—the bill should be without a taxation, cannot, in my opinion, be anything more than a leap in the dark without need and without excuse. The secretary's letter refers to persons "claiming leases or easements under which rents were due:" saying that the Commission had not a list of the "easements or particulars respecting them," and asking for such information as would enable "us" to deal with them. But what had that to do with searching 230 land titles and 500 "easement" titles? Nothing, or indeed less than nothing, because it pointed not to titles but to the leases or deeds under which the easements were held. The books of the companies alone should shew what "easements" were held and on what terms: so that in few if any cases should it have been necessary to look at even the leases or deeds. And this information the Commission had, as the solicitors' letter from which I have already quoted —1st April, 1916—plainly shews:—

"I understand from your Mr. Pope"—the secretary—"and from the Minister of Lands Forests and Mines that, before the purchase was recommended and made, your Commission spent some thousands of dollars investigating the different assets and properties of the vendors and have a list or inventory of the properties to be transferred." "It seems to me that, with your knowledge and inventory, arrangements ought to be made to check off now with your list the properties and assets that are being handed over and that your officers and employees who made the list would be better able to do this checking than any person else. When this is done, or as it is done, the persons doing the checking should send a particular description of each parcel of real estate of which the title requires to be searched and certified to me."

These two letters leave the impression on my mind that the solicitors must have obtained from the Commission this inventory and all the deeds and leases, as they would if they intended to

search titles; and that the absence of them was the cause of the secretary's letter. But in any case one must be driven to the wall to give this letter as a reason or excuse for searching titles, when a glance at the books or at the leases or deeds gave, much better all the information desired and sought.

The personal letter of the Minister—Commissioner also—is helpless to the solicitors: the letter says that "the general statement is that the reports as to title are made to you and that you have knowledge of the situation:" and adds, "I think it very desirable that if the matter is closed some formal report should be made in a formal way to the Commission."

No answer to this letter was put in: if there was one, and if it were helpful to the solicitors, it would have been. What it was, if any were given, we do not know, but what it should have been is manifest, it should have said: "You have a statutory title—look at the Act: or, if sec. 3 had not been in the Act: "You have accepted the companies' titles, and no doubt they are all right: but, if not, searching them will not improve them or help you, it may only disturb sleeping dogs foolishly if there are any: look to your leases and deeds, book and papers: and, if a rare case of a claim not plain in them should arise, and it should become necessary to search the title, let your solicitor communicate with the Registrar and get from him, for a trifling cost, any needed information."

I find nothing in the letters helpful to the solicitors, and if there had been, and if it were evidence, it should only make plainer the need for a full and fair investigation of this claim in which the former Minister, as well as these two gentlemen, might be able to give some helpful evidence: it should be helpful to hear why any one could have thought this enormous expense needful: as the case stands, it seems to me to have been entirely needless: no one has proved even a shilling's worth of good it has done. I refer of course only to the searching title costs, which I understand to be about $30,000.

The other of these two points is: that the solicitors are relieved from rendering a bill, and from any taxation in the usual course, by the fiat authorising the taking of these proceedings. Let us see what that means. It means: that because the fiat on the recommendation of the Attorney-General has said, "Let right be done," the Crown is not only to let wrong be done, but to do it: for if it be right that a bill should be rendered and taxed before payment it should be manifestly wrong to require payment without taxation and without a bill, and, not more than to mention it again, without any real trial. That it was not meant to have any such effect is very obvious from the defence pleaded by

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the Attorney-General, and maintained throughout: that the solicitors must render a bill and submit to taxation, as all solicitors are obliged by law to do. Such points only tend to make plainer the weakness of the solicitors' resistance of the usual, and (may it not be said?) of the universal, rights of clients, established by statute law.

And, before concluding, it may be well to point directly to some of the effects of a dismissal of this appeal: it will relieve the solicitors from the statute-imposed obligation to render a bill and submit to a taxation of it in a case that especially required observance of them: a case in which all irregular or unusual or short-cut methods are manifestly objectionable. The claim is a very unusually large one: the transactions were public transactions, not one in which those concerned had to pay anything out of their own pockets, but those who must pay are the more distant public served by the Central Ontario electric system, who have no opportunity of defending their pockets against unjust impositions except in the taxing officers appointed by law for their safe guarding.

There has been no real trial, nor indeed any pretence of a real trial, of the vital question, whether the services charged for were, or any of them were, unnecessary or otherwise not taxable under Rule 668. The real question should be faced and tried, in the usual way, by the taxing officer, anyway should be tried and determined before this large sum is imposed on the innocent ratepayers, against the will of the Commissioners, and of the Province, in the name of His Majesty the King.

There was no agreement to pay: and so, technically as well as substantially, the solicitors are in the wrong.

There could be no agreement on the part of His Majesty the King to pay: for there was no means to make payment. The Legislature must have been applied to and an appropriation must have been first made: and in the five years which have elapsed no one seems to have had the courage to apply for the appropriation: and yet the judgment, if it stands, may compel payment without any appropriation and without the Legislature ever having had an opportunity to consider the matter.

The Commisison will not pay: this Court has not said that it should: on the contrary, it has said that His Majesty the King should, and that is obviously wrong, for the debt—if there be any—is not that of the Province at large but is that of the Central Ontario Power System only.

If the Commission should pay, the Commission should have been sued: it is untouched and untouchable by the judgment appealed against, or by any judgment that could be made in these

proceedings, as long as it is no party to them: and it never could be a party—an ordinary action would be the means of reaching it. It is not said why it was not sued to compel it to raise and pay the money.

The Province could divest the Commission of the property and management of the system now wholly vested in it, but that is all it could do; and that it is hardly likely to do, for one of many reasons, because it is firmly of the same opinion as the Commission—that the solicitors should render a bill and have it taxed in the usual way, and that little, if anything, should then be found due to them.

Both Province and Commission are willing and ready to tax the bill when rendered, and to pay whatever sum, if any, shall be found due, immediately after the amount is so ascertained; then charging it against the system—that is the ratepayers—with a clear conscience on their part, and with a knowledge on the part of the ratepayers that they are not, behind their backs, being imposed upon.

Why should not that be done?

There is no question of honest or dishonest intention involved in this appeal. I treat every one, in any way connected with it, as above suspicion except of error and of obstinacy: and the former is said to be human, and the latter we all know to be always a prevalent ailment: the only question is: who is right and who is wrong. And, for the reasons which I have given, the solicitors seem to me to be plainly in the wrong in the several ways that I have mentioned: see *Re Allenby and Weir, Solicitors*, 14 P.R. 227: and I am bound to add: that, if the conclusion had been reached that they are, in legal technicality, right, I should still have been in favour of requiring them to have a bill taxed in the usual way before imposing on the ratepayers this very large claim—a power which the Court plainly has.

As it is, I am in favour of allowing this appeal, and, in effect, dismissing the action.

LATCHFORD, J. (dissenting):—It is plain that, having regard to sec. 34 (1) of the Solicitors Act, R.S.O. 1914, ch. 159, an action for the recovery of fees, charges or disbursements, for work done by a solicitor cannot be brought until one month after a bill of costs has been rendered, unless (sec. 49 (1)) an agreement in writing has been made between the solicitor and the client respecting *the amount and manner of payment* for . . . services in respect of business done . . . by such solicitor.

The questions arising on this appeal are not, in my opinion, whether the employment of the suppliant firm by the Minister of Lands Forests and Mines was necessary in view of the provisions

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of 6 Geo. V. ch. 18, and the contract therein referred to, and what is the amount proper to be allowed for the services rendered; but (1) whether a petition of right is an action: (2) whether a bill of costs was rendered by the suppliants; and, if not, (3) whether such an agreement was made as obviates the necessity of delivering a bill of costs.

It seems too late for the Crown to say that the work done by the suppliants was unnecessary. They were employed by a Minister as much a representative of His Majesty as the Minister whom Mr. Bayly now represents: and they appear to have done what, rightly or wrongly, they were employed to do. As a matter of right they should be paid whatever their necessary services are worth. I understood counsel for the Crown to say that the Crown is willing to pay such costs as are properly taxable when fixed by the proper officer. He asks, in the meantime, on the grounds stated, that the appeal be allowed and the action dismissed.

The learned trial Judge held, on the authority of *Rustomjee* v. *The Queen* (1876), 1 Q.B.D. 487, that a petition of right is not an action. The decision in that case does not seem to me to go so far, but only to the extent of stating that the Statute of Limitations relates only to the course of procedure between subject and subject: Cockburn, C.J., at p. 492; Blackburn, J., at p. 496.

It may well be that a petition of right is not an action within the meaning of the Solicitors Act until the fiat is issued which converts it into the fulness of life: but thereafter, in this Province it is, in my opinion, an action according to our statute law.

Section 2(*a*) of the Judicature Act declares that "action" shall mean not only a civil proceeding commenced by writ and also (a civil proceeding commenced) "in such other manner as may be prescribed by the Rules."

Rules 738-747 prescribe the form which a petition of right shall follow, by whom it shall be signed, with whom left, to whom submitted for the fiat "Let right be done:" and what, as well as how and when, subsequent proceedings are to be taken.

By Rule 748 the costs of a petition of right are recoverable in the same way as in ordinary actions.

While a petition of right is not an ordinary action, it is a civil proceeding commenced and even prosecuted in a manner prescribed by the Rules, and is therefore an "action" within the definition contained in the Judicature Act. The same definition is extended to the Solicitors Act, as to an Act relating to legal matters, by sec. 30 of the Interpretation Act.

Considered without reference to our statutes, "action" is usually a general or generic term, as was said by Lush, L.J., in

the first stage of the protracted case of *Clarke* v. *Bradlaugh* (1881), 7 Q.B.D. 38, 57; and includes, unless restricted by the context or by statute, a living petition of right as a species or kind. Nothing appears in the Solicitors Act limiting the general meaning of "action" as employed in sec. 34 (1).

With much diffidence but after careful consideration, I have reached the conclusion that the statement of services delivered to the Hon George Howard Ferguson, Minister of Lands Forests and Mines, cannot be called a bill of the kind specified in sec. 34 (1).

"A bill thereof" means a bill of the "fees, charges or (and) disbursements" for business done by a solicitor. No fees or charges but only disbursements appear in the statement rendered by the suppliants. I therefore think it cannot be regarded as a bill of costs within the meaning of the Solicitors Act.

Under sec. 49 (1) of that Act it was open to the solicitors to make an agreement in writing with their client, the Crown, respecting the amount and manner of payment for the whole or a part of their services in respect of the business done by them.

The suppliants assert that such an agreement was made, relying on their letter accompanying the so-called bill as an offer, acted upon by the reference to Mr. Kilmer, and the order in council directing payment as an acceptance. This contention has been adopted by the learned trial Judge, who considered the order in council an approval of the adjustment of account and an acknowledgment of the prior retainer and so amounting to an agreement to pay.

The solicitors' letter to the Hon. Mr. Ferguson offers to accept whatever a competent person shall determine to be the amount due for the services rendered. A person of undoubted competence is agreed on: he investigates and reports to the Minister the result, which is satisfactory to the suppliants. Then the order in council is passed, directing the Hydro-Electric Power Commission to pay the amount regarded by Mr. Kilmer as due to the suppliants.

In the reasons for the judgment appealed from, the order in council is regarded as an approval of the adjustment of the account, and an acknowledgement of the retainer, and so amounting to an agreement to pay.

In *Ray* v. *Newton*, [1913] 1 K.B. 249, the agreement was much more formal and definite than in the present case, and the statute almost identical with our own, yet the Court of Appeal held that the client was entitled to have a complete bill of costs rendered and an inquiry had regarding the agreement.

As a matter of first impression I thought that the learned trial

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Judge had the right, exercised upon ample evidence, to fix the amount recoverable by the suppliants without referring the matter to the Taxing Officer.

Consideration, however, of the judgment of my Lord the Chief Justice has induced the conviction that the Solicitors Act interposes an insuperable bar to the maintenance of the action, and I therefore agree that the appeal should be allowed.

Appeal dismissed.

LANSTON MONOTYPE Co. v. NORTHERN PUBLISHING Co.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 29, 1922.

SALE (§IB—5)—OF GOODS—GOODS SUBJECT TO LIEN OF PREVIOUS VENDOR FOR PRICE—AGREEMENT OF PURCHASER TO PAY OFF LIEN—RIGHT OF PURCHASER TO RETAIN GOODS AGAINST LIEN HOLDER—PURCHASER IN GOOD FAITH FOR VALUABLE CONSIDERATION—CONDITIONAL SALES ACT R.S.S. 1920 CH. 201, SEC. 2 (1)—CONSTRUCTION.

Where the evidence and the price agreed upon shew that the real bargain between the parties as to a certain chattel, against which there is a lien for the unpaid purchase price, in connection with the sale of a business, is that the purchaser is to be at liberty to take the chattel or not in whole or in part as he should find expedient, but in respect of whatever he took he would pay off or otherwise arrange with the lien holders, the purchaser of such chattel cannot escape his liability to pay the lien holder, on the ground that he is a buyer of such goods in good faith for valuable consideration within the meaning of sec. 2 (1) of the Conditional Sales Act R.S.S. 1920 ch. 201, he having actual notice of the lien although it is not registered.

[*Ferrie* v. *Meikle* (1915), 23 D.L.R. 269, 8 S.L.R. 161, disapproved; *Moffatt* v. *Coulson* (1860), 19 U.C.Q.B. 341, distinguished. See Annotation, 58 D.L.R. 188.]

APPEAL by plaintiff from the judgment of the Saskatchewan Court of Appeal (1921), 61 D.L.R. 16, in an action to recover possession of a chattel on which the plaintiff had an unregistered lien. Reversed.

H. W. Shapley and *G. M. Huycke*, for appellant.

Gregory, K.C., and *Hodges*, for respondent.

DAVIES, C.J.:—For the reasons stated by my brother, Anglin, in which I fully concur, I would allow this appeal with costs throughout.

IDINGTON, J.:—The question raised herein by this appeal is whether or not the respondent can be held to have been a purchaser of the property in question in good faith, for valuable consideration as against the appellant.

The answer depends upon the construction to be given sec. 2, sub-sec. 1 of the Conditional Sales Act of Saskatchewan, R.S.S. 1920, ch. 201, which reads as follows:—

"2 (1) Whenever on a sale or bailment of goods of the value of $15 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor notwithstanding that the actual possession of the goods passes to the buyer or bailee the seller or bailor shall not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration or as against judgments, executions or attachments against the purchaser or bailee unless such sale or bailment with such agreement, proviso or condition is in writing signed by the bailee or his agent and registered as hereinafter provided. Such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished."

The respondent, through its agent who transacted all the relevant parts of the business of the respondent, had actual notice of the appellant having agreed to sell the machine in question, and accessories thereto, to the Phoenix Publishing Co. Ltd. subject to appellant's right to retake possession on default of payment of the price, or any part thereof, or other breach of the conditions of intended sale.

That company, subject to such condition, sold the rights it had in the machine to one A.B. who, in turn, sold to the Northern Publishing Co., Ltd.

The Phoenix Publishing Co., Ltd., having got into financial difficulties in the course of their business as publishers of a newspaper and printing business akin thereto, said A.B. acting as solicitor for others investigated the financial and other conditions of the company with the object of buying for his clients the entire business and assets of said company. In the course of doing so he was given a list of the machines it was possessed of and of much other property acquired in course of said business.

In that list of machines there were set forth the respective liens against each, and its accessories, including a lien of $4,500 on the machine in question in favour of appellant.

The trial Judge refers thereto and to the resultant bargain, as follows: —

"The evidence in this case discloses the fact that when A.B. first visited Saskatoon in May and consulted with the parties representing the Phoenix Publishing Co. that he was given a state ment indicating the liabilities of the Phoenix Publishing Co. and more particularly indicating the parties who had liens against

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the plant or any parts of it, including the lien of the plaintiff company. It is also clear from the evidence that at that time the purchase price of $15,000 for the plant was named, the price that was subsequently entered in the formal agreement and paid. So that I think it is a fair inference to make that in fixing the price of $15,000 for this plant, the vendors, the Phoenix Publishing Co. or the parties representing them, took into consideration all the liens which were detailed in the statement, including the plaintiff's lien.

"So that to some extent, at least, the lien was a factor in the deal."

Lamont, J.A. in his judgment in the Court of Appeal (1921), 61 D.L.R. 16 at p. 17, 14 S.L.R. 371:—

"On June 17th, 1918, A. B. acting for the persons who subsequently became incorporated as the defendant company, purchased certain assets of the Phoenix Publishing Company for $15,000. These assets were valued at $40,000, but against them there were liens amounting to $23,355."

A.B. by way of verifying this basis of the bargain he was trying to make, and did make, searched the office where liens might be registered and found the appellant had not registered any lien.

It seems to me quite clear that when the bargain was made between him and the company on the above basis he was not buying the actual goods of any of those lien holders free from the several respective liens thereon, but the interest of the company therein subject thereto, and that he thoroughly understood the nature and purpose of the following resolution, and especially the reference therein to liens, passed by the shareholders of the company:—

"Resolved that resolution of the directors with respect to the sale of the plant, equipment, accessories and franchises of the Phoenix Publishing Co., Ltd., to A.B. be and is hereby confirmed, provided that the said A.B. make arrangements re liens held on the plant, including the Hoe press, papers held in trust for the John Martin Paper Co., as shall be satisfactory to the directors, and such arrangements regarding wages and rent, as shall be mutually satisfactory to the employees, the landlord and the directors and that the directors be and are hereby authorised to conclude the sale of the equipment, plant, accessories and franchises, etc., of the company, except current accounts for advertising purposes."

He was at the meeting "in and out" as he expresses it, and received a copy of that resolution.

Indeed the respondent company was promoted, and its incorporation obtained, by him, and he was one of the provisional directors and later its president, when the deal now in question was carried out.

The special reference to the lien on the Hoe press, in said resolution, arose by reason of some of those concerned in the Phoenix Company having become personally liable.

The following evidence of Lynd is illuminating as he was president of the Phoenix Company at the time in question:—

Q. "Had that been discussed with A.B. at that time? A. As I said, the question of liens was discussed, but there was no definite understanding arrived at with regard to the liens. Q. What arrangements was A.B. to make regarding the liens?

Mr. Mackenzie: He said there was none arrived at.

A. As I understood it at the time, A.B. was to make his own arrangements regarding the liens with the exception of the Hoe press, which he actually agreed to take care of. Q. What do you mean by 'his own arrangements?' A. My understanding of it at that time was if he got the machinery he would pay the liens, or make arrangements to settle them in some way, and if he didn't, he would try to make some arrangements with the parties who held them. That was my understanding. Q. If he kept the machines he would pay the liens? A. Or make settlement with the lien holders. . . . Q. What were the assets of the Phoenix Publishing Co. at that time? A. We estimated that the whole thing was worth, outside of the mailing list, which at that time was not worth very much, we estimated the plant to be worth $40,000. Q. And did the Northern Publishing Co. assume any of the general accounts at all, any of the general liabilities? A. No, I don't think so. I don't think they assumed any liabilities. Q. If the assets were worth $40,000, can you tell us why the sale was made for $15,000? A. The question of liens was taken into consideration, the liens on the plant. Q. What liens? A. As far as the Phoenix Publishing Co. were concerned they took into consideration all the liens that were on the plant at arriving at the figures . . . . Q. Mr. A. B. says that the only arrangement was that the directors were to be relieved from liability. A. I think it went a little further. I think the Hoe press was to be taken care of, so that the directors would be relieved from liability. Q. And what about the other liens? A. We made no specific arrangement with him regarding them, but my understanding was he would decide himself, or the persons for whom he was acting, would decide whether they would

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keep the rest of the plant, because there was some question as to whether they needed it at that time.

His Lordship: There was nothing as to relieving your company from liability?

A. No, my lord. We were not relieved in any way. Q. Were you as a director, or you, with other directors, asked to recoup the Northern Publishing Co. for any moneys paid on these liens? A. No. Not so far as I was concerned.

His Lordship: Would it be correct to put it this way that as far as the liens were concerned, you had given A.B. full notice of the liens so that there was no come-back to your company? A. He knew about the liens.

His Lordship: But he was to take his chances. A. That was my understanding of it. If he wanted the machinery he would take care of the liens, and make settlement in some way, and if not, he would try and arrange to send it back. That was my understanding.

His Lordship: And if he could get the machinery without having to pay for it so much the better? A. We didn't discuss that. As a matter of fact the Lanston Monotype were about the best creditors the Phoenix Co. ever had, and it was my impression when the Northern Publishing Co. refused to pay they were not quite keeping faith with us."

In the result that followed all the liens except that of the appellant were recognised and dealt with in the spirit which this evidence indicates was expected.

I repeat it seems to me abundantly clear that the purchase by respondent was made on the basis of $40,000 being about the fair value of that being sold, and if all the lien holders could be settled with on a fair basis the purchase price might have been fixed at that sum.

Evidently some of the properties owned were possibly in value not quite up to the respective amount of the liens thereof. Hence that phase of the bargain was left open and when it came to a formal assignment the consideration was named therein as $15,000.

I am quite unable to believe that such sum was intended to cover the actual value of the plant, or any part thereof, subject to liens; as if free from liens but on the contrary that it was the sum named for the residue of what passed thereby and the possible interest of the Phoenix Company in all the plant covered by liens.

And if so I fail to see wherein this case can fall within any

of the several cases relied upon which trace back to the case of *Moffatt* v. *Coulson*, (1860), 19 U.C.Q.B. 341.

In that case the Chief Justice of that Court in his opinion laid down as a test the following at pp. 344, 5:—

"I think he should be so held for there seems to be no reason to doubt upon the evidence that he bought in good faith, in this sense that he paid a *fair consideration for the horse which is in question* and did not buy him collusively in order to assist the mortgagors in placing him."

The words I have italicized in order to call attention to the gist of what was in the mind of the Chief Justice at a test, are not fitted to anything analogous thereto in what we find in above quoted evidence in this case by way of fact to pass upon.

Evidently in that and each of the cases following it and relied upon there was something in way of a basis of valuable consideration in that sense so given, whereas herein if respondent is to have its way it gets a four thousand five hundred dollar machine and its accessories for nothing but the fair value of the chances of defrauding the appellant by invoking the words of the statute which do not fit the facts and the law as laid down in the case upon which *Ferrie* v. *Meikle* (1915), 23 D.L.R. 269, 8 S.L.R. 161, seems to have been supposed to be or be founded.

Even if the mode of thought of that far-off day in administering the common law is applicable, I hold in this case that on the facts the respondent has failed to establish a case within the meaning thereof and hence the appeal should be allowed.

Indeed all that the assignment by the Phoenix Company pretends to convey is the interest of that company in the goods in question and despite the recital I think, reading the instrument as a whole, that is all that was intended to be conveyed and hence no foundation for respondent's pretensions herein.

This case does not at all need a decision upon the many varying views that may be presented of the above quoted statute for there is not enough of common honesty at the basis of the pretensions set up on the facts to bring the claim so made as within the term "good faith."

I, however, lest from the foregoing I should be thought to be agreeing in the law as presented by the Court below, 61 D.L.R. 16, do not hesitate to say that I cannot agree with the view of the law as expressed in the decision of the case of *Ferrie* v. *Meikle*, 23 D.L.R. 269.

I am of the opinion that in any jurisdiction where the common law and equity doctrines are to be administered by the same

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Court, and when in case of conflict the equitable doctrines are to prevail, that ever since *Le Neve* v. *Le Neve* (1748), 3 Atk. 647, 26 E.R. 1172, the doctrine therein and in the numerous decisions since and founded thereon must be applied in construing a statute such as that in question herein.

Apply that to this and the facts herein, and then the respondent's contention seems hopeless.

I am, however, confining my opinion to the case of actual notice which is not to be confounded with constructive notice.

The discarding of the former seems so like fraud as to be beyond good faith but the application of constructive notice does not seem to me as necessarily so within the range of the ordinary intelligence of mankind.

Yet, I am not to be taken as in any way discarding or treating with contempt the doctrine of constructive notice. I merely desire to indicate that difference between actual and constructive notice which exists or might exist in applying such a statute as that before us.

I think this appeal should be allowed with costs throughout and judgment given as prayed for by the appellant.

DUFF, J.:—By a contract dated March 11, 1915, the appellant company agreed with the Phoenix Publishing Co. of Saskatoon to sell for the sum of $4120.80 to the Phoenix Publishing Co. two of its casting machines and certain accessories. The Phoenix company agreed to buy the property specified, to pay the purchase price in specified instalments for which promissory notes were to be given. The contract further provided that a mortgage should be given to secure the deferred payments and until a mortgage was given, (an event which never happened), or the purchase money was fully paid, the title of the property was to remain with the appellant company who, in case of default, was to have the right to take immediate possession. It was further agreed that the Phoenix company "shall not assign this contract nor underlet or subhire the said property without the written consent" of the appellant company. On June 17, 1918, the Phœnix Company executed a deed to which the other party was Mr. A. B. by which the company professed to assign "all the right title and interest" in and to certain goods and chattels including the property which was the subject of the previous purchase from the appellant company. This document contained covenants for the title and covenants for further assurance.

Default was made in respect of the payments of the purchase money due under the contract between the appellant company

and the Phœnix Company. The respondent company which had received possession of the goods from the Phœnix Company sets up a title to retain them notwithstanding the terms of the last mentioned contract by reason of the provisions of sec. 1 of ch. 145 of the R.S.S. of 1909 as a purchaser of the property "in good faith for valuable consideration."

The Court of Appeal held, being constrained as it thought by a judgment of the full Court of Saskatchewan delivered in *Ferrie* v. *Meikle, supra,* that the respondent company was a purchaser in good faith within the meaning of the statute and consequently that its rights were not affected by the agreement between the appellant company and the Phœnix Company. The learned Judges who concurred in this judgment would have been disposed, as appears from the reasons of Lamont, J. to take the view that when a purchaser relies upon this provision of the statute it is, in every case, a question of fact to be decided upon the circumstances in evidence whether or not the purchaser did in fact act in good faith and that if he failed to establish honesty in fact then his plea under the statute must fail. They gave judgment in favour of the respondent company in deference, however, to the opinion expressed in a previous decision that, in order to exclude a purchaser from the benefit of the statute, it must appear that the sale was a collusive one in the sense that it was simulated with the object of protecting the possessor of the property from proceedings by the holder of the lien. I shall give my reasons presently for thinking that the view upon which I conclude the Court of Appeal would have acted if the question had been *res nova* is preferable to that to which it felt itself constrained to give effect because of the previous decision. Before proceeding to that question, it is convenient to point out that there are excellent reasons for rejecting the hypothesis that the gentlemen concerned in the transaction in question were actuated by any dishonest intention—an hypothesis which one is naturally slow to adopt.

I am disposed to take the view that the parties never really intended to do anything more than to place the respondent company in the shoes of the Phœnix Company in relation to its agreement with the appellant company; in other words that the transfer was subject to the appellant company's rights. The bill of sale does in truth, as I have said, contain covenants for title and further assurance; but the trial Judge has found as a fact that the arrangement between the parties was that the Phœnix Company was not to be responsible as upon a warranty

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of title in the event of the appellant company enforcing its rights. It is quite true that the Judge also finds that the respondent company was to be under no obligation to indemnify the Phœnix Company in respect of the appellant company's claim. This was probably regarded as a matter of no consequence; the Phœnix Company being destitute of assets, would be a most unlikely object of legal pursuit.

I gather that if the question had arisen as between the parties to the bill of sale the trial Judge would have rectified the instrument; but that is of no importance because as between the appellant company and the respondent company for the purpose of determining any question arising under the statute touching the respondent company's status as a *bonâ fide* purchaser we are concerned only with the actual agreement, that is to say, with the intention of the parties and for that purpose we are entitled and bound to look at all the facts including oral expressions as well as writings. I am disposed to think that in essence the transaction was a transfer subject to the appellant company's rights under its agreement; and in that view it is quite clear that the statute has no application, the respondent company being a purchaser only of such rights as the Phœnix Company was entitled to transfer under its agreement with the appellant company, was not a purchaser of the property within the meaning of the statute. As against the appellant company, the Phœnix Company has possession and a right to retain possession until disturbed by the appellant company under the terms of the agreement and the right to acquire a title upon satisfying the conditions of the agreement. It could no doubt and did transfer the actual possession of the goods but its right of possession under the agreement (like all other rights under it) it was disabled by the terms of the agreement itself from transferring. The respondent company could not even become a bailee consistently with the provisions of the Phœnix Company's contract.

On this hypothesis then the defense invoked by the respondent company patently fails. The alternative hypothesis is that the respondent company intended to buy and the Phœnix Company intended to sell upon the terms set forth in the bill of sale, that is to say that the parties intended that the respondent company should be placed in possession of the property as owner free from the claim of the appellant company. In considering that hypothesis the finding of the trial Judge becomes important that the claim of the appellant company against the Phœnix Company was taken into account in fixing the price.

It is important also to note that the effect of the transaction as a whole between the Phœnix Company and the appellant company was to denude the Phœnix Company of its assets. The purpose and intent of the transaction, therefore, upon this hypothesis was (notwithstanding the fact that the Phœnix Company had no title but only a bare possession coupled with the right of possession which it was not entitled to transfer) for a consideration altogether disproportionate to the value of the property, to place the respondent company in possession as owner. The respondent relied upon the statute, no doubt, and the judicial interpretation of the statute for protection against the appellant company's claim. Such conduct on part of the Phœnix Company would be an unlawful act in the sense that it would be a breach of contract, and also in the sense that it would be a tort; and as the thing was done behind the back of the appellant company it was, if this hypothesis furnishes the true interpretation of that conduct a flagrant breach of faith and the participation of the respondent company in these things was essential to effectuate the intention of the parties. It is quite true that the respondent company's agent declares that he had never seen the Phœnix Company's agreement with the appellant company. The fact that he failed to examine the agreement could not lend a more favourable colour to what occurred.

Can it be said that a litigant having purchased goods under such circumstances has brought himself within the statutory description of "purchaser in good faith for valuable consideration?" If these words were to receive the interpretation which would everywhere be ascribed to them according to common usage, the answer is of course in the negative. Is there any good ground then for giving some colour to the meaning of these very plain words which, in such circumstances, would enable a purchaser to establish successfully in a Court of law that, although he knowingly participated in a dishonest dealing, he was still in respect of that dealing a person who has acted in good faith within the meaning of this enactment?

I think the earlier decision of the Court of Saskatchewan cannot be sustained. It rests upon a Manitoba decision, *Roff* v. *Krecher* (1892), 8 Man. L.R. 230 placing a construction upon a certain provision of a Chattel Mortgage Act in force in Manitoba which in turn rested upon two decisions, one a decision of the Upper Canada Court of Queen's Bench, (*Moffatt* v. *Coulson*, 19 U.C.Q.B. 341), the other a decision, or I should rather say some language of James, L.J. in *Vane* v. *Vane* (1872), L.R.

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8 Ch. 383 at p. 399, 42 L.J. (Ch.) 299, 21 W.R. 252. With great respect I am unable to agree that either the Upper Canada decision of the language of James, L.J., has any relevancy whatever to the question now before us which concerns the meaning of certain words in a Conditional Sales Act in force in Saskatchewan. The Courts in both cases, and indeed the same may be said of the Manitoba decision as well, were concerned with the construction of language found in contexts entirely different and the two earlier pronouncements upon which the Manitoba Court proceeded are explicitly based upon considerations quite foreign to the interpretation of those words in the context in which they now appear. The judgment of Robinson, C.J. in *Moffatt* v. *Coulson*, 19 U.C.Q.B. 341, shews that the purchaser was in fact acting in good faith in the sense that he paid full value for the property he bought; that he had no actual knowledge of the chattel mortgage which the mortgagee was seeking to enforce against him, but only a vague intimation from a third person that the stock he was buying was mortgaged stock; and, in fact, the description in the mortgage was quite insufficient to identify the stock purchased as part of the property comprised in it and it was held in these circumstances that the mortgagee must fail. The only relevant observation is the observation of the Chief Justice that the transaction was a transaction in good faith in the sense that it was not entered into collusively with the object of protecting the mortgagor but that it was a purchase for fair consideration. Virtually, in that case it was found that there was, in fact, no dishonesty on the part of the purchaser. In *Vane* v. *Vane*, L.R. 8 Ch. 390, the question which James, L.J. was considering at p. 399 in the observations relied upon in the Manitoba decision was the meaning of the phrase *bona fide* in this collocation: "*bona fide* purchaser for valuable consideration who at the time of the purchase did not know and had no reason to believe that such fraud had been committed," and his observations have reference solely to that question. They can afford no guidance to the construction of the words we are now called upon to construe.

It may very well be argued that both the Manitoba decisions and the Upper Canada decision can be adduced in support of a contention for the purpose of applying the phrase "purchaser in good faith" when found in a modern statute one is not to govern one's self by the rules established in the Court of Chancery in relation to the notice and the effect of notice. I do not in the least dissent from that; indeed, I think it is most

important in construing modern statutes where questions arise as to the application of such expressions, to remember that good faith is a matter of fact and, the existence or non-existence of it must be decided as a question of fact. It should be observed further that the Manitoba decision was a decision upon not a conditional sale Act but upon a statute dealing with a different subject; and it is always dangerous as Sir George Jessel pointed out to construe the words of one statute by reference to the interpretation which has been placed upon words bearing a general similarity to them in another statute dealing with a different subject matter. It would, I think, be an insupportable presumption that the legislature of Saskatchewan in enacting the Conditional Sales Act was taking into account the judicial deliverances we have just been discussing.

One further point remains. In 1897 a change took place in the phraseology of the Conditional Sales Act of the North West Territories. I think this change is not without significance, I think it lends point to the observation made above with regard to the equitable doctrine of notice. The legislature has substituted the condition of the existence of good faith for the condition of want of notice, but I am unable to see that this alteration throws any light upon the question we are now called upon to decide.

The appeal should be allowed.

ANGLIN, J.:—With profound respect for the trial Judge and the Court of Appeal for Saskatchewan, I am disposed to think that when the true nature of the transaction which took place between the Phoenix Publishing Co. and A. B., representing the Northern Publishing Co., is appreciated the latter company is not entitled to the protection of sec. 1 of ch. 145 R.S.S. 1909, as "a purchaser in good faith for valuable consideration" of the goods in question in this action, against the assertion of a "right of property" therein made by the plaintiff company. The plaintiff's "right of property" is for convenience spoken of in the record as its lien.

That A. B. bought from the Phoenix Publishing Co. as a trustee for the persons who were then incorporating the Northern Publishing Co., and with the intent of acquiring the property for that company admits of no doubt. The Northern Publishing Co. can have no higher right to the protection of the statute invoked than was acquired by A. B.

The trial Judge found that, while A. B. gave no undertaking to pay off liens on the Phoenix Company's plant (other than

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that on the Hoe press) he took the plant subject to the chance whether the liens, including that of the plaintiff, (of the claims for which he was fully apprised) would or could be asserted in respect of it and without any right to be protected against them by the Phoenix Company. But in my opinion the evidence goes much farther. From the testimony of Mr. Lynn, the President of the Phoenix Company, who is accredited by the trial Judge, I extract these passages:—

"Q. Was there any arrangement made between the Phoenix Publishing Co regarding liens on the plant? A. No. I would not say there was any arrangement made with him, but the question of liens was discussed.

Q. Yes? A. I know this, that it was mentioned at that time that if Mr. A. B.—if they—if Mr. A. B. didn't want to take the machinery he would not have to pay for it, and there was no real arrangement made only in regard to the Hoe press. The liens were mentioned all right.

Q. There was a minute of the shareholders, ex. 'G'. Just read that. A. I might say prior to this that the directors had already met and gone over it with Mr. A. B., and we called a meeting of the shareholders for the purpose of having our action before the shareholders insisting that this provision should be put in there.

Q. What provision? A. Provided that the said A. B. make arrangements re liens held on the plant, including the Hoe press, papers held in trust for the John Martin Paper Co., as shall be satisfactory to the directors.

Q. Had that been discussed with Mr. A. B. at that time? A. As I said, the question of liens was discussed, but there was no definite understanding arrived at with regard to the liens.

Q. What arrangement was Mr. A. B. to make regarding the liens? Mr. Mackenzie: He said there was none arrived at.

A. As I understand it at the time, Mr. A. B. was to make his own arrangements regarding the liens with the exception of the Hoe press, which he actually agreed to take care of.

Q. What do you mean by "his own arrangement"? A. My understanding of it at that time was if he got the machinery he would pay the liens or make arrangements to settle them in some way, and if he didn't, he would try to make some arrangements with the parties who held them. That was my understanding.

Q. If he kept the machines he would pay the liens? A. Or make settlement with the lien holders.

Q. If the assets were worth $40,000, can you tell us why the

sale was made for $15,000? A. The question of liens was taken into consideration, the liens on the plant.

Q. What liens? A. As far as the Phoenix Publishing Co., were concerned they took into consideration all the liens that were on the plant in arriving at the figures.

Q. And what about the other liens? A. We made no specific arrangement with him regarding them, but my understanding was he would decide himself, or the persons for whom he was acting, would decide whether they would keep the rest of the plant, because there was some question as to whether they needed it at the time.

His Lordship: There was nothing as to relieving your company from liability? A. No, my lord. We were not relieved in any way.

Q. In any event, as far as the liens were concerned, he was to deal with the lien holders and do the best he could? A. Well, yes.

Q. And you say there was no arrangement outside of the written agreement.? A. Between the Phoenix Publishing Co., and A. B.?

Q. Yes. A. No. No definite arrangement.

Q. No arrangement? A. No.

His Lordship: Except as to the Hoe machine? A. Yes. And I may say further, that the shareholders understood that the lien was assumed. Whether Mr. A. B. was there or not I do not know. I know the directors got the impression that any machinery that was kept by the company by him would be taken care of.

Q. That was the expectation? A. I think it was more than that. That was the understanding we got of it."

In A. B.'s evidence I find this corroboration:—

"Q. You knew when you entered into that agreement you had to pay all these liens in order to get the rest of the plant, didn't you? A. There was a question if we would need the rest of it.

Q. Then you would not get it? A. We would not need it.

Q. And the vendors would get back their plant, wouldn't they? A. I presume so. Q. You were buying the whole plant, including the plant subject to liens, for $15,000? A. We bought everything that was included in that schedule for $15,000, and I was particularly instructed that we were not to assume any of those liens, and I had a partial understanding with regard to the Hoe press.

Q. And, notwithstanding that, your company paid liens to

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the extent of $15,000? A. It might have been that another plant would be necessary.

Q. Did you ever request the Phoenix Company or did your company request the Phœnix Co., to refund any part of that $15,000? A. I didn't.

Q. Do you know if your company did? That is, the defendant company? A. Not that I know of."

Moreover in the bill of sale itself from the Phoenix Company to A. B., although the recital and the covenants are consistent with an absolute sale of the entire plant, the operative words of sale and transfer are restricted to "all the right, title and interest of the bargainor in and to all the goods, etc."

Whatever might be the situation in a controversy between the parties to this bill of sale, I am satisfied that as between the litigants now before us we should ascertain and be guided by the true nature of the transaction between the Phoenix Company and A. B. as disclosed by the whole of the evidence.

While I have little doubt that A. B. when taking the transfer from the Phœnix Company had the intention of cutting out the unrecorded claim of the plaintiff by invoking the statute, I incline to think he failed to put himself in a position to effectuate that purpose.

Had the transaction, in fact, been an absolute sale of the goods here in question to A. B., I should have felt called upon to consider very seriously whether what he did was not such an attempt to use the statute to accomplish a fraud on the plaintiff as this court, which is a court of equity, should strain its resources to frustrate. But the real bargain between A. B. and the Phœnix Company as to the plant in possession of the latter covered by liens (other than the Hoe press as to which he agreed to protect his vendor) was that he would be at liberty to take it or not, in whole or in part, as he should find expedient; that in respect of whatever he took he would pay off, or otherwise arrange, with, the lien-holders; and that what he did not take in that way, as he himself says, the vendors (i.e., the lien-holders) would get back. That being his position as to the goods now in question, he was, in my opinion, not a purchaser of them in good faith for valuable consideration in any sense which would entitle him to the protection of sec. 1 of ch. 145.

I would, therefore, allow this appeal with costs throughout and direct judgment for the plaintiff for possession of the goods described in the statement of claim. There should also be judgment for $5 as nominal damages for wrongful detention thereof unless the plaintiff prefers to take a reference to ascertain

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what actual damages it has sustained. Should it do so, the costs of the reference and further directions should be reserved to be disposed of by the Supreme Court of Saskatchewan.

BRODEUR, J. (dissenting):—If it were not for the decisions which have been quoted, I would have been of the view that the Northern Publishing Co. and A. B. could not prevent the Lanston Monotype Co., from taking possession of the goods in question.

But the construction put on the statute by the Courts in Ontario, in Manitoba and in England gives to the words "buyer in good faith for valuable consideration," a meaning which precludes me from giving to these words the construction which otherwise I would have put on them. The purchasers knew that the appellant company had a lien on these goods when they bought them from the Phoenix Company. They had notice that the Phoenix Company did not own them? However, the jurisprudence seems to be well established that a purchaser in good faith means a real purchaser as distinguished from a collusive one, that the knowledge of an unregistered lien would not constitute the purchaser in bad faith. *Moffatt* v. *Coulson*, 19 U.C. Q.B. 341; *Vane* v. *Vane*, L.R. 8 Ch. 399; *Roff* v. *Krecker*, 8 Man. L.R. 230; *Ferrie* v. *Meikle*, 23 D.L.R. 269.

I may add that this construction should not affect the well settled doctrine and jurisprudence in Quebec concerning art. 2251 of the Civil Code. *Dessert* v. *Robidoux* (1890), 16 Q.L.R. 118; *School Comm'rs of St. Alexis* v. *Price* (1895), 1 Rev. de Jur. 122; *Renouf* v. *Côté* (1901), 7 Rev. de Jur. 415.

For those reasons the appeal should be dismissed with costs.

MIGNAULT, J. (dissenting):—The question here is whether a conditional sale of certain chattels with retention of ownership, which was not registered as required by ch. 145 R.S.S. 1909, can be set up against the respondent, the purchaser of these chattels.

Only a brief reference to the facts is necessary. The appellant, in 1911, sold the chattels in question, a monotype machine and accessories, to one Aiken, publisher of the Phœnix newspaper in Saskatoon. Aiken disposed of these chattels (some of which had been changed by the appellant) to the Phoenix Publishing Co., which subsequently, in March 1915, entered into a contract of purchase with the appellant, reserving to the latter the title to the property until the purchase price was fully paid. This contract of conditional sale was never registered.

In May, 1918, some parties interested in the Phoenix newspaper sought to purchase the plant and assets of the Phoenix Company, and, at their request, Mr. A. B. went to Saskatoon

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and negotiated the proposed sale with the directors of the Phoenix Company. He obtained a statement of the assets and liabilities of the company, shewing the liens affecting its property. There were five liens, comprising that of the appellant, figured at $4,500. Of these liens, three were registered, those of R. Hoe and Co., (for which certain directors of the Phoenix Company were personally liable), of Canadian Linotype Co., and of Miller and Richard. The lien of Hettle Drennan Co., for $2,800 was apparently not registered, but Mr. A. B. says this firm was in possession and had to be settled with to get their goods. The appellant's lien, as I have said, was not registered.

A resolution was adopted by the shareholders of the Phoenix Company authorising the directors to sell to Mr. A. B. its plant, equipment, accessories and franchises, "provided that the said A. B. make arrangements *re* liens held on the plant, including the Hoe press." The sale price was $15,000. Later, a formal agreement of sale was signed by the parties, no mention being made therein of any liens. It appears to have been understood that Mr. A. B. would look after the claim of R. Hoe and Co. for the Hoe press, and free the directors from any personal liability. As to the other liens, the trial Judge found, and I fully agree with him after carefully reading the testimony, that, while it seemed to be understood that A. B. and those for whom he purchased were to take care of the Hoe press lien and to protect the directors against any possible action that might arise out of it, there was no such understanding as to the rest of the liens. The trial Judge added that the purchasers took the plant and assumed any chance of the possibility of the lien holders asserting their liens.

This purchase was made by Mr. A. B. on behalf of the respondent company which was immediately constituted under the Saskatchewan Company legislation, Mr. A. B. becoming its first president. A formal transfer of the plant was made to it by Mr. A. B. After taking possession, the respondent, beside the purchase price, paid approximately $15,000 in discharging liens on the plant, but the appellant's claim was not settled.

The question now is whether the appellant is entitled to assert its non-registered lien against the respondent. Section 1 of ch. 145, of R.S.S. 1909, provides as follows:—

"Whenever on a sale or bailment of goods of the value of $15 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor notwithstanding that the actual possession

of the goods passes to the buyer or bailee the seller or bailor shall not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration or as against judgments, executions or attachments against the purchaser or bailee unless such sale or bailment with such agreement, proviso or condition, is in writing signed by the bailee or his agent and registered as hereinafter provided. Such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished."

By sec. 2 of the same statute, it is provided that the agreement of sale shall be registered in the office of the registration clerk for chattel mortgages where the buyer or bailee resides within 30 days from the time of actual delivery of the goods.

Under section 1 the question is whether A. B. or the respondent company was a purchaser in good faith for valuable consideration. The trial Judge, had he not considered himself bound by the authorities to which I will refer, would have thought not, and this view was shared by Lamont, J.A. in the Court of Appeal. I do not however think that either the trial Judge or Lamont, J.A. considered that Mr. A. B. had acted fraudulently, and from my reading of the evidence I am quite clear that no case of fraud was made out, and none was alleged, the statement of claim merely asserting unlawful detention. The whole point is whether A. B., having purchased these goods with notice of the appellant's lien, was a purchaser in good faith for valuable consideration, and both Courts have considered that nothing in the facts of this case would take the matter out of the operation of the rule laid down in the cases to which I will refer. There is no doubt that A. B. and the respondent gave a valuable consideration for the sale, to wit the $15,000 which was paid in cash.

As long ago as 1860, the Ontario Court of Queen's Bench held in *Moffatt* v. *Coulson*, 19 U.C.Q.B. 341, that a chattel mortgage not containing a sufficient description of the goods is void as against subsequent purchasers in good faith, and that notice of such a mortgage to the purchaser will not affect his right. This decision is relied on because, in the Upper Canada statute there under consideration (1857 (Can.) ch. 3), the words "subsequent purchasers or mortgagees in good faith for valuable consideration" were defined. Robinson, C.J. said at pp. 344-5: "The only question then is whether this defendant should be held to be a subsequent purchaser in good faith, within the meaning of the second section, in which case only would he be entitled to

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hold against the mortgage, in consequence of the defective description of the horses. I think he should be so held, for there seems to be no reason to doubt upon the evidence that he bought in good faith, in this sense, that he paid a fair consideration for the horse which is in question, and did not buy him collusively, in order to assist the mortgagors in placing him out of the plaintiffs' reach. . . . . In our Registry laws, the words 'purchaser for valuable consideration' have never been held by courts of common law to exclude purchasers with notice of the unregistered conveyance."

In Manitoba, in 1892, the Court of Queen's Bench held in *Roff* v. *Krecker*, 8 Man. L.R. 230, that a second chattel mortgage made in good faith, and for valuable consideration, takes priority over a prior unfiled chattel mortgage, even if the second mortgagee has actual notice of the prior mortgage. The Manitoba statute, 48 Viet. ch. 35, amending a prior statute containing the words "without actual notice" which were struck out, used the expression, "purchasers or mortgagees in good faith for valuable consideration." Taylor, C.J., relied on the English case of *Edwards* v. *Edwards* (1876), 2 Ch. D. 291, decided under the English Bills of Sale Act, 17—18 Viet. ch. 36, the first section of which provided that every bill of sale should be registered within a certain time, otherwise it should be null and void to all intents and purposes against, among others, sheriff's officers and other persons seizing any property or effects comprised in such bill of sale, in execution of any process. Referring to this case, Taylor, C.J., said at p. 237:—

"The court there held that the fact that an execution creditor was, at the time his debt was contracted, aware that his debtor had given a bill of sale did not prevent his availing himself of the objection that it had not been registered. *LeNeve* v. *LeNeve* (3 Atk. 646) was there cited and relied on, but James, L.J., said he thought it would be dangerous to engraft an equitable exception upon a modern Act of Parliament. Mellish, L.J., agreed with him saying 'we ought not to put such constructions on modern Acts of Parliament.'"

Further on the Chief Justice at p. 239 said:

"It seems to me that under the authorities, the plaintiff being a purchaser in good faith for valuable consideration, his having had notice of the defendant's prior but unfiled mortgage is not material, and he is entitled to the protection of the statute."

Dubuc, J., and Killam, J., concurred in this view, the latter with some reluctance. He was, however, impressed by the fact that the words "without actual notice" had been omitted when

the statute was amended in 1885. He expressed the hope that the Legislature would restore the statute to its previous position as respects this question of notice. This, however, was not done, as the present Manitoba Bills of Sale and Chattel Mortgage Act, R.S.M. 1913, ch. 17, shews.

We have, therefore, in two provinces, Ontario and Manitoba, authoritative decisions laying down that notice of a prior bill of sale or chattel mortgage does not prevent the subsequent purchaser for a valuable consideration from being a purchaser in good faith.

The same construction has been adopted in the province of Saskatchewan. There the Court of Appeal held in *Ferrie* v. *Meikle, supra,* that a purchaser in good faith and for a valuable consideration of chattels comprised in an unregistered lien note obtains a good title thereto, even though he has notice of the existence of the lien note. The Court there followed *Moffatt* v. *Coulson, supra,* and *Roff* v. *Krecker, supra.*

Should we now overrule these decisions which have settled the law in three Provinces of the Dominion? For my part, even were I of a contrary opinion, I would feel extreme reluctance to overrule long standing decisions which have emphasized the necessity of registration of chattel mortgages and liens on personal property. To do so would be to disturb rights acquired in the belief that these long unquestioned decisions correctly stated the law.

Moreover, we find in Saskatchewan the same development of the statutory law as in Manitoba. Ordinance No. 8 of the North-West Territories of 1889, concerning receipt-notes, hire-receipts and orders for chattels, rendered the agreement, in the absence of registration, of no effect against any mortgagee or *bonâ fide* purchaser *without notice*. These words "without notice" were omitted by Ordinance No. 39 of 1897, sec. 1 of which is in the same terms as sec. 1 of ch. 145, R.S.S. 1909, and it does not seem possible to disregard, in the construction of the statute as it now reads, the omission of these words in the new enactment.

On this question of statutory construction I have come to the conclusion to accept the interpretation placed on the words "purchasers or mortgagees in good faith for valuable consideration." It is very important that the Courts should respond to the efforts made by the Legislature to require the registration of bills of sale, chattel mortgages and lien notes. And, for my part, I cannot concur in a construction which would give to notice or knowledge of a prior non-registered lien the same effect, against a purchaser who has on the faith of the registry bought

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goods and paid therefor, as the registration required by the statute.

It is contended that Mr. A. B. bought merely such rights as the Phoenix Company had in these goods. I think he bought the goods themselves, and the trial Judge so held. It follows that the respondent is entitled to rely on the protection of the statute.

I would dismiss the appeal with costs.

Appeal allowed.

COUNTY OF SIMCOE v. SANDERSON.

Ontario Supreme Court, Mowat, J. November 14, 1921.

STATUTES (§IIA—96)—REGISTRY ACT, R.S.O. 1914, CH. 124, SEC. 110—CONSTRUCTION—POWERS OF INSPECTOR OF REGISTRY OFFICES—APPOINTMENT OF SPECIAL ADVISOR IN REGISTRY OFFICE—REMUNERATION.

Under the Registry Act, R.S.O. 1914, ch. 124, sec. 110, the inspector of registry offices has the determination of the question of pay or salary to registry office officials, and where he has determined that the services of a retired official should be retained in an advisory capacity, and the salary to which he is entitled in such capacity, there is no appeal from his decision.

ACTION by the Municipal Corporation of the County of Simcoe against the Registrar of Deeds for that county, to recover 90 per cent. of the sum of $1,437.50, the difference between the expenses and disbursements of the defendant's office for 1919 and 1920 as the plaintiffs said they should be, and the amount at which the defendant stated them in his return to the Inspector of Registry offices.

W. A. J. Ball, K.C., for the plaintiffs.

J. A. Macintosh, K.C., for the defendant.

MOWAT, J.:—Substantially the dispute is one between the Government of the Province and the municipality on a question of both law and policy; the statutes have therefore to be examined.

Forty-nine years ago the Legislature decided to limit upon a graded scale the personal emoluments of Registrars derived from their fees, and enacted that any surplus over a fixed amount should be paid to the county or city as the case might be. The deductions from fees has increased from time to time to the disadvantage of Registrars and to the advantage of the municipalities.

The Act now governing the shading down of remuneration is the Registry Act, R.S.O. 1914, ch. 124, sec. 101, as amended by the Registry Amendment Act, 1918, 8 Geo. V. ch. 27, sec. 18, under which every Registrar shall pay to the treasurer of the

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county or city for which, or for part of which, he is Registrar, "on the excess over $6,000, 90 per cent." of his net income, which, by sec. 102, is defined to be "the excess of all fees and emoluments earned during the calendar year after deducting the disbursements incident to the business of the office."

The Registrar for Simcoe deducted from his fees for 1919 the sum of $687.50 and for 1920 the sum of $750, making the total of $1,437.50, 90 per cent. of which is here claimed by the county. These sums were paid respectively in each year to F. M. Montgomery, who had been for over 40 years employed in the Registry Office, and was for many years, and up to January, 1920, senior Deputy Registrar. This gentleman's health having become impaired in June, 1919, or before, and he being scarcely able ever to go to the Registry Office, the Registrar ceased paying his salary from the 1st October, 1919, but did not dismiss him, owing to his dislike to so treating an official who had such a long period of public service to his credit. The Deputy and his friends complained of this non-payment to the Attorney-General, under whose department the Inspector of Registry Offices administers the duties of his office. The Inspector, Mr. Mallon, with the approval of the Attorney-General, then went to Barrie, the county-town, and had a meeting with the Deputy Registrar and the defendant Registrar, and an amicable arrangement was concluded on the 7th January, 1920, under which the Deputy was to resign his office, and be appointed to a position of advisory or consulting clerk from the 1st October, at a salary of $750, being one-half his former salary.

Mr. Mallon, the Inspector, was called as a witness at the trial, and said that his reason for suggesting this arrangement was that it would have been harsh to take away the Deputy's means of living after his 44 years' service; but, apart from that, Mr. Sanderson, the defendant, had been appointed only in 1918 and had no previous experience; that, when questions arose as to long abstracts and as to the registration of plans, Mr. Montgomery's long familiarity with the titles and localities in the county would make him valuable as an advising and consulting officer. He had also heard that the second deputy had been complaining of the difficulty of getting help from a Registrar who was unfamiliar with conveyancing and practice. He said that he had these things in mind when he approved of the new position for the deputy.

That these considerations are sufficient to warrant the employment of an official who never since October, 1919, attended the office to work at any duties, met with an emphatic denial and protest from the members of the county council. They asserted

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that the Deputy had not done a day's work since early in 1919.

It was argued for the plaintiffs that the arrangement made was in reality a method of obtaining a superannuation salary for the debilitated Deputy. And here is the crucial point of the case.

It, no doubt, was uppermost in the mind of the Inspector, and of his chief the Attorney-General, that the Deputy should not be turned adrift without means of livelihood; but there may be sound policy in bringing about just such a substituted appointment, in the fact that rewards for faithful service produce a feeling of loyalty and content in other and fellow-employees, who, if of the belief that their old age will not be spent in perilous poverty, no matter how slender the foundation on which their hope is founded, will apply themselves with greater interest and assiduity to their duties, as well as become more obliging and accommodating to the public. Such treatment as was meted here may be said to be an administrative substitute for the provision for a superannuation Act. There are also the other practical reasons which the Inspector says he had in his mind. And there is evidence that on one occasion the former Deputy was consulted on a problem which presented itself. So, when the Registrar's report of disbursements reached the Inspector, it was inevitable that the inclusion of this salary for the new advisory clerk should be "revised and determined," in the exercise of the Inspector's power and duty under sec. 110. in favour of the item, and of the official. He held that it was "a disbursement incident to the business of the office" (sec. 102); and I am not to sit in appeal from his ruling.

It was suggested that Mr. Mallon did not use his own mind in determining that the item of this salary should be allowed, but was swayed by what he supposed was the wish of the Attorney-General. However, he stated positively in the witness-box, and I think truly, that he acted under the powers of sec. 110 solely on his own initiative, and not under the influence of any other official.

It is to be noted that the enactment which is now sec. 110 provided only for "revision" of the disbursements until the passing of the consolidated Registry Act, 10 Edw. VII. ch. 60, when the word "determined" was added (sec. 109). And this was when the late Donald Guthrie, K.C., was Inspector—a just and competent official.

It therefore is obvious that the Registrar, although the employer, yet is subordinate to the Inspector, who has the determination of the vital question of pay or salary. And, the Inspector having determined that the allowance of these two years' salary was warranted in the general interest of the Registry

Office and the public requirements, the plaintiffs are before the wrong Court. The result is not without its advantages, because it is plain that if an action at law may arise every time county councillors differ from the Provincial authorities upon what clerks it is or is not advisable to have in a Registrar's office, then a Registrar's troubles and liabilities will be unduly increased.

Before going to law, the county council might well have written or spoken to the Inspector, and he might have convinced them that his action was not without reason and that he was the statutory arbiter in the matter.

The percentage contribution clauses, being in derogation of the common law right of Registrars, are to be construed strictly: *Re Ingersoll, Gray* v. *Ingersoll* (1888), 16 O.R. 194.

The action will therefore be dismissed with costs.

GROSS v. WRIGHT.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. March 31, 1922.

DAMAGES (§IIIA—42a)—PARTY WALL—AGREEMENT AS TO ERECTION OF—BREACH OF AGREEMENT—MEASURE OF COMPENSATION.

Where a person in breach of an agreement to build a party wall, "the half on each lot," and the agreement providing that the middle line of the wall is to coincide with the boundary line, builds the first storey in accordance with the agreement but narrows each succeeding storey, on his own side, keeping the other side of the wall perpendicular, the other party to the agreement is entitled to damages for breach of the agreement. The measure of compensation being the value of the space he has lost by the construction of the wall as erected.

APPEAL by defendant from the trial judgment in an action for a mandatory injunction to compel defendant to pull down part of a party wall not erected in compliance with an agreement and for specific performance. New trial ordered to assess the damages.

A. H. MacNeill, K.C., and *J. A. Mackay*, for appellant.

J. A. MacInnes, for respondent.

MACDONALD, C.J.A.:—The parties being the owners of adjoining lots entered into an agreement for the erection of a party wall. It was agreed that Wright might build the wall 2 feet or more in thickness, the half on each lot. He built a wall, the foundation and basement and first storey of which were in accordance with the agreement. He narrowed the second storey by 4 inches on his own side of the wall, and the third storey by a further 4 inches, keeping the wall on the outside, on plaintiff's side, perpendicular. The wall was erected several years ago and forms one of the walls of the defendant's building. The agreement provided that "the middle line of which (the wall)

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would coincide with the said boundary line." The plaintiff claims to have recently discovered this departure from the agreement and sued for a mandatory injunction to compel the defendant to pull down that part of the wall not erected in compliance with the agreement, also for specific performance of the agreement and such other relief as the nature of the case may require.

The Judge held that there had been a trespass and granted an injunction which he stayed for a period to enable the defendant to make the wall conform to the agreement.

It is admitted by the plaintiff himself, that the wall as built is a good and sufficient wall for the purpose for which it was built, in other words, he has no complaint to make to it, except that it was narrowed from the defendant's side and not equally from both sides. He admits that it was proper and in accordance with practice to narrow the wall as it gained height, but claims that it puts an undue burden upon his lot and deprives him of space to which he was entitled.

The first question to be decided is as to whether or not there was a trespass. In my opinion, there was not. It was at most a breach of the agreement. The agreement being one affecting an interest in land could be ordered to be specifically performed but as that remedy is one which is discretionary with the Court, it will not be ordered where great loss would be caused to one party without a corresponding benefit to the other, and where the breach of the agreement may be reasonably compensated for by awarding damages. There is no evidence in the case upon which we can decide what the damages are. It appears to me that what the plaintiff is entitled to is the value of the space of which he has been deprived, namely, 4 inches of the second storey, 8 inches of the third, and I think, part of the wall has been built slightly above the third storey narrowed an additional 4 inches, which should be taken into account. The value of such space is the measure of damages.

The case by which the Judge felt himself bound to give the relief granted, *Stollmeyer* v. *Petroleum Development Co.*, [1918] A.C. 498(n), 87 L.J. (P.C.) 83, is one of nuisance not of contract, and with deference, does not, in my opinion, conclude this case. The other authorities to which we were referred on behalf of the appellant, were authorities under the Building Acts in England, and furnish no guide in this case. The authorities cited by the respondent's counsel are like *Stollmeyer* v. *Petroleum Development Co., supra,* cases of nuisance or other tort and are likewise not applicable to this case.

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I would therefore allow the appeal and order a new trial for the purpose of ascertaining the damages.

The appellant is entitled to the costs of the appeal. The extra costs occasioned by the new trial to be disposed of by the trial Judge.

GALLIHER, J.A.:—I would allow the appeal.

I do not think that the evidence in this case justifies me in concluding that there was a trespass. Such being the case, there remains only the question as to what, if any, damage has been suffered by the plaintiff by reason of the wall being constructed in its present form.

The most that can be said, and I think it can be properly said, that the plaintiff has been deprived of a certain amount of space if he should decide to make use of the party wall to the extent to which it is constructed. That space he is entitled to under the agreement to construct and if the parties cannot agree as to the value of this, there should be a new trial to fix the value.

The appellant is entitled to the costs of appeal, and as to the costs below, each party is entitled to costs on the particular issues upon which they succeed.

MCPHILLIPS, J.A. (dissenting):—I would dismiss the appeal.

EBERTS, J.A., would order a new trial.

New trial ordered.

HENDRIE v. GRAND TRUNK R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Middleton and Lennox, JJ. November 4, 1921.

RAILWAYS (§IIIB—52)—ACCIDENT AT HIGHWAY CROSSING — RAPIDLY MOVING PASSENGER TRAIN—MOTOR TRUCK SLOWLY APPROACHING CROSSING—RIGHT OF ENGINE DRIVER TO ASSUME THAT TRUCK WILL STOP—FAILURE TO GIVE SPECIAL WARNING AND APPLY EMERGENCY BRAKE—JUSTIFICATION—ACTIONABLE NEGLIGENCE.

Railway companies are still liable to common law duty to exercise reasonable care, and may be guilty of actionable negligence without breach of any duty or obligation imposed by statute, but in the absence of special circumstances. The engine driver and fireman of a rapidly moving passenger train are not negligent in assuming when the train is within 200 yards of a crossing that the driver of a slowly moving motor truck approaching the crossing and about 50 yards distant and having an unobstructed view of the railway track, will stop and allow the railway train to pass before attempting to cross the track, and failure on the part of the engine driver to give special warning and apply the emergency brakes under such circumstances is not actionable negligence.

[*City of London* v. *Grand Trunk R. Co.* (1914), 20 D.L.R. 846, 32 O.L.R. 642, followed.]

APPEAL by plaintiff from a judgment of Mulock, C.J. Ex., dis-

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missing two actions for damages for negligence of the defendants causing injury to and the subsequent death of a motor truck driver, the result of being struck by one of defendant's trains. Affirmed.

The judgment appealed from is as follows:—

"These two actions arise out of the same accident, and were tried together before me, with a jury, at the recent Hamilton assizes. Thomas Hendrie was the owner of a motor-truck which he operated for hire between Hamilton and Niagara Falls, and at about noon on the 4th October, 1919, was driving it in a westerly direction along the public highway known as the Whirlpool road, where it crosses, on the level, the double tracks of the defendant company's railway at a point known as Morrison's crossing, when a passenger train of the defendant company struck and damaged the truck and seriously injured Thomas Hendrie. Thereupon he began the first action for damages because of injuries to himself and the truck; but before the trial he died, and the action was revived in the name of his wife, administratrix of his estate; and she also, on behalf of herself and the children of the deceased, brought the second action for damages under the Fatal Accidents Act.

From the inartistic statements of claim I gather the following to be the acts of negligence charged against the defendant company: (1) that the brakes and other train appliances were defective, whereby the train was not under proper control; (2) that the train was being driven at an immoderate rate of speed; (3) that the company's employees failed to keep a proper look-out when approaching the crossing; (4) that the company's employees failed to reduce the train's speed, and thereby prevented the deceased from escaping injury; (5) that the whistle was not sounded and that the bell was not rung, as required by the statute.

The following are the questions submitted to the jury, with their answers:

1. Was the defendant guilty of any negligence which caused the accident? A. Yes.

2. If yes, in what did such negligence consist? A. In not giving special warning and applying the emergency brakes.

3. Was the deceased guilty of any negligence which caused or contributed to the accident? A. No.

4. No answer.

5. When the trainmen or any of them realised or ought to have realised that an accident was imminent, was it possible for the company to do anything to avoid the accident? A. Yes.

6. If yes, what? A. In not giving special warning and applying emergency brakes.

7. What is the total amount of damage which you assess to the plaintiff? A. $8,000.

8. What amount, if any, is included in the above mentioned sum in respect of damages up to the time of the death of the deceased? A. $2,850.

9. What amount, if any, is included in the last mentioned sum in respect of pain and suffering of the deceased? A. $200.

10. In what proportion do you divide between the widow and children whatever sum they may be entitled to because of the death of the deceased? A. Widow, $3,000; children, $5,000.

The answers to the 2nd and 6th of these questions being indefinite, I questioned the jury as to their meaning, and the following is the stenographer's report of the jury's explanation:

"May I ask you what you mean. You say in answer to the 2nd question and to the 6th question—'In what did the negligence consist, and what might the trainmen have done to avert the accident—'In not giving special warning and applying the emergency brakes.' What do you mean by saying 'not giving special warning?' Foreman: We thought, your Honour, the whistle could have been specially sounded.

"His Lordship: What do you mean by that? Foreman: In addition to the crossing-whistle, the whistle might have been specially sounded.

"His Lordship: When? Foreman: When the truck was observed.

"His Lordship: "Do you mean at a point 200 yards from the crossing? Foreman: Yes, your Honour.

"His Lordship: When the fireman and engine-driver say they first observed it? Foreman: Yes.

"His Lordship: They should have given the warning then? Foreman: Yes.

"His Lordship: What do you mean by saying 'apply the emergency brakes?' Foreman: The same as they did later on. Emergency brakes were applied later on when the truck was in front.

"His Lordship: Is it your opinion, if the emergency brakes had been applied at some period after the possibility of an accident arose, that they would have effectively prevented the accident? Foremau: We believe so, slackening in speed.

"His Lordship: The application of emergency brakes at 200 yards from the crossing would, in your opinion, have averted the accident? Foreman: We felt so.

"His Lordship: Are you all content that the answers which

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your foreman has given to me to the questions which I have now put to him shall be considered as part of the answers which you have brought in? A. Yes.

"His Lordship: You all agree that shall be, do you? Do you all endorse the answers of your foreman as part of your answers to those questions? Foreman: On some of our questions we stood ten for, two against. We felt—we understood that was sufficient. Ten to two we stood.

"His Lordship: Are there ten of you agreed upon the answers which you have given to me? Foreman: Yes, sir.

"His Lordship: Are there ten of you who also agree to the statements made by the foreman now in answer to my questions? A. Yes, sir.

"'His Lordship: Who amongst you does not accept the answers given by the foreman. If not, stand up. (Two jurymen stand up).

His Lordship: Then I am to assume that the remaining ten adopt the answers of the foreman to the questions which I have now put to you?"

As thus explained, the jury's findings are to the effect that the accident was caused by the company's negligence in failing, when the train was at a distance of 200 yards from the scene of the accident, to sound the whistle and to apply the emergency brakes, and that the company was not guilty of any other act of negligence. Thus it follows (*Andreas* v. *Canadian Pacific R.W. Co.* (1905), 37 Can. S.C.R. 1) that, as required by sec. 274 of the Railway Act, the company sounded the whistle when the train was 80 rods from the crossing, and that the bell was rung continuously from that point until the engine crossed the highway.

The line of railway at Morrison's crossing is double-tracked, and the train in question was proceeding in a south-easterly direction along the westerly track, and the deceased with his brother was proceeding westerly along the Whirlpool road, the deceased sitting on the left and driving.. The truck had a wooden top with solid wooden sides.

According to the evidence of the brother, they were both on the look-out for approaching trains, but the brother swore that he did not see the train until the truck had crossed the easterly track, and the front wheels were on the first rail of the westerly track, and that he then jumped. He swore that the speed of the truck as it approached the crossing was about 6 miles an hour; that the deceased was a good chauffeur; and that the truck could have been stopped within a distance of 3 feet.

For a distance of 140 feet easterly of the crossing there was nothing to prevent the occupants of the car seeing the approach-

ing train, except two trees, one an apple-tree situated 60 feet easterly of the crossing, and another a hickory-tree situate 140 feet from the crossing. The space between these two trees was fairly open, and from a point about midway between them there was a clear view along the track for a distance of 1,300 feet. As the truck proceeded westerly and passed the apple-tree, there was a clear view between that point and the nearest track of 50 feet, and a further clear view of 18 feet, or a clear view of nearly 70 feet between the apple-tree and the westerly rail.

When the train reached the 200 yard point above referred to, the engine-driver was at the right side of the engine on the look-out, and swore that he saw the truck slowly approaching the crossing; that it was then between the hickory-tree and the apple-tree, and that he thought it was going to stop. The fireman was also in the cab on the left side, and his evidence was to the same effect as the engineer's. As the train approached the crossing the fireman realised that a collision was imminent, and at once "yelled" to the engine-driver, who immediately sounded the whistle and applied the emergency brakes, but the engine struck the right hind wheel of the truck, and thereby the accident which has given rise to these actions occurred.

In effect the jury find that, when the train was at a point 200 yards distant from the crossing, the company were bound to have given a special warning, and to have applied the brakes, ,and that their failure to do both of these things was the cause of the accident.

It is not the duty of the defendant company whenever their train is approaching a level highway crossing to give special warning, and to apply the brakes, which means to slow the train. The statute has declared what, under such circumstances, its duty is, and in this case the company had performed their statutory duty. Were there any exceptional circumstances which created a new duty? If, when the train was within 200 yards of tthe crossing, those in charge had reason to believe that a collision would take place unless they gave special warning and applied the brakes it was their duty to have done these things, but not if they had no reason to apprehend an accident. Were it otherwise it would mean that whenever a train was approaching a level crossing, and any one on the highway was also approaching it, under circumstances like those in this case, the company must give special warning and slow up the train. If such were law, the operation of steam railways would be impracticable.

I am unable to discover here any circumstances that made it the duty of the company to give such special warning and to apply the brakes. The whistle had been sounded and the bell was

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ringing, as required by the statute. The approaching train was visible to the occupants of the truck when it was in a place of safety, and where it could have remained, and the truck was proceeding at the readily controllable speed of about 6 miles an hour on a slightly up-grade road. There was nothing in any of these circumstances to cause a careful trainman to suppose that the driver of the truck intended to run the grave risk of an accident by endeavouring to cross the tracks in front of the train. On the contrary, they were justified in assuming that he would act with prudence and remain in a place of safety, and, therefore, they were ,not bound to give special warning and apply emergency brakes.

For these reasons, I am of opinion that there is no evidence to support the jury's findings of negligence, and that the action should be dismissed with costs."

J. P. MacGregor, for appellant.

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

MIDDLETON, J.:—The learned Chief Justice in his judgment at the trial has set out the facts with his usual painstaking care, and they need not be repeated.

The only allegation of negligence to be considered is that arising upon the answers of the jury, for they were warned that no negligence would be considered that was not found by them. The finding of the jury is that when the train crew realised or ought to have realised that an accident was imminent the whistle should have been sounded and the emergency brakes should have been applied. From the oral explanation of the foreman, this meant that, when the deceased was 200 yards from the crossing, he might have heard the whistle and stopped, and if the brakes had then been applied, though the train would not have been stopped, it would have slowed down sufficiently to allow the truck to have crossed the track safely. The plaintiff's counsel does not suggest that the answers mean more than this.

There is no evidence that the train crew did in fact realise that an accident was imminent.

The question thus narrows itself to this—was there any evidence that under the circumstances the train crew were negligent in failing to realise that an accident was imminent?

There is no question as to the law. It is not enough for the railway employees to obey the requirements of the statute—these are an irreducible minimum—but over and above these requirements there is the common law obligation to exercise due care in the transaction of business of necessity dangerous, even when it is fully authorised by law: *City of London* v. *Grand Trunk*

R.W. Co., (1914), 32 O.L.R. 642; 20 D.L.R. 846, *Boyle* v. *Canadian Pacific R.W. Co.* (1921), 19 O.W.N. 508.

The obligation is precisely the same as that which arises in an emergency following the plaintiff's negligence, commonly called the question of ultimate negligence. Did the defendant do all that he should have done to avert the disaster after he knew or ought to have known that it was imminent?

The plaintiff's counsel has summed up the circumstances which he contends shew negligence on the part of the train crew in failing to realise the peril of this man. They all resolve themselves into the one proposition, that, because the fireman saw the deceased "proceeding slowly, cautiously, and unhesitatingly" toward the track for some 6 seconds, he (the fireman) was at fault in failing to realise that the deceased did not know of the oncoming train, which was in his full view if he looked. When the engine-driver saw the deceased he was 50 or 60 yards from the crossing. He was after this out of view by reason of the long engine-boiler. The fireman, who had the better view, saw the truck, and says he "thought the man was going to stop till the train passed;" that, as soon as he saw he was going on the track, he called the engine-driver, who at once stopped the train. It was then far too late to avoid the impact.

I agree with the learned trial Judge that there was no evidence of any negligence to go to the jury. I agree with my Lord that the Court must sedulously avoid usurping the function of the jury. But, on the other hand, it is the duty of the Court firmly to maintain its own function and to determine whether there is any evidence which can in any view justify the verdict. It is for the Judge to say whether from a given state of facts negligence can be inferred, and for the jury to find whether the inference ought to be drawn. In my opinion, there is here no evidence upon which negligence can be found, and the case was rightly dealt with at the trial.

In all cases such as this, where no one can avoid sympathy for the plaintiff there is a temptation ever-present to both Judge and jury to lean towards the plaintiff's side; and, where there is some evidence, so that the jury's finding cannot be reviewed, the plaintiff has an advantage; but this cannot justify the upholding by the Court of a verdict where there is no evidence to justify it.

If dangerous level crossings are to be maintained without protection because neither the railway company nor the public can afford the expense necessary for a change to a condition of safety, I venture to suggest that compensation for the inevitable disaster ought to be borne by the public at large, either directly or through the railway companies, upon the same principle that

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injuries to workmen are regarded as an incident to all industries and are the subject of compensation even when arising from the negligence of the person injured. Verdicts of juries contrary to evidence were frequent in accident cases before the Workmen's Compensation Act, and represented the attempt of illogical minds to achieve justice, and the same thing is true of many verdicts in crossing cases.

I cannot part with this case without deprecating the novel and indefensible style of pleading adopted by the plaintiff. Instead of a concise statement of the material facts, the pleading is a verbose and somewhat declamatory summary of the evidence which it was hoped would be given.

RIDDELL, J., agreed with MIDDLETON, J.

LENNOX, J.:—The defendants were not guilty of the breach of any statutory duty or order of the Railway Board. There was evidence pro and con as to this, but the single act of negligence found by the jury negatives the plaintiff's contention that the engine-whistle was not sounded when the train came within 80 rods of the highway-crossing in question, and that the bell was not "rung continuously from time to time" during the passage of the train over the intervening 80 rods: in other words it is to be taken that the jury accepted the evidence of the defence upon this question:: *Andreas* v. *Canadian Pacific R.W. Co.*, 37 Can. S.C.R. 1.

It is quite true that a railway company may be guilty of actionable negligence without breach of any duty or obligation imposed by statute—railway companies are still subject to common law obligation to exercise reasonable care. The statute is the measure of safety provided by Parliament to meet the ordinary conditions of interchanging traffic over the railway and the highway, and the legalised rule, too, governing the operation of railways under the jurisdiction of the Parliament of Canada in all ordinary circumstances. Exceptional conditions may of course arise, and, confronted by extraordinary conditions pointing to the probability of a collision the company is called upon to do all it can—short of incurring a greater danger to its passengers and servants—to avert a disaster. The onus of proving that conditions are exceptional, and, to the servants, obviously fraught with peril, is upon the party setting up negligence. The possibility of an accident is not enough—there is always a possibility at level crossings. The company complied with the direction of the statute; and, in the absence of evidence, direct or inferential, of the knowledge of the company's servants of the existence of uncommon conditions calling for the exercise of special care, the presumption is that the company were not negligent. There must

at least be some evidence in support of the jury's finding to entitle the plaintiff to judgment. Was there any evidence? Eliminating the contention negatived by the finding of the jury, the alleged failure to comply with the statute, there is no conflict of testimony as to the surrounding circumstances or the conditions under which the accident occurred. Counsel for the plaintiff, at the trial, with quite unnecessary elaboration in the notices of appeal, and upon the argument in this Court, dwelt upon the training, intelligence, and exceptional capability of the deceased Thomas Hendrie as the driver of a motor-car, and that, upon the evidence for the defence, he was driving "slowly and carefully" when first seen by the engine-driver and fireman—the engine being then about 200 yards and the truck about 50 from the crossing—and each in open view of the other. And he was also careful to emphasise that the railway servants assumed, "took it for granted," that the driver of the truck would stop in time, and would certainly not attempt to cross in front of a rapidly moving train on a down-grade line.

"Mr. MacGregor: Q. I suppose, Mr. Dobson (the fireman), that the fact is, that you and Mr. Stewart (the engine-driver) took it for granted that this truck would come to a stop and you would go by? A. There was nothing in the movement of the truck that would indicate it would not.

"Q. I suppose you took it for granted? A. Yes."

And why not? The view of the engine-driver was obstructed by the boiler until the engine was almost on the crossing, but the fireman was in a position to see and keep upon the look-out. Until it was too late to avert the collision, the slowly moving truck—going at about 6 miles an hour, as James Hendrie says—of course confirmed the impression that the driver had no intention of attempting to cross ahead of the train.

The deceased was familiar with the conditions, he crossed at this point several times a week. There is no evidence that he looked or took the slightest precaution for his safety, until his front wheels had crossed the first rail, when, but too late, he attempted to speed up. The other occupant of the truck—James Hendrie—tells the story in a very few lines:—

"I remember the front wheel bumping over the first rail of the track, and I looked to the right again, and there was a train coming whisking by us, I guess 50 or 60 miles an hour. By this time our wheel had crossed the front track, and I shouted to my brother to speed up—there is a train coming—and he evidently speeded up. I seen we couldn't make it, and jumped, and I jumped clear."

He said that at the rate they were travelling the truck could

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be stopped in 3 feet. He looked twice. Upon cross-examination he said, "If I had kept looking I would have seen the train;" and his brother had an equal opportunity of seeing it. When the truck was 50 yards from the track the two men on the engine could see the truck, and the fireman says that it was continuously in his view afterwards until the collision occurred. It follows that the driver of the truck would have seen the engine from any point in the 50 yards, had he been exercising reasonable care.

And, on the evidence of the defendants' engineer, Mr. Hewson, the driver of the truck, looking from a point on the highway over which he passed, and 96 feet distant from the first rail, could see the railway over which this train approached him for a distance of 1,300 feet, at least.

I do not propose to discuss the question of whether the deceased was negligent or was the unfortunate author of his own death. The question of a new trial was not, I think, referred to. An intelligent man, in full possession of his senses, sight and hearing included, knowing of the railway crossing and all its surroundings, driving a "silent engine," and crawling along at 6 miles an hour, as James Hendrie says, apparently unconscious or heedless of the statutory warning, and of the "long blast" for Clinton Junction as well, and apparently only aroused from his reverie when his brother called out to him to "speed up," has been exonerated by the jury from negligence of any kind.

Paraphrasing the answers to the 1st, 2nd, 5th, and 6th questions, the jury found that the company's servants were guilty of negligence causing the accident, in that, after they realised, or ought to have realised, that an accident was imminent, they could have avoided it by giving special warning and applying the emergency brakes.

The explanations given to the learned Chief Justice shew that this all refers to the time when the engine-driver was about 200 yards and the truck about 50 yards from the crossing.

Is there any fact or circumstance in evidence to suggest even to the company's servants at that time, or in fact at any time before a collision was inevitable, that an accident was imminent or even probable, or that there was reason for the exercise of more than ordinary care? I can find nothing. In every section of this country, with its network of railways, on every day in the week, and, in the busy hours, every moment of the day, men are driving just as this man was driving, towards a railway crossing fully alert to the fact that a train is approaching, and stopping within a few feet of the rails, and in time to let the train go by. I find nothing in this case to separate it from the ordinary every

day conditions of highway traffic to and across railway intersections.

The questions presented by these appeals are not new. They are to be decided upon the principles governing the decision in *City of London* v. *Grand Trunk R.W. Co.*, 32 O.L.R. 642, 20 D.L.R. 846, and I refer particularly to what was said there by my learned brother Riddell, at p. 664.

I am of opinion that the appeal should be dismissed.

MEREDITH, C.J.C.P. (dissenting):—These actions were brought by the plaintiff to recover damages from a railway company, who are the defendants in it, for personal injuries to and the death of Thomas Hendrie, when a motor-truck, which he was driving, was run down by a very fast running express train, of the defendants, on an open highway which the railway double-tracks crossed on a level with the open road.

The trial of the action was by jury; and the verdict of the jury was: that the deceased's injuries were caused by the negligence of the defendants; that such negligence was "in not giving special warning and applying the emergency brakes," and that the deceased was not guilty of contributory negligence; and they also found: that the enginemen might have avoided the accident, after they realised, or ought to have realised, that an accident was imminent, by "giving special warning and applying emergency brakes."

The case was fully tried; and there is no suggestion that there was any misconduct or misconception, in any way, by the jury; on the contrary, the case seems to have received their careful and intelligent consideration; and the more so as they were not unanimous; the verdict was given by ten of them, two disagreeing, and so making it more certain that all the facts of the case, and all that could be said on each side, was present to the minds of all the jurors; and their intelligence and understanding of the case is further made evident by their foreman's answers to a number of questions which the trial Judge asked him when their verdict was rendered.

The grounds upon which the jury found for the plaintiff were explicitly put to them by the trial Judge, in his charge to them, as grounds upon which they might find for the plaintiff, and were so put without any kind of objection by any one. The learned Judge asked them: If "when they," that is, the enginemen, "first discovered the truck," when "the train was within 200 yards of the crossing, if they had done everything that was possible, could they at 200 yards have brought the train to a stop and have averted the accident? That is a feature that you will deal with when considering the question." And again: "they,"

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that is, the enginemen, "must try to avert an accident which seems to reasonable men likely to happen unless they slow down or stop," and "if, notwithstanding the right to cross the street at the highest rate of speed, those in charge of the train, controlling it, discover that unless they slow up and adopt some extra precaution they may cause an accident,—in that case the common law steps in and imposes a duty."

The charge was not as favourable, in this respect, to the plaintiff as it should have been, because it seems to have been dominated by an impression that what is generally called ultimate negligence was needed to support the action, though it might be sustained as well by that which is commonly called primary negligence; for it might have been the duty of the enginemen to have sounded the whistle, as the jury found that they should have done, even though they did not appreciate the fact of the imminent danger which ended in the injury and death of Thomas Hendrie; however "the situation was saved" in that respect by the questions submitted to the jury, coupled with the jury's intelligence and care.

Notwithstanding that the case was so submitted to the jury, and notwithstanding their clear verdict in the plaintiff's favour, the trial Judge, some time after the trial, ignored the verdict and directed that judgment be entered for the defendants.

There is, need it be said, no appeal from the verdict of a jury. The general rule is that a verdict once found ought to stand. Yet, if there be no evidence upon which reasonable men could find as a jury has found, the Courts have power to set aside, and to enter judgment contrary to, such a verdict. But in such a case as this, in which the jurors must, from experience, know more than Judges, having some knowledge of the place where the accident happened, and of the working of railways and of traffic on highways in the locality, and indeed generally; and in which there have been no complicated questions to consider and no misconceptions or misconduct, actual or even suspected, but there has been a careful trial and an intelligent and clear verdict, one must have much faith in his own judgment to be able not only to say that the verdict is an unreasonable one, but is so unreasonable that no reasonable ten men could have given it—that ten men who should know more than we about such things have given a verdict which no ten reasonable men could give. It is not uncommon for each of two persons in a controversy to say or think the contention of the other unreasonable; but that is far from saying that no reasonable person could have made it. There seems to be some danger of a verdict being disregarded because

the Judge thinks it unreasonable, and treats that as equivalent to considering that reasonable men could not have so found.

In this case my conclusion is not only that the verdict is one which reasonable men might find; but that it is a proper one; though I do not go so far as to say that no reasonable man *could* find otherwise, but only that he *should* not.

The facts are plain and simple:—

The place in question was a wholly unguarded crossing, by two railway tracks, of a highway at "rail level," necessarily a place of danger, but, in the circumstances of this country, often practically an unavoidable one. It was crossed many times during the day and night by trains of the defendants running both ways and generally running at a speed of from 10 to 30 miles an hour, but there were a very few trains called "flyers" which ran at a much greater speed; the train which injured and killed Thomas Hendrie was one of "the flyers," and there was a "down-grade" approaching the crossing as that train was.

The engine-driver happened to be a "spare man," taken from a yard or freight train locomotive, to fill temporarily the place of a regular driver; and he had very little experience in such work or "in emergencies," never but once having applied what is called—rather misleadingly—because there is only one air brake and the difference is only in the speed and force with which it is applied—the "emergency brake," and certainly not best able to do, or to say what should be done, in an emergency.

The whistling-post for this crossing is about a quarter of a mile from the crossing; and whether the whistle was sounded there or not was one of the questions in controversy at the trial, and there was evidence on each side which would have supported a verdict either way upon that question. The jury made no finding upon it. It is said, for the defendants that no finding is equivalent to a finding that the whistle was sounded: but that is obviously not so; the jury may have been unable to find whether it did or did not; and, that which is more to the point, may have concluded that it really made no substantial difference whether it did or not, because the disaster was not attributable to what was done or not done there, but was attributable to later or earlier negligence.

There was evidence upon which the jury may have found properly, that the train was running at the speed of 60 miles an hour. The fireman, who was somewhat indefinite in his evidence on this question, said that it might have been running from 45 to 50 miles—and the driver admitted that much too—and also that this train regularly goes "past that crossing at 50 miles an hour." According to his testimony, the train was an hour and a

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half "behind time," the driver said an hour and twenty minutes. It was one of the most important trains making connection at Niagara Falls with the day-train for New York, and so it is altogether likely that everything was being done that could be done to make up for lost time.

The story of the enginemen is: that the injury was done about noon on a bright day; that they saw the truck when they were about 200 yards from the crossing and the truck was about 50 or 60 yards from it, "likewise approaching the crossing, but going slowly."

From the whole evidence the jury might well have found that the truck was proceeding at a speed of 6 miles an hour and the train at 60; but, whatever respective speeds could have been found, it is obvious that the enginemen's opinions of respective distances from the crossing are wrong. At 60 and 6 miles an hour if the truck were 60 yards away, the engine must have been 600; whilst, if the engine were 200, the truck must have been 20; else they could not have met as they did on the crossing. At the usual speed of 50 miles the engine must have been 500 yards, or the truck only 40 yards, that is from the track on which the train was; the nearest part of the other track would be 5 or 6 yards nearer to the truck.

The truck was plainly in sight of either driver or fireman from the time it was first seen until the crash came. The fireman, who had the better opportunity for observing, states what occurred thus:—

"*Mr. McCarthy*: Tell us what you saw of the man in the truck? A. I couldn't see the man in the truck—there seemed to be a curtain down on the side of the truck.

"Q. What did the truck do? A. Come right on.

"Q. Vary its speed at all? A. I couldn't notice it vary its speed at all.

"Q. Going slowly? A. Going slowly.

"Q. At what point was it you yelled? A. I would judge probably about 30 yards when I shouted out to the engineer.

Q. From the crossing? A. Yes, sir.

"Q. Where was the truck then? A. About the first wheel was upon the first rail of the west-bound track.

"Q. The front wheel of the truck was on the first rail of the west-bound track? A. Yes.

"Q. In that position you yelled to the engineer? A. Yes, sir.

"Q. And the engine went on? A. That is right."

So that, whether it was 200 yards or 600 or any other distance, these enginemen under those circumstances, ran down

the truck and killed the driver without making the least attempt to save him, though effectual means were at their hands, one of which could have been employed almost as easily as left wholly untried.

There was nothing to indicate that those on the truck knew of the approach of the train; they could not be seen—"there seemed to be a curtain down" on that side of the truck. If the enginemen could not see them, it was probable that they could not see the engine; and they kept steadily coming on towards inevitable destruction if nothing were done to avert it. The enginemen knew that the "flyer" was out of time, and would be unexpected; they knew that ordinary trains ran at less than half their speed; that between the crossing-whistle and the crossing there was usually from 30 seconds to a minute; with them less than 15 seconds; that with an ordinary train—and they were probably 30 to 1—there was abundance of time for a truck nearing the tracks to cross and be some distance beyond them before the train could reach the highway.

In these circumstances, and indeed without any of them except the steady approach of the truck, what possible excuse can the enginemen have for not giving an alarm, for not making the whistle shriek, when the truck was so seen by them; it would cost nothing, it could do no harm, and was almost as easily done as left undone; and it might prevent a terrible and costly accident. I feel bound to say that, in my judgment, that much less than intelligent judgment, even instinct, should have demanded a shrill alarm, an alarm which, having regard to James Hendrie's testimony as to what was happening on the truck, would have made it certain that the disaster should have been averted.

It is urged that the enginemen might have rightly assumed that the truck would stop; and with some hesitation the fireman accepted that position thus (cross-examined by Mr. MacGregor):—

"Q. I suppose, Mr. Dobson, that the fact is that you, like Mr. Stewart, took it for granted that this truck would come to a stop and you would go by? A. There was nothing in the movement of the truck that would indicate it would not.

"Q. I suppose you took it for granted? A. Yes."

This man saw the truck, with, he thought, a blind down, obscuring his view of any one in it, and likewise any one's view from it of the engine, and he saw it come slowly and steadily on, until it was on the other track, before doing or saying anything. The driver did not see the on-coming of the truck, and so was in no position to form any opinion of what the driver intended

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to do; so the jury might very properly find that there was no justification or excuse, for taking it for granted that the truck would stop, and doing nothing when so much might so easily have been done. Whatever any one else may think of the reasonableness or unreasonableness of it, I feel bound to say that in my judgment the failure to give an alarm—whistle when the truck was seen steadily approaching the track, with apparently a blind down, was a grossly negligent thing and the proximate cause of the disaster.

If it had been given, it should have awakened the driver to a sense of the fact that the train was not one of the many tortoises, but was one of the few hares—the "flyer"—which would cover the quarter-mile or so in 15 seconds or so, and have caused him to stop.

But, even if it did not, it should have put the blame on him, if he went on and suffered; unless the speed of the train ought to have been checked so as to avoid an imminent, or at least likely accident, in which case the defendants should be liable even though the alarm had been given and had been unheeded; but that would be a different case.

In this way, in my opinion, the verdict not only may but must be sustained and effect given to it; and indeed if the case had been tried by me, without a jury, in this way the plaintiff should have succeeded.

The other separate ground upon which the jury found the defendants also liable, namely, that the defendants could and should have avoided the accident by sooner checking the speed of the train, is not, in my judgment, as strong an one as the other, yet it is one on which I have no doubt reasonable men could well found a verdict for the plaintiff.

The trial Judge spoke of it as stopping the train; but, of course, that was not at all necessary; a very slight slackening of speed, one-third or so of a second, should have been enough. It was the hinder part of the truck that was struck; and, as it was going at the rate of about 3 yards a second, it almost escaped as it was.

I am quite unprepared to say that it was not the duty of the enginemen to have first sounded an alarm-whistle, and then, if that had no effect, have applied the brakes enough to bring the train under greater control; if obliged to determine the question, I should find that it was: the place was one of much danger; the train was an unusually dangerous one; and it was running out of the usual time. It was a case for the exercise of more than ordinary care.

Admittedly it was the duty of the enginemen to have

applied the brakes at some time. Why wait until the disaster was unavoidable? Who, but the jury is to say just when that duty should have been performed? It is useless to talk of the impossibility of carrying on the business of a railway if its trains must be stopped at every level crossing when a vehicle on the highway is in sight; it would be just as sensible, if not more so, to say that if, in such a case as this, the speed of trains were not slackened, owners of trucks could not carry on business, and that no vehicle could go safely on a railway crossing, and still more so to say that it would be impossible for railway companies to carry on business if their enginemen ran down vehicles as this truck was run down, when a whistle or a lowering of speed a fraction of a second would have prevented it. Why wait until the front wheels of the truck were on the first track?

In this case nothing turns on the question of contributory negligence. There was not suggestion that James Hendrie was guilty in that respect; and so the only question submitted to the jury was whether the deceased (the driver of the truck) was so guilty; and his guilt, if there had been any, could not be attributed to this plaintiff. So, too, contributory negligence is out of the question on the jury's finding of ultimate negligence of the enginemen. And, in addition to that, the jury have found that there was no contributory negligence; and there is evidence upon which reasonable men could so find. Even if the driver heard the crossing-whistle, that might only lull him into security, knowing it was not the time for the "flyer," and that with ordinary trains there was what drivers like to call "tons of time" to cross over in safety, and it must not be forgotten that, whilst the enginemen were traversing the 600 or the 200 yards in the 20 or the 7 seconds whichever it may have been, with the steam shut off, the engine-drifting, as it is called, down the grade, neither had anything to do but look out and avoid accident, whilst the truck-driver must have been constantly employed, mind and arms, in guiding his car and also looking ahead to avoid accident; that his car was not, like the engine, guarded by iron rails which performed the main duties of its safe guidance.

The case was, in my opinion, one for the jury; and it was so treated by every one concerned in it at the trial; the jury, not the Judge, were the chosen judges of all the questions of fact upon which the rights of the parties depend; they have with care and clearness performed that duty; and I feel bound to say that, in my judgment, it is an usurpation of their

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exclusive power for any Judge to ignore their verdict and give judgment between the parties in the teeth of it.

Therefore I am in favour of allowing this appeal, and giving effect to the jury's verdict.

Appeal dismissed.

JACKSON MACHINES, LTD. v. MICHALUCK.

Saskatchewan Court of Appeal, Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

BILLS AND NOTES (§ VIA—151)—PROMISSORY NOTE ENDORSED TO BANK FOR SECURITY—BANK INSTRUCTING SOLICITOR TO SUE IN NAME OF ENDORSER—NOTE NOT ENDORSED BY BANK—ENDORSEMENT TO BANK NOT STRUCK OUT—RIGHT TO SUE IN NAME OF ENDORSER.

Where a promissory note has been endorsed to a bank as collateral security for an indebtedness, and the bank sends it to its solicitor for suit on account of the person making the endorsement, the solicitor is justified in suing in the name of such person, and the Court has power to give effect to the rights of the parties without the formality of having the note endorsed by the bank or of having the endorsement to it struck off.

APPEAL by defendant from the trial judgment in an action on a promissory note. Affirmed.

J. N. Fish, K.C., for appellant.

F. F. Macdermid, for added respondents, the Canadian Bank of Commerce.

LAMONT, J.A.:—By an agreement in writing which substantially complies with form B of the Farm Implements Act, R.S.S. 1920, ch. 128, dated July 30, 1919, the defendant purchased from the Jackson Machines, Ltd., a sheaf-loader for $1,250, and gave his promissory note therefor, payable November 1, 1919. The company endorsed the note to the Canadian Bank of Commerce as collateral security for their indebtedness to the bank. The defendant did not pay the note. After repeated requests for payment, the said bank sent the note to the Union Bank at Cupar, as the defendant lived near that place, which bank sent it to a solicitor, W. J. Ruston, with the following instructions:—

"Acting under instructions from our correspondents, the Canadian Bank of Commerce, Saskatoon, we are enclosing herewith the following promissory notes for suit on account of Jackson Machines Ltd., Saskatoon:—

. . . .

2. L. Michaluck due Nov. 1/19 $1250 and interest.

Any expenses incurred in the above connection will of course, be paid by the Jackson Machines Ltd. We would request that you kindly acknowledge receipt of these notes at your earliest convenience."

Ruston on these instructions sued the note in the name of the

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Jackson Machines, Ltd., and all his subsequent correspondence was with that company.

The defendant in his statement of defence alleged that the plaintiffs were not the holders of the note, and that the machine for which the note was given was not reasonably fit for the purposes for which it was required, and he set up the allegations necessary to bring the transaction within sec. 16 of the Sale of Goods Act, R.S.S. 1920, ch. 197. At the trial the plaintiffs proved the making of the note; its presentation and non-payment. They then rested. Counsel for the defendant then moved for the dismissal of the action, on the ground that the plaintiffs having endorsed the note to the bank, and having admitted that they still owed the bank the debt for which the note was given as collateral security, were not in a position to sue upon it. The trial Judge took this view, but allowed the plaintiffs to amend by adding the bank as co-plaintiffs.

The jury found as follows:—

"Q. 1. Did the defendant expressly or by implication make known to the plaintiffs the particular purpose for which the machine was required so as to shew that the defendant relied on the plaintiffs' skill or judgment? A. Yes. Q. 2. Was the machine of a description which it is in the course of the plaintiffs' business to supply? A. Yes. Q. 3. Was the machine so sold reasonably fit for the purpose for which it was sold? A. We believe that it is reasonably fit for the purposes for which it was sold, although it may not have given satisfaction on the hills. Q. 4. If said machine was not reasonably fit for such purpose, in what respect was it deficient? No answer."

On the above answers, the trial Judge gave judgment in favour of the bank for the amount of the note and interest, but gave the defendant his costs against the Jackson Machines, Ltd.

From this judgment the defendant now appeals on two grounds:—(1· That no amendment should have been allowed; (2· that on the answers given by the jury the plaintiff was not entitled to judgment.

If an amendment was necessary to enable judgment to be given against the defendant, I agree with the trial Judge that it was his duty to grant it. The non joinder of parties is not now a ground for defeating an action. Rule 42. *Leeson* v. *Moses* (1915), 24 D.L.R. 158, 8 S.L.R. 122.

In my opinion, however, the amendment was not necessary. Had the bank returned the note to the Jackson Machines, Ltd., with instructions to sue it in their own name, there could be no question, it seems to me, of the right of that company to maintain the action and have judgment in their favour.

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In the *Nova Scotia Carriage Co.* v. *Lockhart* (1906), 1 E.L.R. 76, the defendant accepted a bill of exchange drawn by the plaintiffs, payable "to the order of the Union Bank of Halifax." The note was dishonoured, and the bank returned it to the plaintiffs without endorsing it. The plaintiffs sued. The defendant set up that they had no right to maintain the action without having the bill endorsed by the bank. In giving judgment, Longley, J., at p. 77, said:—

"I think the drawers had a right to receive the bill from the bank as soon as it was dishonoured, and thereby became lawful holders and entitled to take action against the acceptors."

In *Black* v. *Strickland et al.* (1883), 3 O.R. 217, the head-note, in part, reads:—

"The possession of bills of exchange by the indorser, after he has specially indorsed them, is *prima facie* evidence that he is the owner of them, and that they have been returned to him, and taken up in due course of time upon their dishonour, although there be no re-indorsement; so that by the possession he is remitted to his original rights."

In giving judgment, Boyd, C., at p. 220, said:—

"If the bill was discounted by the Bank of Ottawa it was merely forwarded to the Bank of Commerce, as their agents, to collect; this failing, it would be returned in due course to the Bank of Ottawa. Upon their giving it back to Whitla it is to be assumed that their claim on it was satisfied. If it was not discounted by the bank, but merely left for collection, it would come back as of course to the hands of Whitla as lawful owner. *Quacunque via* it seems settled on the authorities that when the bill came back to Whitla, he was remitted to his original rights against the acceptor."

In *Rat Portage Lumber Co.* v. *Margulius* (1914), 15 D.L.R. 577, 24 Man.L.R. 230, the plaintiffs sued on a promissory note made by the defendant, Margulius, in favour of the defendant Jorundson. The plaintiffs endorsed the note to the bank, and on taking it up at maturity left the endorsement to the bank on the note, and it was still there when they moved for summary judgment. It was held that, under sec. 140 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, the plaintiffs should be permitted to strike out the special endorsement to the bank and deposit the note in Court, and that on doing so the plaintiffs might have summary judgment, notwithstanding the defence that the plaintiffs were not the holders in due course. In giving judgment, MacDonald, J., at p. 578, said:—

"The plaintiffs being in possession of the note sued on, it is to be presumed that they have discharged any claim the bank

may have had and that they are restored to their original rights and they may strike out the subsequent indorsement. Their failing to do so prior to action brought should not deprive them of their rights and I now allow them to strike out the indorsement making the note payable to the order of Imperial Bank of Canada and, by depositing the note in Court, I dismiss the appeal, but without costs."

This judgment was affirmed by the Court of Appeal (1914), 16 D.L.R. 477.

It seems to me, therefore, that had the bank returned the note to the Jackson Machines, Ltd., with instructions to sue on their own behalf, such instructions would be conclusive proof that the bank had given up its lien on the note and had no further claim thereto. Is the position the same where, instead of returning the note to the company, they send it to a solicitor with the instructions set out in the letter to Ruston above quoted? I am of opinion that it is. The letter to my mind is clear authority to sue in the name of the Jackson Machines, Ltd. By giving those instructions the bank surrendered any claim it had in respect of the note. That surrender made the company again the sole owners of the note, and gave them the right to maintain an action in respect thereof. In sending the note to the solicitor to be sued in the name of the company, the bank should have struck out the endorsement to itself, or have endorsed it "without recourse." That not being done before action brought, the procedure set out in *Rat Portage* v. *Margulius, supra,* might have been followed, although if the note is deposited in Court, and the plaintiffs are proven to be the only persons having any interest therein, I cannot see any great virtue in having the endorsement struck off the note. The Court can, it seems to me, give effect to the rights of the parties without that formality. In any event, I cannot see how its continuance on the note can afford the defendant any defence to the action. Under the circumstances existing in this case, the action was, in my opinion, properly constituted without the amendment.

I also agree with the trial Judge in the interpretation he placed upon the findings of the jury, and that in these there was no defence upon the merits. The failure of the machine to give satisfaction on the hills did not arise from any defect in the machine, but was due to the steepness of the hills, which made it heavy to pull.

As the Jackson Machines, Ltd., do not ask to have the judgment varied, and did not appear before us on the argument of the appeal, I take it that they are content with the judgment as entered. Rule 5 provides that if a respondent desires on

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the hearing of the appeal to contend that the judgment of the Court below should be varied, he should give notice of such intention. The omission to give such notice, however, does not diminish the power of the Court, but may be a ground for an adjournment or for a special order as to costs. Rule 44 gives this Court the power to give any judgment or make any order which ought to have been made below, and that, notwithstanding that the respondent or a party may not have appealed from or complained of the decision.

In *Att'y-Gen'l* v. *Simpson*, [1901] 2 Ch. 671, 70 L.J. (Ch.) 828, the Attorney-General brought action to establish on behalf of the public as against the defendant, the right of passage along the river Ouse including the locks, subject, as to boats laden with merchandise, to a toll of 3d. for each lock, and to establish an obligation on the part of the defendant to maintain the locks. The Court below held that the public were entitled to pass the locks without paying toll, and that the defendant was not under obligation to maintain the locks. The defendant appealed from the judgment other than the part declaring that he was under no obligation to maintain the locks. The plaintiff gave no cross notice of appeal. The Court allowed the defendant's appeal to the extent of giving him the right to collect toll for passage of boats through the locks. It was of opinion, also, that the judgment below was wrong in holding that he was not liable to maintain the locks. As the Attorney-General had not appealed against the judgment as entered below, the question was as to the duty of the Court of Appeal to vary the judgment in respect of a matter not appealed against. Stirling, J., at p. 720, said:—

"I think that this Court ought to exercise the power conferred by Order LVIII., r. 4, namely, 'to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.' The order confers power to do this, although the appeal may be from part of the judgment only, and although the respondent may not complain of the decision."

It is true that in that case the public had an interest in the result, but I fail to see that the rule, generally speaking, should be given any different interpretation where the interest of the public rather than the interest of an individual is involved. Where, however, as here, a new plaintiff has been added and judgment given in favour of that plaintiff, and that judgment has been acquiesced in by the former plaintiff, who does not ask us to vary the judgment, and where all that is really involved are the costs awarded to the defendant below, I think the judg-

ment may well remain as it is. I would, therefore, dismiss the appeal with costs.

TURGEON, J.A.:—I agree that this appeal should be dismissed with costs. The trial Judge, in my opinion, gave the proper effect to the finding of the jury, so that on the merits of the case the defendants cannot resist payment of the note. There is no cross-appeal from the ruling of the trial Judge whereby he held that the Jackson Machine Co. were not entitled to bring the action. The question of whether he was right or wrong in so ruling must depend upon the circumstances under which the letter to Ruston, referred to by my brother Lamont in his judgment, was sent, and the interpretation to be put upon that letter. In my opinion there is considerable doubt upon the question thus raised, and, as the matter was not discussed on the appeal, I do not find that I can or ought to express any opinion upon the right of the Jackson Machine Co. to maintain the action.

MCKAY, J.A.:—I agree in the result.

Appeal dismissed.

Re COX.

Ontario Supreme Court, Rose, J. November 26, 1921.

WILLS (§ III—75)—ADMINISTRATION—GIFT TO HOSPITALS—EQUAL SHARES —ONE IN ENGLAND, ONE IN CANADA—RATE OF EXCHANGE—DIVISION.

When property is directed by will to be divided equally, the executors will divide the assets for distribution accordingly, and not allow for the rate of exchange, which may fluctuate from day to day.

MOTION by executors upon originating notice for an order determining (1) whether the executors can properly and legally distribute the residuary estate during the lifetime of the annuitants, and (2) as to the method of distribution, having regard to the present abnormal condition of the rate of exchange.

A. E. Fripp, K.C., for executors.

W. D. Herridge, for St. Luke's Hospital.

ROSE, J.:—The argument of the questions raised on the originating notice took place some time ago, but the giving of judgment was deferred in the hope that the parties themselves might arrange, as was suggested on the argument, some mode of dealing with the principal question which would be satisfactory to the two hospitals concerned. However, no arrangement has been arrived at, and I have been asked to give my judgment.

Two questions are raised by the originating notice: the one, whether the executors can, properly and legally, distribute the residuary estate during the lifetime of the annuitants, and the

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other as to the method of distribution, having regard to the present abnormal condition of the rate of exchange.

The first question is obviously one that cannot be determined in the absence of representatives of the annuitants, but counsel for the executors said that the executors had made, or would make, such provision for the annuities as that they would feel safe in making certain payments to the hospitals, and it is only as to the second question that the judgment of the Court is required.

The Bootle Hospital was not represented on the argument, but the trustees had caused a letter to be written to one of the executors in which they stated their willingness to be bound by the opinion of the Court, and set forth a course which they thought ought to be adopted. That letter was directed to be filed as a part of the material upon the motion.

The testator, who appears to have been domiciled in Canada, left a large estate, of which about one-half consisted in lands in Canada, and bonds and stocks and other securities in Canada and the United States, the other half being his interests in two firms in England and a comparatively small amount of money on deposit in a bank in England. By his will, which was apparently made in Ottawa, he appointed as his executors two gentlemen therein described as residing in England, but one of whom now lives in Ottawa.

By the will the property, other than a residence in Ottawa, is given to the executors in trust to convert, and pay certain legacies and annuities, and, subject to the legacies and annuities, to divide the residue, as it becomes free, in equal parts between St. Luke's Hospital in Ottawa and the Bootle Hospital in England.

Under arrangements which the executors have made with the firms in England, moneys representing the interests, or the balance of the interests, of the testator in these firms will be paid to the executors from time to time; but the securities in Canada and the United States will probably not be turned into cash for some time, and even after their conversion into cash a considerable period must elapse before the annuities drop, and the whole residue is divided between the two hospitals. The question is as to how the executors are to proceed, having regard to the rate of exchange, with the division between the hospitals of the funds received from time to time from the firms in England, and the other funds which hereafter become available for division.

Cases were referred to on the argument most of which are collected and discussed by the Chief Justice of Ontario in de-

livering the opinion of the majority of the Court in *Quartier* v. *Farah* (1921), 49 O.L.R. 186, 64 D.L.R. 37. It appears to me, however, that none of these cases are really of much assistance in dealing with the matter under discussion. They, or most of them, relate to questions as to the rate of exchange applicable where a person is bound to pay a certain sum, at a certain place, on a certain day. Similarly the question dealt with in the cases cited in Williams on Executors, 11th ed., p. 1175 and the following, have little application. They, and similar cases which might be cited, relate to legacies of a certain number of pounds, or dollars, or francs. The case in hand is entirely different. It raises a question as to the division into equal parts of the testator's assets, whatever they may be; and, so far as I have been able to discover, the precise point has not been under discussion in any case.

However, it does not seem to me that there is much doubt as to the course which the executors ought to pursue. When they have available in England a sum which they desire to divide between the hospitals, no purpose will be served by transferring it to Ottawa, and making the division from there. The simple course will be to give half of it to the Bootle Hospital, and with the other half to buy Canadian exchange, and to pay over the proceeds of the draft to St. Luke's Hospital, unless, indeed, St. Luke's Hospital prefers to take payment in England, and to keep its money there until the rate of exchange becomes more favourable. And when the executors have funds available in Ottawa which they desire to divide between the two hospitals, the simple course will be to give one half to St. Luke's Hospital, and with the other half to buy English exchange in favour of the Bootle Hospital, unless the Bootle Hospital prefers to accept payment in Canada.

St. Luke's Hospital says that this course will be unfair because, as I understand the argument, if one half of any sum which the executors have in England is given to the Bootle Hospital, and the other half is used in the purchase of Canadian exchange, St. Luke's Hospital will, at the present rate of exchange, receive a sum which, expressed in dollars, will be less than the sum which it would receive if the exchange was normal, and the pound sterling represented $4.86 2/3 Canadian currency; and similarly that, when moneys in Canada come to be divided, if one half of the sum for division is used in purchasing English exchange, the Bootle Hospital will receive sums which, expressed in pounds, are more than it would receive if the exchange was normal. St. Luke's Hospital says, therefore, that the suggested course will, both in the present and in the future

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(assuming that the exchange does not become normal), give to the Bootle Hospital more than its one half of the funds divided. In this argument there is, I think, a confusion of form with substance, which will be apparent when the reason why the rate of exchange is at present abnormal is considered.

If, when the executors had, say, £200 coming to them, in England, they could get, in payment 200 sovereigns, and if the export of gold coin was not prohibited, there would be no difficulty: they could give 100 of those sovereigns to the Bootle Hospital and bring the other hundred to Canada and give them to St. Luke's Hospital, when, obviously, each hospital would have exactly the same amount of money. Of course, if conditions were normal—if there was no depreciation of currency either in England or in Canada—the executors would neither receive nor distribute the gold; the transaction would be by cheque and banker's draft. On the purchase of a draft, in England, for an amount in dollars, equivalent to the £100 available for St. Luke's Hospital, there might or might not be payable a premium, this depending upon the state of trade balances and the like existing at the moment of the transaction. If there was such a premium payable, it may be that it would be proper to charge it to the estate generally, as part of the costs of administration—as the expense of getting into possession in the country of the testator's domicil an asset which was to be handed over to a beneficiary in such country. But the premium, if there happened to be one, would be very small—an amount not exceeding the cost of transmission of specie: at least that is the way economists, for instance Professor Jevons, in "Money and the Mechanism of Exchange," used to state the case in discussing the question of exchange at a time when paper currency was, on demand, redeemed in gold, and there was no prohibition of the export of gold. That kind of premium, however, is not the thing that is responsible for the present rate of exchange as between England and Canada: it may or may not enter into the calculation, and, if it does, I imagine that it would be difficult to discover precisely what its effect is on any given day; and so, because of the difficulty in calculating its effect, and because its effect, if discoverable, is very small, and because before the administration of the estate is completed there will be movements of money to England from Canada, as well as those which are now about to take place from England to Canada, and finally, because the two hospitals, as residuary legatees, will bear in equal shares any expenses that are thrown upon the estate generally, I think that in the practical administration of the estate the simple, and probably the fair thing, is to disregard it.

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The existing, and abnormal, rate of exchange depends, as I understand it, upon something quite different from the thing that regulates the rate under normal conditions: it is attributable to the fact that the English and Canadian currencies are both depreciated, but the English to a greater extent than the Canadian. The result of this difference in the extents of the depreciation is that if a person in England has what he calls 100 pounds he cannot convert it into something which will be called in Canada 486.66 dollars, as he could if the exchange was at par; what he converts it into will be called in Canada, say, $430. Nevertheless, I think that one who has in England to-day what he calls 100 pounds has just as much as, and no more than, is possessed by one who has in Canada what he calls $430 (if that is the amount, expressed in terms of Canadian currency, which £100 paid down in London would produce in Canada); and I think it is a mistake to speak of the difference between $486.66 and $430 as the cost of transmitting £100 from England to Canada or as a loss on exchange. I do not think there is any loss at all. Take the hypothetical case with which I started: the executors have, in England, 200 sovereigns, and there is nothing to prevent the export of gold, but the English and Canadian currencies are both depreciated. The executors give 100 sovereigns to the Bootle Hospital and bring the other hundred to Canada and give them to St. Luke's Hospital. Each hospital has then the same amount in gold coin. Each proceeds to convert its gold coin into paper currency, with the result that the Bootle Hospital has more than £100 in paper and St. Luke's Hospital has more than $486.66 in paper, and, because of the difference in the extents of the depreciation in currency in the two countries, the ratio between what the Bootle Hospital has (expressed in terms of English currency) and what St. Luke's Hospital has (expressed in terms of Canadian currency) is not the same as the ratio between one and 4.86⅔, but is, say, as one is to 4.30. Is it not clear, notwithstanding the fact that the ratio is no longer that of one to 4.86⅔, that each hospital has still the same amount of money as the other? If it is clear that this transaction (impossible because gold is not allowed to be exported or converted into paper at a premium) would have left the two hospitals on an equality, after the conversion of their gold into the paper currencies of their respective countries, is it not equally clear that they will also be on an exact equality if the executors, receiving, in England, £200 in currency, give one hundred in currency to the Bootle Hospital, and either give the other hundred to St. Luke's Hospital in England, or convert it into Canadian dollars and give the dollars to St. Luke's Hospital? I think it is.

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There is another way in which the matter may be tested. Take a case which can really happen, instead of the case as to the transmission of gold coin which I have put, but which cannot happen while the law remains as it is. Suppose the executors to receive their £200 in England in Bank of England notes, and to give £100 in such notes to the Bootle Hospital and to bring the other hundred to Canada and to tender them to St. Luke's Hospital. St. Luke's Hospital might accept them or might say to the executors: "Your duty is to convert the assets of the estate into money that is legal tender in Canada, and to pay us in such money. Proceed, therefore, to convert this asset and give us the proceeds of the conversion." The executors would then sell their Bank of England notes for, say, $430 in Canadian notes, and would tender the latter. How could St. Luke's Hospital complain? It would be exactly in the position in which it would have been if the executors had brought the whole £200 in Bank of England notes to Canada, and had sold them for $860 and had given St. Luke's Hospital half of the amount and with the other half had bought a draft on London in favour of the Bootle Hospital.

When the time comes for the division of the Canadian and American securities, the same reasoning will apply: any apparent advantage which the Bootle Hospital may gain will be apparent only, not real.

The answer to the question submitted is that the executors ought to follow the course which I have described as the simple course. The costs of all parties will be paid out of the estate.

Judgment accordingly.

LABONTE v. BANQUE d'HOCHELAGA.

Quebec Superior Court, Surveyer, J. December 30, 1920.

PLEDGE (§ IIA—11)—LIFE INSURANCE POLICY—HANDED TO BANK AS COLLATERAL SECURITY—AGREEMENT OF BANK TO PAY PREMIUMS—FAILURE TO PAY—LAPSE OF POLICY—PAYMENT OF DEBT TO BANK—RIGHT TO RECOVER AMOUNT OF POLICY FROM BANK.

A creditor to whom a life insurance policy is pledged as collateral security for the debt and who undertakes to pay the premiums on the policy and who after making several payments discontinues paying, and without notifying the insured allows the policy to lapse is liable upon payment of the debt to the bank for which the policy was pledged, for damages sustained by the insured by reason of the lapse of the policy. The debtor not having reimbursed the creditor for the necessary expenses of preserving the pledge, is only entitled as damages to the cash value of the insurance policy when he ceased to pay the premiums.

[*Trust & Loan Co.* v. *Wurtele* (1905), 35 Can. S.C.R. 663, (1903), 13 Que. K.B. 329, distinguished.]

ACTION to recover the amount of a life insurance policy

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pledged to the defendant as collateral security and allowed to lapse by the defendant who had undertaken to pay the premiums.

Kavanagh, Lajoie & Lacoste, for plaintiff.

Lavallee, Desmarais & DeSerres, for defendant.

SURVEYER, J.:—The plaintiff owed the Banque d'Hochelaga $1,500. In 1905 he transferred to the bank as collateral security an insurance policy for $2,000. The defendant undertook to pay the premiums and did so until the month of July, 1914, when it discontinued payment and the policy lapsed. Plaintiff, having paid his debt to the defendant, asked for the return of the policy, but the defendant was, of course, unable to comply with his request. The plaintiff declares that it is impossible for him to insure his life now on account of his advanced age and physical condition. He claims from the defendant the sum of $2,000, the amount of the policy.

The plaintiff pleads, in the first place, that the defendant still owes him $1,345.06 plus $418.38 for premiums paid. It denies all responsibility.

The Superior Court maintains the action in part for the following reasons:— ....

"Considering that the creditor is responsible for the loss or deterioration of the thing given in pledge (C.C. 1973) whether such loss or deterioration results from a fault or omission or from a positive fact (Dalloz P.R. 1905-1-13); that these rules have been applied to the pledging of an insurance policy in the case of *Trust & Loan Co. of Canada* v. *Wurtele* (1905), 35 Can. S.C.R. 663; (1903), 13 Que. K.B. 329, but that in that case the creditor had sufficient funds in hand belonging to the debtor to enable him to preserve the pledge, which is not the case in the present action; that the defendant, by paying regularly the insurance premiums due on the said policy up to and including January 1914, has put the plaintiff under the impression that it would continue to pay the premiums at least until the judgment obtained by it against the defendant had been settled, and that the defendant furthermore admits by a letter produced, and by para. 6 of its plea, that the payment for July 1914 was omitted by inadvertence; that, with the exception of pawnbrokers, no creditor can dispose of the thing pledged in default of payment (C.C. 1971); that no agreement to that effect has been proved; that, on the contrary, on June 22, 1914, the defendant allowed the plaintiff to pay his debt by means of notes, the last of which fell due on October 15, 1915; that the plaintiff appears to have paid the whole of his debt within the term allowed, and that the defendant gave him a receipt in full on

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March 19, 1915; that the duty of defendant in July, 1914, was to continue paying the premiums, saving its right to require reimbursement, or to return the policy to the plaintiff, or at least to advise him that it intended to discontinue paying the premiums; but that it did not take any of these courses and allowed the policy to lapse without plaintiff's knowledge; that it was admitted at the hearing that the amount of certain notes pleaded by the defendant in compensation had already been claimed and satisfied; as regards the notes mentioned in paras. 10 and 11 of the answer to plea, that the said notes are prescribed on their face; that the notes filed as defendant's exs. 9, 10 and 32 were struck from its list of production and are not in the record; that the defendant did not allege in writing in its plea or in its reply that prescription had been interrupted; that this proposition appears to be at variance with the decision rendered in *McGreevy* v. *McGreevy* (1891), 17 Q.L.R. 278, but that it is useless to decide this question since all the notes produced are in fact posterior in date to the transfer of the policy to the defendant by way of pledge; as regards the plea of compensation for the sum of $418.32, being the amount of premiums paid by the defendant to the Mutual Life Insurance Co. of New York, that the debtor is obliged to reimburse the creditor for necessary expenses incurred for the preservation of the pledge (C.C. 1973), and that through error on the part of its employee the defendant did not preserve the pledge and the policy lapsed, but that it simply increased the sum which the bearer of the policy could draw on default to pay the premiums regularly; that the defendant's plea and exception of compensation are therefore unfounded; that the conclusions of the declaration are also erroneous; that the plaintiff could not have any greater right against the defendant at the time when the action was taken than he would have had against his insurer, if the insurance policy had been in force; that the insurer's obligation to pay $2,000 only took effect on the death of the defendant and on condition that all the premiums had been paid; that when the action was taken plaintiff was only entitled to a free policy or to the cash value mentioned in the table printed on the policy, which is still in the hands of the defendant, and claims an exaggerated and unjustifiable amount of money; that the plaintiff in continuance of suit, who was, after the death of plaintiff, named curator to the latter's vacant succession, could not have any greater rights than the plaintiff himself had when the action was taken; that the measure of damages sustained by plaintiff is the cash value he could have recovered when he ceased to pay the premiums; that the plaintiff appears to have paid thir-

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teen half-yearly premiums; that the cash value of the policy at the end of the seventh year is $238, which represents the amount lost by the defendant; dismisses the plea; declares that the insurance policy of the Mutual Life Insurance Co. of New York, bearing No. 1,208,626, is defendant's property to avail *ce que de droit;* condemns the defendant to pay to the plaintiff in continuance of suit, in his quality of curator to the vacant succession of Joseph Labonté, the sum of $238 with interest from May 29, 1915, the date of service, and costs.

Judgment accordingly.

HOWSON v. THOMPSON.

Ontario Supreme Court, Middleton, J. November 28, 1921.

PLEADING (§ VI—355)—ACTION—DEFENCE—COUNTERCLAIM—REPLY TO COUNTERCLAIM—AMBIGUITY—RULE 142.

By the rules of practice a defendant or a defendant by counterclaim must set out in his defence or reply (as the case may be) the facts on which he really relies in the action.

APPEAL by defendant from an order of the Master in chambers refusing an application to set aside a joinder of issue delivered and a notice of trial served by the plaintiff.

J. M. Telford, for plaintiff.

H. Ferguson, for defendant.

MIDDLETON, J.:—The plaintiff is the assignee for the benefit of creditors of the F. W. Fearman Company, Limited, of Hamilton. The defendant carries on business in Toronto. The claim is for the price of goods sold and delivered by the Fearman Company to the defendant, less a credit given for a balance due upon a commission account.

The defendant filed a defence and counterclaim, which, after setting up matters that are not now important, alleges that the defendant was the agent for the Fearman Company and that it was a term of the agency that he should receive a commission of 2 per cent. on all goods sold by Fearman in Toronto, even when not sold through the defendant as its agent; that the Fearman Company sold large quantities of goods in Toronto upon which no commission has been allowed to the defendant; and that, after the assignment, the plaintiff has also sold a large quantity of goods in Toronto, and has not accounted to the defendant for the commission thereon. These allegations are repeated by way of counterclaim, and it is alleged that the amounts due for commission exceed any indebtedness to the Fearman Company, and it is claimed that an account may be taken of the amounts due by the plaintiff and by the Fearman company, and that the balance due to the defendant may be

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paid. No defence was filed to this counterclaim, but issue was joined thereon and notice of trial at once given.

If the decision in *Hare* v. *Cawthrope* (1886), 11 P.R. 353, is still the law, this course is warranted, but the Rules have been radically changed since that decision. Then a general denial of the allegations contained in the statement of claim was regarded as a permissible form for a statement of defence. Now, by Rule 142, it is provided that a defendant (which covers a defendant by counterclaim) shall not deny generally the allegations contained in the statement of claim (which covers a counterclaim), but shall set forth the facts upon which he relies, even if this may involve the assertion of a negative.

I attempted to cross-examine the plaintiff's counsel for the purpose of ascertaining what he thought the defence to the counterclaim, as he had pleaded it, really meant. I was unable to ascertain from him whether he denied the existence of the agreement alleged, or intended to deny that any goods had been sold in Toronto upon which the defendant would be entitled to commission as alleged, or whether his real intention was to assert that the amount for which credit had been given covered all commission earned. The object of the Rule in its present form is to compel the party pleading to set out the facts upon which he really relies. There is nothing to prevent a party from pleading inconsistent defences if he chooses to take the risk of so doing. The defendant may deny that he made the promissory note sued on, and in the next paragraph may plead that he paid it upon maturity. The penalty he certainly incurs is that these inconsistent statements will not both be believed, and his case may suffer at the hearing. Another penalty may be that costs may be refused him because he may fail upon one or other of the issues raised. The optimistic framers of the present Rules thought that much would be accomplished if those pleading could be induced to state, shortly and simply, the facts upon which it was really intended to rely at the hearing.

The joinder of issue will, therefore, be set aside, but the plaintiff will be at liberty to deliver a defence to the counterclaim within a week's time; the notice of trial will, of course, go by the board. The costs will be to the defendant in any event. No substantial harm will be done, as, although the case is thrown beyond the autumn non-jury sittings, the winter sittings will be held a few weeks later.

Judgment accordingly.

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RODDA v. C.P.R. CO.

Saskatchewan King's Bench, Embury, J. June 28, 1922.

EVIDENCE (§ IIH—224)—MASTER AND SERVANT—SERVANT FOUND IN ASHPIT OF ROUNDHOUSE—ROUNDHOUSE POORLY LIGHTED—NO EXPLANATION OF ACCIDENT—SUFFICIENCY OF EVIDENCE TO GO TO JURY.

The fact that a workman whose duty is to enter the cabs of engines which are stationed in a roundhouse for the purpose of oiling them, is found lying in an ashpit, near a locomotive standing on a track over it, such workman being unable to explain in any way how he came to be there, there is sufficient evidence of negligence on the part of the defendant in not providing a safe and proper place in which to work, to justify the trial Judge in sending the case to the jury.

[*Beck* v. *C.N.R.* (1910), 13 Alta. L.R. 177 applied. See Annotation, Sufficiency of evidence to go to the jury in negligence actions, 39 D.L.R. 615.]

ACTION for damages for injuries received through the defendant's negligence in not providing a safe and proper place for plaintiff to work.

D. Campbell and *W. G. Currie*, for plaintiff.

L. J. Reycraft, K.C., and *H. A. Whitman*, for defendant.

EMBURY, J.:—The plaintiff's claim is for damages arising through the defendant's negligence.

The plaintiff was employed by the defendants in their yards at Wynyard, Saskatchewan. On the evening of March 1, 1921, after it was dark, he was working in their roundhouse at this point when he suffered the injury complained of. The evidence shews that it was part of the plaintiff's duty to go into the cabs of engines which were stationed in the roundhouse for the purpose of oiling them and putting them into condition for service on the railway. On this occasion the engine in question had been separated from the tender, and was stationed on a track in the roundhouse, the track being over the ashpit, which was a large vacant area between the rails and some 3 or 3½ feet below the level of the rails on which the engine was standing. The roundhouse is a place which from its nature is more or less dark and filled with steam and smoke and the light supplied at the time was up to the average of the light which ordinarily was provided in the roundhouse, although it was not the best that could be provided. Also there was a curtain or tarpaulin partly covering the rear of the cab.

The plaintiff climbed over the front of the engine, went up the side platform on the left of the engine, climbed into the cab by the left door, carrying a torch and an oilcan. The evidence shews that the last thing he remembers was when he was filling the lubricator on the right front of the cab of the engine some feet away from the rear end of the cab which opened over the ashpit. The plaintiff was found lying in the ashpit with

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his head against the cement side thereof, the side being that of the left side of the engine, his body stretched diagonally across the pit, the feet being closer to the cab of the engine than the head. The plaintiff had suffered severe injuries and was unconscious and did not recover consciousness for some hours. As has been said, when he went into the cab of the engine he was carrying a torch, and the evidence of two of the employees of the defendant is that they saw a light fall into the ashpit as if from the firebox of the engine,—and this in face of the fact that there was no fire in the engine whatever,—so that the light which was seen to fall was presumably the torch which fell into the pit, probably with the plaintiff.

Counsel for the plaintiff, in his opening to the jury (and in his pleadings) claimed that the negligence of the company consisted in their not providing for the plaintiff a safe and proper place in which to work, i.e., particularly that some barrier should have been provided at the rear of the cab of the engine when it was standing over the ashpit and the tender was detached.

At the close of the plaintiff's case, the defendant applied for a non-suit; and, although I allowed the case to go to the jury (who were unable to agree on a verdict), I reserved the question of non-suit for consideration.

If it were a case in which a man were found lying in the ashpit, behind an engine on which he was known to have been working, in full and unrestricted daylight, and could give no explanation as to how he got there, then, in the absence of other evidence, I should be inclined to the opinion that there was no case for the jury. But it does seem to me that, when the evidence shews that this place was from its nature more or less dark and dimly lighted, and the plaintiff is found lying in the position in which he was found, the conclusion may possibly be drawn that he fell from the cab by reason of the defendant's negligence in failing to provide him with a safe place to work in. While the evidence is slight, it is a case which, in my opinion, on the authorities, should go to the jury. It is true that the plaintiff remembers nothing about making a mis-step, that he remembers nothing about his falling, that the last thing he recalls is pouring oil into the lubricator, as above set out. But does this circumstance lead so inevitably to the conclusion that the plaintiff was unconscious as the result of some physical or mental incapacity at the time of the accident as to make it impossible for the jury to do other than find that the accident resulted from such disability and not from any possible negligence of the defendants? It seems to me that, while this is a conclusion which might properly follow from the evidence, nevertheless it is a conclusion which it is the

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privilege of the jury to accept or reject in the light of the evidence. In *Beck* v. *C.N.R.* (1910), 13 Alta. L.R. 177, at p. 178, the Supreme Court of Canada has held that in circumstances quite as favourable to the railway company, the case should go to the jury. In this case I think the Judge might properly charge the jury that they should not act on what approximates to a mere conjecture, nor form a mere theory not based on the preponderance of the evidence. But on the authorities the question itself is one for the jury.

Having come to the above conclusions, the application for nonsuit should be refused.

Judgment accordingly.

Re SIEVERT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 22, 1921.

EXECUTORS AND ADMINISTRATORS (§IVC—102)—POWER TO TRUSTEES TO SELL IN THEIR DISCRETION—PROPERTY LIABLE TO INCREASE IN VALUE—MAJORITY OF BENEFICIARIES AGAINST SALE—MOTION FOR ADMINISTRATION BY ONE BENEFICIARY—RULE 612.

The right of the Court to grant administration of an estate on motion of a beneficiary is discretionary.

[*Re Burrage* (1890), 62 L.T.R. 752; *Tempest* v. *Lord Camoys* (1882), 21 Ch. D. 571, followed.]

APPEAL by one of the beneficiaries under a will from a judgment of Middleton, J., dismissing a motion for an order for the administration of the estate under the direction of the Court. Affirmed.

The judgment appealed from is as follows:—

MIDDLETON, J.:—The testator died on the 25th August, 1918. By his will he gave his executors full discretionary powers as to the time when they should sell his land, expressly stating that they should not be bound to sell in a year, but when, in the exercise of their discretion, they should see fit.

The only real complaint put forward as a justification for this motion is the fact that the executors have not sold, though more than three years have elapsed.

The land is on Teraulay street, in the city of Toronto; that street is now being developed as a leading thoroughfare; and the executors expect a largely enhanced price owing to the works in hand.

The plaintiff is unfortunately hard up and is ready to sacrifice.

The majority of the beneficiaries are against him.

It is argued that the provision of the will is nugatory or

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that at most the executors have only two years in which to sell and after that they are in default.

I have read the many cases cited and others. Those relied upon by the applicant go to shew that when money or property is absolutely vested in the object of the testator's bounty any attempt to tie it up and prevent him from receiving it, or from receiving it before a certain age, is nugatory. No case determines that, when trustees are given property with instructions to realise and distribute at such time as the executors think fit, any one beneficiary may demand an immediate realisation if the executors or trustees *bonâ fide* think that realisation should, in the interest of all, be delayed.

All such trustees must understand that the trust is a trust for sale and must not be converted into a trust to hold; but, so long as this is kept in mind and good faith is shewn, the Court cannot interfere and take from the trustees the power the testator has given them.

In *Re Burrage* (1890), 62 L.T.R. 752, Chitty, J., states the position clearly:—

"There is undoubtedly a duty upon the trustees to sell the leaseholds some time. I think their power of sale is coupled with a trust or duty, which the Court will enforce if the trustees neglect to act in a proper and timely manner, but the Court will not interfere with the discretion which the trustees possess as to the particular time or manner when and in which they will exercise their power, so long as their conduct is bonâ fide and they act fairly between the beneficiaries."

In the earlier case, *Tempest* v. *Lord Camoys* (1882), 21 Ch. D. 571, the same learned Judge had expressed similar views, and his decision was affirmed by the Court of Appeal, consisting of Jessel, M.R., Brett and Cotton, L.JJ., one of the strongest Courts ever constituted, which affirmed the principle that the Court has no power, save in the case of *mala fides* or a refusal to discharge the duty undertaken, to put a control on the exercise of the discretion which the testator has left to the trustees.

Since our Rule was recast some years ago, no beneficiary has the right to an administration order. It is now discretionary, and the cases cited and many others indicate the principle to be applied.

Motion dismissed; the executors to charge their costs against the share of the applicant.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.O.:—It

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is perfectly clear, I think, that this power of sale is not open to the objection which has been urged by counsel for the appellant.

In Mr. Farwell's work on Powers, at p. 42, in which he cites the case of *Goodier* v. *Edmunds*, [1893] 3 Ch. 455, upon which Mr. O'Neill relies, the statement is: "but, if the trust for sale be mere machinery, and the persons who are intended to take can be ascertained within the perpetuity limit, the gift to them will not fail." He refers, as I say, to the *Goodier* case as one of the cases establishing the proposition.

Now, with regard to the other points. The main objection to the course the executors are pursuing is that they do not desire at this moment to sell the property on Teraulay street: their view being that, in consequence of the improvements now taking place in that street, the property will increase very much in value, and that it is not in the interest of the beneficiaries that it should be now sold. They do not propose that there shall be any lengthy postponement of the sale, but to delay it until the effect of what is now happening on that street is seen in improved real estate values, and in the propriety of that view my brother Middleton concurred and in the exercise of his discretion refused this order, I think, quite properly.

The appeal will be dismissed.

Appeal dismissed.

MACKIE v. STANDARD TRUSTS CO.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 18, 1922.

MORTGAGE (§ VIIB—150)—FORECLOSURE ABSOLUTE—RIGHT OF MORTGAGOR TO REDEEM AFTER—JURISDICTION OF COURT—SALE BY MORTGAGEE—IMPOSSIBILITY OF FOLLOWING LAND—COMPENSATION TO MORTGAGOR FOR LOSS.

The Court has jurisdiction to allow a mortgagor to redeem after an order of foreclosure absolute, and the setting aside of the final order and the certificate of title to the mortgagee are not essential to such right to redeem, and when the Court in its discretion decides that such facts existed as to entitle the mortgagor to redeem it will allow him compensation for his loss where by the act of the mortgagee in transferring the property to a third person he has lost his right to follow the land. The amendment of sec. 62b by ch. 37, 1919 stats., sec. 4, notwithstanding its general terms, does not detract from the right of the mortgagor to redeem.

[See Annotation 17 D.L.R. 89.]

APPEAL by plaintiff from an order of Simmons, J., made on an appeal from the Master in Chambers reversing the Master's order (which dismissed an application by the defendant to strike out the statement of claim) and ordering that the plain-

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tiff's action be dismissed and the statement of claim struck out as disclosing no cause of action. Reversed.

A. M. Sinclair, K.C., for appellant.

H. A. Chadwick, for respondent.

SCOTT, C.J., concurs with CLARKE, J.A.

STUART, J.A.:—I agree with the opinion expressed by my brother Clarke. The existence of our system of land titles may make the situation somewhat different in this province with respect to the rights of purchasers from the mortgagee who has foreclosed, that is, their rights are probably more extensively protected than they would be under the old system. But here no claim is made against the purchasers from the defendants.

I place little importance upon the use of the word "damages" in the prayer for relief. The Court is asked to exercise an equitable jurisdiction and it is clear that in many cases of which the circumstances in *Nocton* v. *Lord Ashburton*, [1914] A.C. 932, 83 L.J. (Ch.) 784, furnish an example, a Court of Equity will give relief in the way of judgment for a sum of money where an equitable wrong has been done. See p. 952. It is a matter of indifference whether the plaintiff calls it damages or compensation or what particular term may be used.

Once it is conceded, as I think it must be (and this I conceive to be the real crux of the case), that in refusing to take the mortgagor's money and to accept payment in full for all possible claims for principal, interest, costs and expenses at a time when they still had the property in their hands, the defendants may at the trial be found to have done a wrong to the plaintiff, that is, a wrong in equity and good conscience and that there was, therefore, a violation of an existing right, there can then be no doubt that the Court has power to give relief in the form of a judgment for a sum of money. It may be that the proceeds of the sale should take the place of the property and that the defendants should be treated as trustees thereof for the benefit of the mortgagor. But even that may not be an exhaustive description of the mortgagor's rights. Without expressing any mere *a priori* opinion it seems to me possible that circumstances might be found to exist, I do not say necessarily in this case, but in a conceivable case, where the mortgagor's loss might be shewn to be larger than the difference between his debt and the proceeds of the resale. But all this depends upon the facts of each particular case.

It is understood, of course, that nothing now said touches the case of a mortgagee who has foreclosed and has *bonâ fide* resold before any offer or motion to redeem has been made.

BECK, J.A.:—I concur entirely in the reasons for judgment

of my brother Clarke, but I desire to add some general observations.

It is settled beyond question that under some circumstances the Court will "open a foreclosure"; in other words, a mortgagor, settling before the Court a variety of circumstances, may apply to the Court on notice to the mortgagee asking the Court to open the foreclosure and allow the mortgagor to redeem. The Court having considered all the circumstances shewn by both the mortgagor and the mortgagee, decides whether or not it is a case in which it is proper for the Court to grant the mortgagor's application. In stating this proposition I have been careful to refrain from using the expression "a certain set of circumstances" and to use instead the expression "a variety of circumstances"; because the granting of such an application depends upon the particular facts of each particular case. If the particular facts of a particular case are such that applying the well settled principles of the Court, the Court ought to grant the application, there is no discretion in the Court to refuse it and the decision of a Judge is equally and as fully subject to appeal as upon a question of pure law, and, consequently, when the case is such that the Court ought to grant the relief asked the applicant has a right to the relief; call it an equitable right, if you retain the old nomenclature, notwithstanding that in this jurisdiction we have never had any but a single system of jurisprudence; but, nevertheless, it is a right, equally and as effectively as a right to recover for a tort or a breach of contract and similar to the *right* to specific performance. This general aspect of the question is discussed and illustrated in Pomeroy's Equity, 2nd ed., secs. 96 *et seq.*

In this case the statement of claim alleges in substance partly expressly and partly by clear inference these facts: that the plaintiff was mortgagee and the defendant mortgagor of 160 acres of land; that the mortgage was made on August 10, 1905, and was for $400; and interest. That, after the costs of proceedings to enforce the security had been incurred—that is—added to the principal and interest the amount owing on the mortgage on September 29, 1917, the date of an abortive sale, was $567.50; that, by inference, at the date of foreclosure, the total amount owing on the mortgage represented less than $4 an acre for the land. That, by inference, the mortgagor had paid the interest for about 12 years; that, the final order of foreclosure having been made on December 6, 1917, the mortgagor, within 7 weeks, i.e. promptly, tendered to the mortgagee the whole amount owing for principal, interest, costs, taxes and other disbursements and the costs of a conveyance and asked

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the mortgagee to transfer to him the mortgaged lands which the mortgagee still retained and was in a position to transfer, but the mortgagee refused to do so and, afterwards, sold and transferred the land to a third person presumably a *bonâ fide* purchaser for value without notice.

These facts, in my opinion, make such a case that, had the mortgagor followed up his tender by an appropriate proceeding in Court, the Court ought to have opened the foreclosure unless the case so made were answered or explained; in other words, the statement of claim had it then been filed and had it claimed redemption would have disclosed a good cause of action; and again, in other words, the mortgagor now shews that at the date of the tender he had a right (an equitable right, if you will) to redemption. He was, subsequently, by the wrongful act of the mortgagee, deprived of this right. In equity, there is no right, that is, no right which the Court recognises, without a remedy; and no one can take advantage, either at law or in equity of his own wrong. If, then, the mortgagee has deprived the mortgagor of his primary remedy, the Court will not fail to discover or invent a remedy to meet the case.

That remedy is not precisely damages as at common law, but a pecuniary compensation given by a Court of Equity in proceedings for an account and in a large number of other cases. See Pomeroy's Equity, 2nd ed., para. 1316, and Pomeroy's Eq. Remedies, para. 11.

The use of the word "damages" for some other more appropriate word does not detract from the fact that the allegations of the statement of claim disclose a good cause of action.

HYNDMAN, J.A., concurs with CLARKE, J.A.

CLARKE, J.A.:—In the view I take of the matter, it is not necessary to deal with the plaintiff's objections, that the defendant's application was *res judicata* by reason of a former application to the Master in Chambers, and that the defendant, having taken out an order for directions, had elected to go to trial.

The application was made under R. 255, which originally read as follows:—

"255. The court or judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, or that it is frivolous or vexatious, and may order the action to be stayed or judgment to be entered as may be just."

By an amendment of December, 1917, the word "reasonable" was struck out.

In a proper case, no doubt, this rule can be invoked so as to terminate the action at an early stage without any injustice to either party; but where, as in this case, as I view it, the plain-

tiff's right of redemption depends upon the discretion of the Court to be exercised upon a consideration of all the relevant facts after such amendments or the delivery of such particulars as may be deemed proper and necessary, I do not think the rule is applicable.

Shortly, the facts alleged in the statement of claim are that the defendant being a registered mortgagee from the plaintiff who was the registered owner of a quarter section of land upon default in payment took foreclosure proceedings under the Land Titles Act, 1906, ch. 24, and after an abortive sale, obtained from the registrar a final foreclosure order on December 6, 1917, and a certificate of title was issued to him by the Registrar. On or about January 22, 1918, the plaintiff tendered to the defendant the amount owing under the mortgage, with interest, costs, taxes and other disbursements, including the costs of a reconveyance and demanded a reconveyance; the defendant refused to accept the money and to transfer the land to the plaintiff. The defendant on or about April 6, 1918, sold the lands and a certificate of title has been issued to one Brown. The plaintiff alleges that as a result of the defendant's refusal to allow the plaintiff to redeem the lands, he has suffered loss and damage, wherefore, he claims damages.

There is no allegation of illegality or irregularity in the mortgage proceedings, no reason or excuse is given for non-payment prior to the final order, and there is no allegation that the land was of greater value than the amount owing to the defendant.

If any facts exist other than those set out in the statement of claim, which support the plaintiff's claim to redeem, they should be disclosed before trial either by amendment to the statement of claim or upon an application for particulars, otherwise the plaintiff should not be permitted to give evidence respecting them. Upon the hearing of the appeal it was stated that the property was sold for considerably more than was owing to the defendant, this and any other facts to be relied upon should be set up in one of the manners indicated. Upon the bald facts set up in the statement of claim alone, it may be that the trial Judge, in the exercise of his discretion, would not consider them sufficient to justify the opening up of the foreclosure but on the other hand, in view of the favourable attitude of the Court towards mortgagors as shewn by the authorities, I cannot say that he would not be justified in doing so. Although the discretion of the trial Judge is, I think, a judicial one which can be reviewed on appeal, I scarcely think it proper at the present stage for this Court to express its opinion as to the exercise of a discretion which should in the first instance be exercised by the trial Judge upon the facts in evidence before him. There are some questions of law, however, which arise

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Clarke, J.A.

which are not matters of discretion upon which it will be of assistance to the parties in the further conduct of the action to have the opinion of this Court. It may seem strange to laymen that after a final order of foreclosure it is still open to a mortgagor to redeem but that such is the law under certain circumstances is undoubted. Lord Cranworth, V.C., in *Thornhill* v. *Manning* (1851), 1 Sim. (N.S.) 451, 61 E.R. 174, speaking of the doctrine of the Court with regard to mortgages, says: "They are anomalous cases: the Court in dealing with them is governed by rules which are totally different from the rules which govern it in other cases."

In *Campbell* v. *Holyland* (1877), 7, Ch. D. 166, 47 L.J. (Ch.) 145, Jessel, M. R., says at p. 169:—

"An order for foreclosure, according to the practice of the old Court of Chancery, was never really absolute nor can it be so now. In cases of great hardship, a mortgagor might have obtained further time for payment; and the suit was allowed to go on after decree. The decree though final in terms, was not final in fact, and the suit could not be considered as terminated."

And at p. 171:—

"The question in dispute is really whether a mortgagor can be allowed to redeem after an order of foreclosure absolute; and I think, on looking at the authorities, that no Chancellor or Vice-Chancellor has ever laid down that any special circumstances are essential to enable a mortgagor to redeem in such a case."

And again at pp. 171, 172:—

"In that foreclosure suit the Court made various orders—interim orders fixing a time for payment of the money—and at last there came the final order which was called foreclosure absolute; that is, in form, that the mortgagor should not be allowed to redeem at all; but it was form only, just as the original deed was form only; for the Courts of Equity soon decided that, notwithstanding the form of that order, they would after that order allow the mortgagor to redeem. That is, although the order of foreclosure absolute appeared to be a final order of the Court, it was not so, but the mortgagee still remained liable to be treated as mortgagee and the mortgagor still retained a claim to be treated as mortgagor, subject to the discretion of the Court. Therefore, everybody who took an order for foreclosure absolute knew that there was still a discretion in the Court to allow the mortgagor to redeem. Under what circumstances that discretion should be exercised is quite another matter."

In *Thornhill* v. *Manning*, already referred to, Lord Cranworth says at p. 454:—

"It is quite impossible to lay down any general rule as to the circumstances which will induce the Court to open a decree of

foreclosure; but this I must observe, that the Court has a very strong inclination to give assistance to a mortgagor if he applies promptly and the Court has the means of giving the mortgagee immediate payment: and perhaps that is the only clue which the Court has to guide it."

For instances showing under what circumstances a mortgagor has been allowed in to redeem after final order reference may be made, in addition to the cases already referred to, to the following:—

Nanny v. *Edwards* (1827), 4 Russ. 124, 38 E.R. 752; *Jones* v. *Creswicke* (1839), 9 Sim. 304, 59 E.R. 374; *Ford* v. *Wastell* (1847), 6 Hare 229, 67 E.R. 1151; 2 Ph. 591, 41 E.R. 1071; *Patch* v. *Ward* (1867), L.R. 3 Ch. 203, 16 W.R. 441; *Ingham* v. *Sutherland* (1891), 63 L.T. 614; *Beaton* v. *Boulton*, [1891] W. N. 30; *Trinity College* v. *Hill* (1884), 10 A.R. (Ont.) 99; *Scottish American Investment Co.* v. *Brewer* (1901), 2 O.L.R. 369; *Dovercourt Land Co.* v. *Dunvegan Heights Land Co.* (1920), 47 O.L.R. 105; *Credit Foncier* v. *Redekope* (1919), 46 D.L.R. 225.

But, although the order of foreclosure is not final for all purposes, the mortgagee has a right, after the final order to deal with the property as his own and on being redeemed is entitled to be repaid all money *bona fide* expended on the faith of the final order. *Thornhill* v. *Manning supra.*

The authorities so far referred to relate to mortgage proceedings not under the Land Titles Act, but it was decided in *Williams* v. *Box* (1910), 44 Can. S.C.R. 1, in construing the Manitoba Real Property Act that the Court has jurisdiction to open up foreclosure proceedings in respect of mortgages foreclosed under the sections of that Act, corresponding to sec. 62 (a) of the Alberta Act, ch. 24, 1906 (under which the proceedings for foreclosure in question in this action were taken) notwithstanding the issue of a certificate of title in the same manner and upon the same grounds as in the case of ordinary mortgages, at all events where rights of a third party holding the status of a *bona fide* purchaser for value have not intervened.

The jurisdiction of the Manitoba Court over the redemption of mortgages is not given in the same terms as in the Alberta Act, but I think it is more clearly expressed in the latter than in the Manitoba Act. By virtue of sec. 62, proceedings to redeem any land from a mortgage or encumbrance may be taken in the Supreme Court, and under sec. 116 authority is given to a Judge to direct the cancellation or substitution of the certificate of title, so that where there is the right given to redeem, the Court has authority to revest the property in the mortgagor to make his right effective.

The setting aside of the final order and the certificate of title to the mortgagee are not, I think, essential to the right to redeem.

The point was discussed in *Thornhill* v. *Manning*, *supra*, and the judgment in *Ford* v. *Wastell*, *supra*, adopted that the extension of time is something collateral to the order, the order remains the same order notwithstanding the time is extended to a future day.

My conclusion is that if such facts existed at the date of the tender as the Court in its discretion will decide entitled the plaintiff to redeem the defendant erred in refusing to be redeemed and to recover the property upon payment of the amount owing. The plaintiff's rights were then established and if by the defendant afterwards transferring the property to a third person the plaintiff lost his right to follow the land as I assume he did, it seems to be plain equity that the defendant should compensate the plaintiff for his loss. And I think it is immaterial whether on the statement of claim that loss is called "damages" or any other term which comprehend the loss. Reference should be made to the amendment, to the Land Titles Act by the insertion of sec. 62b by ch. 37, sec. 4, 1919, which was passed before the commencement of this action but after the denial by the defendant of the plaintiff's claim to redeem and after the transfer of the land by the defendant to Brown.

Notwithstanding the general terms of this new section, I cannot see that it detracts from the right of the mortgagor to redeem; the effect which it gives to an order for foreclosure is substantially the same as that given by sec. 62a (16) previously in force so far as the mortgagor is affected, but it makes a material change so far as the mortgagee is affected by providing that the order shall operate as satisfaction of the debt. Apparently, this amendment was made in consequence of the decision in *Mutual Life Assurance Co.* v. *Douglas* (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243. If the mortgagor's right to redeem after foreclosure is dependent upon the existence of the debt it would, no doubt, be affected by the amendment, but I do not understand from the authorities that the right to redeem is so dependent. Even if his interpretation of the amendment is erroneous I think that it does not operate to bar the plaintiff's remedy which became complete at the latest upon the transfer of the property by the defendant in 1918, see *Smith* v. *Upper Canada College* (1920), 57 D.L.R. 648, 61 Can. S.C.R. 413.

For the reasons stated I would allow the appeal, set aside the order appealed from and restore the Master's order. Under the rather peculiar circumstances of this appeal, which decides questions of law at the beginning rather than at the end of the action, I think it can be fairly treated as a step in the action. It is not yet determined which party will succeed and I would make the costs of this appeal and of the appeal to Simmons, J. costs in the action. *Judgment accordingly.*

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Judicial Committee of the Privy Council, Lords Buckmaster, Atkinson, Sumner and Parmoor. June 29, 1922.

EXPROPRIATION (§IIIE—165)—SEVERAL PARCELS OF LAND—EXPROPRIATION OF ONE PARCEL FOR PUBLIC WORK—RIGHT OF OWNER TO RECOVER DAMAGES FOR INJURIOUS AFFECTION OF OTHER PARCELS—EXPROPRIATION ACT R.S.C. 1906, CH. 143 SECS. 15, 22, 26, 27—ENGLISH RAILWAYS CLAUSES AND LANDS CLAUSES ACTS—APPLICATION AND CONSTRUCTION.

Where several parcels of land owned by the same person are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, and one of such parcels is expropriated by the Crown for the construction of public works, the owner is entitled to compensation for injurious affection to the lands not taken, but which are damaged by the proposed works, the fact that other lands are comprised in the scheme in addition to the lands taken from the claimant does not deprive him of his right to compensation, but this fact will be taken into consideration in fixing the amount of damage.

[*Holditch* v. *Canadian Northern Ontario R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536; *Cowper Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153; *Ricket* v. *Metropolitan R. Co.* (1867), L.R. 2 H.L. 175; *Re Stockport etc. R. Co.* (1864), 33 L.J. (Q.B.) 251; applied; *Hammersmith and City R. Co.* v. *Brand* (1869), L.R. 4 H.L. 171; *City of Glasgow Union R. Co.* v. *Hunter* (1870), L.R. 2 H.L. Sc. 78, distinguished.]

APPEAL by claimants from the judgment of the Supreme Court of Canada, affirming the decision of the Exchequer Court of Canada (1919), 46 D.L.R. 213, 18 Can. Ex. 385. Reversed.

The judgment of the Board was delivered by

LORD PARMOOR:—This appeal raises an important point as to the right of the appellants to claim compensation on the ground that a portion of their property, which has not been taken for the construction of public works, has been "injuriously affected" by the construction of a railway shunting yard, which in part extends over lands which have been taken from them under statutory powers. The material facts may be shortly stated. The property of the appellants, prior to the expropriation of any part thereof, on March 7, 1913, by the Minister of Railways and Canals for the Dominion, consisted of lands situated on the east and west side of a public road which had been in existence from time immemorial, and of a railway which was originally constructed from 1850 to 1854. The lands expropriated were situated entirely on the east side of the railway, in and on the margin of Bedford Basin, which constituted part of the public harbour of Halifax. These lands consisted of two small promontories. The appellants have been paid the value of the lands taken, and have been compensated for all con-

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sequential damage, other than damage to their lands on the west side of the railway. These are the lands which are alleged to have been "injuriously affected," but the claim of the appellants has been disallowed both in the Exchequer Court and in the Supreme Court of Canada. Considerable buildings have been erected on the lands on the west side of the railway for educational and charitable objects by the appellants, who are a religious order incorporated by an Act of Parliament of Nova Scotia. It is not necessary, however, to describe these buildings in any detail. Their size and cost are not material to the only question before their Lordships, which is whether the appellants have a right to make any claim for compensation beyond that already allowed.

In the Courts below, and in their petition of right, the appellants further based their claim to compensation partly on a right of way which they alleged to exist over the railway between their property situated on the east side of the railway and that situated on the west side. Their Lordships give no opinion whether such a right could be established across the railway, and all documents which might have proved the conditions, which existed when the railway was made, have been lost. In the opinion of their Lordships there was no evidence of sufficient adverse user, and no ground for disturbing the findings on this point in the Courts below. So far as the claim for compensation has been based on the existence of this right, it cannot be maintained, and in the further consideration of the case it will be assumed that no such right exists, and that the lands on the east, and west side of the railway are severed by the railway track. The appellants further claimed that although the harbour of Halifax, of which Bedford Basin is a part, is a public harbour, within the meaning of the schedule of the British North America Act, 1867, yet that the appellants having constructed, on a portion of the bed of the harbour, a wharf and an esplanade, at which goods and provisions were landed for the use of the school, with the assent and license of the Crown, such assent and license had under the circumstances become irrevocable, and that they were entitled for the purposes of compensation to regard the bed of the harbour underlying the wharf and esplanade as their property. This claim, however, does not appear to have been pressed at the hearing in the Exchequer Court, and during the hearing of the appeal their Lordships intimated that it could not be maintained.

Compensation claims are statutory and depend on statutory

provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected," unless he can establish a statutory right. The claim, therefore, of the appellants, if any, must be found in a Canadian statute. The Judge, in the Exchequer Court, states that the Canadian Courts have followed the decisions in the English Courts under the Lands Clauses Act, ch. 18 and that he thinks that he is bound by the English decisions. This statement of the Judge was not questioned in the Supreme Court of Canada, or at the hearing before their Lordships. In the case of *Holditch* v. *Canadian Northern Ontario Railway Co.*, 27 D.L.R. 14, 20 C.R.C. 101, [1916] 1 A.C. 536, it is clear that the decision of their Lordships was based on the principle of English decisions, and that there was a special reference to the case of *Cowper Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153. Their Lordships have applied the English decisions, so far as they are applicable, in the construction of the Canadian statute.

The Canadian statute gives exclusive jurisdiction to the Exchequer Court to hear and determine every claim against the Crown, either for property taken for any public purpose or for damage to property "injuriously affected by the construction of any public work." The words "injuriously affected by the construction of any public work" are to be found in secs. 22, 26, 27, of the same statute. In sec. 15 the words are "damages occasioned by the construction of any public work," but this section is not applicable to the circumstances of the present appeal, its object being to authorize agreements between a claimant and the Minister. There are sections in the English Railways Clauses and Lands Clauses Acts which do not appear in the Canadian Act, but the words "injuriously affected by the construction of any public work" are to be found in sec. 6 of the Railways Clauses Consolidation Act, 1845, ch. 20 and substantially similar words are to be found in sec. 68 of the Lands Clauses Act, 1845, ch. 18. Section 6 of the Railways Act enacts that the company shall make to the owners, . . . interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, . . . by reason of the exercise as regards such lands, of statutory powers vested in the company. The latter portion

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of this section is not to be found in the Canadian statute.

Section 68 of the Lands Clauses Act begins, "If any Party shall be entitled to any Compensation in respect of any Lands or of any Interest therein which shall have been taken for or injuriously affected by the execution of the Works." There is some doubt on the English decisions whether sec. 68 alone would give a right to compensation for the injurious affection of lands by the execution of public works, or whether such section should be regarded as a procedure section, but this distinction is not of importance in considering the Canadian statute. Lord Chelmsford, in *Ricket* v. *Metropolitan R. Co.* (1867), L.R. 2 H.L. 175, 36 L.J. (Q.B.) 205, 15 W.R. 937, after referring to sec. 68 of the Lands Clauses Act, and sec. 6 of the Railways Clauses Act, says, "There appears to be no difference in the language of the 68th section of the former Act and the 6th section of the later Act." The real questions, however, to be determined in the present appeal are whether under the special circumstances of the case, the appellants can maintain a claim for damage to their property on the west side of the railway, on the ground that it has been injuriously affected by the construction of a public work over the two promontories, and, if so, what is the principle to be applied in assessing the amount. The actual amount, if any, is for the decision of the Exchequer Court, and cannot be raised before their Lordships.

If the railway shunting yard, of which complaint has been made, had been constructed on land, no part of which had been expropriated from the appellants, the appellants would not have been entitled to claim compensation, although, in fact, such construction had seriously depreciated the value of their property on the west side of the railway. Where no land of the same owner has been taken, the words "injuriously affected" only include damage or loss, which would have been actionable but for statutory powers, and such damage or loss must be occasioned by the construction of the authorised works, as distinct from their user. These limitations were adopted in a series of early English cases, and confirmed in the House of Lords in the case of *Hammersmith and City Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171, 38 L.J. (Q.B.) 265, 18 W.R. 12. Lord Cairns dissented from this interpretation of the statutory right to compensation, but the decision in this case states the principle to be applied in English law. It is authoritative, and cannot be altered without fresh legislation. If, therefore, the land taken for the shunting yard had belonged wholly to some

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owner other than the appellants, the appellants could not have claimed compensation on the ground that their property on the east side of the railway had been "injuriously affected"; but part of the land so taken was the property of the appellants, and it is on this ground that the appellants base their claim to compensation.

The first of the reported English decisions which deals with the question of injuriously affecting lands by the construction of public works, where the mischief of which complaint is made, is caused by what is done on lands taken from the same owner, is *Re Stockport, etc. R. Co.* (1864), 33 L.J. (Q.B.) 251. This decision has been considered in a number of subsequent cases. For a time it gave rise to considerable difference of judicial opinion, but the law as applied by Crompton, J. has been twice considered, and approved in the House of Lords, *Buccleuch* v. *Metropolitan Board of Works* (1872), 5 H.L. 418, 41 L.J. (Ex.) 137, and *Cowper Essex* v. *Local Board of Acton, supra.* In the *Stockport* case, a company had taken land, the property of L., and proposed to make their railway so close to a cotton mill belonging to him, that, by reason of the proximity of the railway, and the danger of fire from trains using the line, the building could only be insured at an increased premium and was rendered of less salable value. Crompton, J. states the principle as follows at p. 253:—

"Where the damage is occasioned by what is done upon other land which the company have purchased, and such damage would not have been actionable as against the original proprietor, as in the case of the sinking of a well and causing the abstraction of water by percolation, the company have a right to say, 'We had done what we had a right to do as proprietors, and do not require the protection of any act of parliament; we therefore have not injured you by virtue of the provisions of the act; no cause of action has been taken away from you by the act.' Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say, 'It is by the act of parliament, and the act of parliament only, that you have done the acts which have caused the damage; without the act of parliament everything you have done, and are about to do, in the making and using the railway would have been illegal and actionable, and is therefore matter for compensation according to the rule in question.'"

The rule to which Crompton, J. refers is that an owner is not entitled to compensation, except for matters, which, but for

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statutory powers, would have given a right to action, and he brings the case before him within this rule. In assessing the amount of compensation due to an owner of lands for damage, caused by the construction of works on other land taken from him, Crompton, J. justified the inclusion of mischief which arises both in the making and using of the railway, on the ground that but for the Act of Parliament both the making and the using of the railway would have been illegal, and that he was only applying the general principle already established to the circumstances of the case before him.

The principle stated by Crompton, J. in the *Stockport* case was considered in *Buccleuch* v. *Metropolitan Board of Works, supra*, and a distinction was drawn between that case and the cases of the *Hammersmith and City R. Co.* v. *Brand*, and *City of Glasgow Union R. Co.* v. *Hunter* (1870), L.R. 2 H.L. Sc. 78. Lord Chelmsford at p. 458 (5 H.L.) referring to these cases, says:—

"In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use, and not by the construction of the railway. But if in each of the cases lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke or noise, occasioned by passing trains."

If this decision is applied to the circumstances of the present appeal, it would, in the opinion of their Lordships sanction a claim to compensation for the probable or apprehended use of the two promontories as part of a railway shunting yard. No doubt a difficulty arises in the assessment of amount where the mischief complained of arises, not only on the land which has been taken from the appellants, but also on land over which they had no ownership claim; but this is no reason for refusing to entertain a claim, so far as the damage claimed can be shewn to arise from the apprehended legal use of the lands taken from them.

The subsequent case of *Cowper Essex* v. *Local Board of Acton, supra*, cannot be differentiated from the case under appeal. It accepts the decision of Crompton, J. as an accurate exposition of English compensation law. When this case was before the Court of Appeal, it was held that the intervention of

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a railway, which was wholly the property of the railway company and in which the claimant seeking compensation had no interest, made a valid distinction from the *Stockport* case, and that that case ought not to be extended. The Master of the Rolls further expressed an opinion that the *Stockport* case was in itself wholly wrong. When the case came before the House of Lords, the principle of the *Stockport* case was confirmed and approved, Lord Macnaghten saying, that, in his opinion, it had stood the test of criticism, that in practice he believed it had always been followed, and that it was perfectly right. As in this case the land taken was separated from the lands alleged to be injuriously affected by a railway, and there is no evidence that there was any right of way over the railway between the lands of the same owner on either side. It was held, however, to be sufficient that the lands taken and the lands alleged to be injuriously affected, were held by the same owner under such conditions that the unity of ownership conduced to the advantage of the property being comprised in one holding. Lord Watson, after referring to previous cases says at p. 166:—"It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers."

In a further passage Lord Watson says at p. 167:—"I am prepared to hold, where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act, so that if one piece is compulsorily taken, and converted to uses which depreciate the value of the rest, the owner has a right to compensation."

In the same case the Lord Chancellor says that where the future use of the part of a proprietor's land taken from him may damage the remainder, then such damage may be injuriously affecting the proprietor's other lands, though it would not be injurious affection of the land of neighbouring proprietors, from whom nothing has been taken for the purpose of the intended works. Applying then the principle of this decision to the case under appeal, it is clear that the possession and control of the two promontories did give an enhanced value to the land of the same owners on the west side of the railway, and

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that so far as the depreciation of the value of the lands on the west side of the railway is due to the anticipated legal use of works which may be constructed over the two promontories, the appellants are in the position of owners whose land has been injuriously affected by the construction of public works. It appears that before the hearing of the case the railway shunting yard had been laid out, and that the actual use of the land comprised in the two promontories was inconsiderable. In the opinion of their Lordships, however, actual user at the time, when the compensation case is heard is not the basis on which the amount of compensation should be assessed. It may be that at the time when the compensation case is heard no works have been constructed, and in any case the appellants are entitled to claim compensation, which must be claimed once for all, for depreciation in the value of their lands on the west side of the railway, in so far as such depreciation is due to the anticipated legal use of authorised works which may be constructed upon the two promontories. The limitation of the amount of compensation to the anticipated construction of authorised works upon lands actually taken from the appellants has a special importance in a case like the present, where the shunting yard has been largely laid out on land which has not been taken from the appellants, and which has never been part of their property. This limitation, which is plainly expressed in all the leading English decisions, is again restated in *Horton* v. *Colwyn Bay, and Colwyn Urban District Council*, [1908] 1 K.B. 327, 77 L.J. (K.B.) 215, in which it was held that as the acts of user, the contemplation of which caused the depreciation, would be done on lands not the property of the claimant, the claimant was not entitled to any compensation. The problem of applying the above principles in a case where the mischief complained of has arisen partly on lands taken from the claimants, and partly on other lands outside their property, can only be settled by a consideration of all the circumstances in a particular case. Clearly in this case the appellants are entitled to a less amount of compensation than if all the lands taken in the laying out of the shunting yard had belonged to them, but on the other hand, the fact that other lands are comprised in the scheme in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories of a railway shunting yard.

It is not possible on the information available before their Lordships to give further assistance on the assessment of the amount of compensation due to the appellants.

Their Lordships will humbly advise His Majesty that the judgments of the Exchequer Court and the Supreme Court of Canada should be reversed, and that the case be remitted to the Exchequer Court, and that the costs of this appeal and in the Courts below be paid by the respondent.

Judgment accordingly.

SHERLOCK v. GRAND TRUNK R. Co.

Ontario Supreme Court, Middleton, J. December 6, 1921.

COSTS (§ I—14)—MONEY ADVANCED AS SECURITY FOR COSTS OF APPEAL—NOT THE PROPERTY OF THE APPELLANT—DISMISSAL OF APPEAL—MOTION FOR PAYMENT OUT—APPLICATION OF FUNDS PUT UP FOR SECURITY.

Moneys pledged as security for an appellant to prosecute an appeal which is unsuccessful, are answerable only for the costs of such appeal, the same having been advanced for that limited purpose only.

[*McKenzie* v. *Kittridge* (1881), 1 C.L.T. 110, followed; *In re Buckwell & Berkeley*, [1902] 2 Ch. 596, referred to; see also *Sherlock* v. *Grand Trunk R. Co.* (1920), 54 D.L.R. 524.]

MOTION by defendants for payment out of Court of money paid in as security on an appeal to the Supreme Court of Canada which proved unsuccessful, and of $100 paid in by defendants with their defence, their liability being admitted to that extent.

W. S. Walton, for plaintiff.

H. A. Harrison, for defendants.

MIDDLETON, J.:—The $500 put up as security upon the appeal to the Supreme Court of Canada was not the property of the plaintiff, but of some of her friends, placed in her solicitor's hands to enable security to be given. It is admitted that the costs of the appeal to the Supreme Court must be paid out of it, and this includes not only the costs taxed in the Supreme Court but the costs of the order allowing the appeal, which were taxed at $20.

The balance of this money is not answerable to the defendants' claim for costs. Had the money been lent to the plaintiff so that she might be in funds, the case would be different; but this was, as I understand the facts, merely pledged as security for the limited purpose; and, when that purpose is answered, it then remains the property of the original owners. This is in accordance with *McKenzie* v. *Kittridge* (1881), 1 C.L.T. 110, a case which has been more than once followed, and is not in conflict with *In re Buckwell & Berkeley*, [1902] 2 Ch. 596, which deals with a widely different question.

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The $100 is in a different position. This may be applied on the defendants' costs in the Court below.

No costs of this motion.

RE EMMONS.

Manitoba King's Bench, Prendergast, J. April 25, 1922.

INFANTS (§IC—11)—CUSTODY OF—PARENT'S RIGHT TO—CONDUCT AND CIRCUMSTANCES OF PARENT NO BAR TO CLAIM—MEDICAL EVIDENCE SHEWING REMOVAL FROM PRESENT KEEPER DETRIMENTAL TO CHILD'S WELFARE.

Although there is nothing in a father's conduct or circumstances that is a bar to his claim to the custody of his infant child, the Court will refuse his application where it is evident on the medical evidence that the child's welfare requires that it be left with its present keeper.

APPLICATION of father for the custody of his infant child detained by its maternal grandmother. Application refused.

P. C. Locke, for applicant; *H. A. Bergman*, for respondent.

PRENDERGAST, J.:—The applicant claims the custody of his infant child detained by the maternal grandmother Mrs. Groa Magnusson.

The applicant, who is thirty-three years old, came here from England in 1909 and is a printer by trade. In 1917, he was married to Sarah Magnusson, the respondent's daughter, who had just come back from the Ninette Sanitorium where she had been as a tubercular patient. After the marriage, the two first lived for one month with the bride's parents, Mr. and Mrs. Magnusson, and then in the Coronado Apartments for about 3 months, when she was seized with illness made more severe by advanced pregnancy and was taken to the General Hospital where she remained for 2 weeks. From the hospital she went with her husband to her parent's home where she was nursed for another month, and then returned to the Coronado Apartments.

In May, she was again taken to the hospital where she gave birth to the child in question and stayed about 10 days, after which she spent another 10 days with her parents, during which time the applicant, who had given up the Coronado Apartments, was looking for new lodgings, which he eventually found on Toronto St. and where they then settled.

But Mrs. Emmons' health, which had been very bad before the baby's birth and was very much worse after, continued to fail so that she could no longer be left alone when her husband was out working; so they both went to live again with the Magnussons on September 15, 1917. Mrs. Emmons, whose

illness was tuberculosis, then rapidly got worse from day to day, and she died at her parent's home January 3, 1918.

The applicant, after his wife's death, continued to live with his parents-in-law for about 6 weeks and then moved to a part of the city where he was nearer those with whom he was associated in his work.

As to the child, she has been in the custody of the respondent ever since she was a few days old, the unfortunate young mother never having been able to take care of her.

All the witnesses who had an opportunity to judge, speak most highly of the Magnusson home. Dr. Bjornson, who has visited it for over fifteen years, says that it is "a specially healthy home, both physically and morally."

The Magnusson family is composed of the father, fifty years old, who has permanent employment as a carpenter in the Winnipeg Electric Railway shops and earns $185 a month, the mother, the respondent, who is forty-seven and seems quite active and healthy; three boys, one of whom earns $200 a month with the C.P.R. and contributes to the general upkeep; and one grown-up daughter.

The house where they have lived for 5 years is a fully modern eight-roomed house.

The applicant's home, situate in St. James, is no doubt in every way a very much less pretentious building, but still quite sufficient I am sure to properly bring up a child in, there having been, during an adjournment of the case, a back-kitchen added to the body of the house and a sanitary closet installed in the basement.

The applicant was remarried a year after the death of his first wife to a young widow 26 years old, who has had no children, but says she had experience in taking care of the children of some relatives. She had been a widow only 4 weeks when she married again, but states that her first marriage had been particularly unhappy.

When the applicant's first wife died, he was earning $16 a week. Two years ago he was making $20 a week, and he says he is now earning $35 a week and at times $40, as a printer at Eaton's with whom he had been 4 years, which seems in itself to convey a certificate of efficiency and steadiness.

The applicant paid Mrs. Magnusson $3.50 a week for the child's keep from the time he left her place up to January 1919, when, having remarried he asked to take away the child, which the respondent refused, adding that he need not pay

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anything more for its keep.

It appears that after January, 1919, the applicant was again at the Magnussons two or three times and that his relations with the family were always cordial enough, except once when he brought up again the subject of taking the child away and there was a violent quarrel with the daughter.

The ground, however, upon which the respondent bases her refusal is that the change would be highly detrimental to the child owing to its peculiar condition of health, a view that is supported by Drs. Bjornson, Halldorson and Chowan, while Dr. Young states that the child is healthy and normal.

A consideration which imposes itself, however, is that while Dr. Young saw the child but once, which was for the purpose of testifying in this action, both Drs. Bjornson and Halldorson have treated the deceased mother and have been visiting the Magnussons all along, one as the family physician and the other special attendant on the child.

Dr. Halldorson, who specialises in tuberculosis and diseases of the lungs, treated the deceased Mrs. Emmons, who was tubercular as stated, and has been attending to this child ever since. He says:—"The infection is in the child. She is infected with tuberculosis. It is in her lymphatic glands and one examination will not reveal it—She was born when her mother was in the last stages of the disease—I have been treating this child ever since. Her temperament is nervous and irritable, and as soon as she is upset mentally, she loses appetite and she gets run down. She has frequent fever spells and night sweats when the treatment is left off. It has to be kept down all the time. She has to be attended to and probably will have until grown up . . . I think a change would be detrimental. It is all we could do to keep her as she is, and if her care is changed either on the keepers' or on the physicians' side, it would be detrimental of course . . . The grandmother has studied this child since she was born. It is sure that if it were not for the unusual care that the grandmother has given her, she would be dead today. The care of the grandmother is essential. As she develops, she will develop a greater immunity. But until she is eight and a half years or so, the care of the grandmother will be essential especially from her knowledge of the child's needs and disposition . . . If the second wife were middle-aged and a graduate nurse and they were with money, it would make a difference; although there is the question of affection still. But as it is, it would be detrimental to move her to any place where the grandmother was not."

Dr. Bjornson, who delivered the mother of this child, says that the latter was weak from the first, owing to inanition or malnutrition as the mother was unable to nourish her and that the outlook was not by any means good at the start. He says:—

"The grandmother took the baby over and it required very much more than the usual care . . .The child's condition is now comparatively good . . . She is decidedly of nervous disposition. If she were taken now from her present home and put amongst strangers, I think the change would be very detrimental to the child's health—certainly it would not be safe."

Dr. Gorden Chowan, a specialist in diseases of children, who has been at the Magnusson home several times before in attendance on the daughter, made a special examination of the child for the purpose of the trial. He says that he tried, with the aid of the grandmother, to bring the child to him and that she screamed, kicked and struggled so that he was unable to either apply the stethoscope properly to her chest or take her temperature. He said he had no hesitation in saying that she is of very high-strung and extremely nervous temperament. He said:—

"All children of tuberculous mothers have a bad outlook; it is unusual for them to live beyond five or six years. I do not think she would be as much hurt by a change later on because she would be more amenable to reason; but now, it would have an injurious effect,—for how long I cannot say . . . A change with a child of this temperament might cause a permanent effect. It might—that is all I have to say. I do not go further than that."

On the other hand, Dr. Young, who has apparently made a special study of tubercular diseases, examined the child between two sittings of the trial and said:—

"I found that the child appeared robust and quite healthy. She was of good average weight. I examined all the organs and found them healthy. Temperature was normal. There was no evidence of disease either external of internal. She was quite normal. I found no indication of tubercular trouble, either past of present. Dr. Halldorson was also present. They described a state of nervousness about Christmas, which was natural enough in children and could be explained. The pulse was a little fast on account of the excitement due to the examination but the temperature was normal. The child was quite tractable . . . The grandmother was there and she was holding the child or assisting me in every way. They undressed

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it as I was there . . . The temperature was taken under the arm or in the groin, I am not sure, but it was external temperature. The thermometer was left there approximately two minutes. Dr. Halldorson did it and I observed him. As to trying to take the temperature and the child breaking the thermometer, I do not remember that. The child was comparatively calm. It would whimper and then be more or less interested in what was going on and be quiet. Well, she did as a normal child would do. I did not examine or gather sputum. Taking Dr. Halldorson's answers here and the information given me together with my examination, I would say I am perfectly justified in coming to the conclusion that I have . . . I thought the child was a credit in every way to those keeping it and had a good home in every way . . . The child may be upset by being taken away to a new home for a few days."

It is true that Dr. Chowan did not have any better although he apparently had as good an opportunity as Dr. Young to judge of the child's condition. But I think that Drs. Halldorson and Bjornson were in the best position to judge, having both attended the dying mother, and being so familiar with the family history. I consider particularly worthy of consideration Dr. Halldorson's statement that the tubercular infection is in the child's glands and that one examination would not reveal it.

There is nothing shewn in the applicant's conduct or circumstances that is a bar to his claim; but on the medical evidence, I am of opinion, although perhaps after a momentary hesitation, that the child's welfare requires that it be left with its present keeper.

Provision should, however, be made in the order taken out, that the applicant have every reasonable opportunity to visit his child and keep alive in her the affectionate sentiments which she should have for her father.

The application will be dismissed without costs.

Application dismissed.

ASHTON v. POWERS.

Ontario Supreme Court, Middleton, J. December 12, 1921.

COMPANIES (§ IVG—105)—BY-LAWS—AMENDMENTS THERETO—NOTICE OF MEETING—PROVISION IN BY-LAWS FOR SAME—"SEVEN CLEAR DAYS"—VALIDITY OF NOTICE—INJUNCTION RESTRAINING THE HOLDING OF MEETING.

When a notice of a meeting is required by statute to be delivered so many days "at least" before the holding thereof, the time must be reckoned excluding both the day of delivery, and the day of the meeting.

[*Regina* v. *Justices of Shropshire* (1838), 8 Ad. & El. 173, 112 E.R. 803, followed. See Annotation Company Law of Canada, 63 D.L.R. 1.]

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ASHTON v. POWERS.

Middleton, J.

MOTION by the plaintiff for an injunction restraining the holding of a meeting of a company pursuant to a notice. The circumstances under which the notice was given are fully set out in the judgment.

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

MIDDLETON, J.:—This is a motion by the plaintiff for an injunction restraining the holding of a meeting of the company pursuant to a notice given in circumstances to be mentioned. The individual defendants had not been served with the writ of summons or notified of this motion, but the defendant company appeared voluntarily, fearing that a motion might be made for an *ex parte* injunction.

The by-laws of the company provide that notice of the time and place of the holding of the annual or general meeting of the company must be given at least 10 days previous thereto, by delivering the same by mail or otherwise duly addressed to each shareholder at least 15 days previous to the meeting.

It is said that the directors passed an amending by-law substituting 7 days in place of 10 days and 15 days mentioned in this original by-law; this amending by-law was passed on the 25th November, 1921, and was sent to the Provincial Secretary by mail and received by him on the 9th December.

Under the charter of the company it is expressly provided that the by-laws of the company or amendments thereto, from time to time, shall not be valid or acted upon until the same in duplicate, certified by the president and secretary, with the seal of the company, have been filed in the office of the Provincial Secretary.

The notice in question is said to have been mailed to the shareholders on the 6th December, and the meeting is called for the 13th December.

The allegation is that this notice is not sufficient, and several grounds of attack are assigned. First, it is said that the amending by-law could not be acted upon at the time the notice was mailed, because it had not been filed with the Provincial Secretary; second, that, even assuming that the amending by-law is operative, the notice is yet inadequate, as "at least 7 days" means 7 clear days, and from the 6th to the 13th is obviously only 6 clear days; thirdly, upon the same assumption, the notice is inadequate because the by-law must be read in conjunction with sec. 143 of the Ontario Companies Act, which provides that a notice or other document served by post by a corporation on a shareholder or member shall be deemed to be served at

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the time when it would be delivered in the ordinary course of post. The by-law, it is said, does not provide that the notice shall be given by mailing at least 7 days previous to the meeting, but by delivering the same at least 7 days previous to the meeting. The delivery by registered mail is justified by sec. 142, but the time of delivery is that indicated by sec. 143.

After careful consideration, I have come to the conclusion that all these contentions are well-founded, and that there is no course open to me but to grant the injunction asked.

I do not know that it will serve any useful purpose to discuss the first and third grounds, as the provisions of the law referred to appear to me to be too plain to admit of controversy.

With reference to the second ground, that the expression "at least" indicates that the days named must be clear days, I refer to what I regard as the leading case upon the subject: *Regina* v. *Justices of Shropshire* (1838), 8 Ad. & El. 173, which decides that, where an act is required by statute to be done so many days "at least" before a given event, the time must be reckoned excluding both the day of the act and that of the event. This was a carefully considered decision of Lord Denman, C.J., Littledale, J., Patterson, J., and Coleridge, J.

The Chief Justice said: "We may regret the decision we have to pronounce in the particular instance; but it is much best not to shake a rule settled by former decisions."

The learned Judges indicate that if the matter had not then been long-settled they might have arrived at a different conclusion. I think it is better for me, on this question, to follow that which was regarded as a settled matter for one hundred years, and adopt the view which has been acted upon ever since. I do not think that any case since then has shaken this principle.

In the case referred to by Mr. Kilmer, *Morell* v. *Wilmott* (1870), 20 U.C.C.P. 378, this case and others were cited as deciding the precise point. It is true that, in dealing with the question then before the Court, an opposite conclusion was arrived at, but that was because the provisions of the statute which governed the matter then under consideration had this effect and overruled the earlier law. In none of the cases that I have found has there been more than an endeavour to get away from the settled law by reason of some statutory provision indicating that it was not to apply.

As this decision disposes of the whole subject-matter of the litigation, there is no reason why the action should continue; and I therefore direct that this motion be turned into a motion for judgment, and that there should be judgment against the company restraining the holding of the meeting. Inasmuch as

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the other defendants have not been served, no order should be made concerning them, and no costs should be awarded against them.

It would seem an absolutely unnecessary thing to serve these individual defendants now, for they will be in effect bound by the injunction awarded against the company.

WOOD GUNDY & CO. v. CITY OF VANCOUVER.

British Columbia Supreme Court, Macdonald, J. May 25, 1922.

GUARANTY (§I—6)—HOSPITAL DEBENTURES—GUARANTY BY MUNICIPAL CORPORATION—CONSTRUCTION OF DOCUMENT—INTENTION OF PARTIES—PAYMENT—RIGHT OF HOLDER TO BE PAID IN UNITED STATES CURRENCY.

In construing the liability of a municipal corporation which sanctioned the issue and became surety for the due payment of the debentures and interest to the holders thereof, consideration must be taken of the construction of the document not only from the standpoint of the surety but also of the intention of the parties at the time when the debentures were issued and guaranteed; and where it is evident that the intention was to guarantee payment at a bank in the place where the bonds were issued. The holder cannot, by presenting them for payment at a branch of such bank in the United States, compel payment in United States currency or its equivalent in Canadian currency, notwithstanding that the interest may be payable in the United States; the debentures not distinctly stating that the payment of the principal was to be made there.

ACTION to recover the sum of $4,400 alleged to be still due by defendant corporation under a guarantee given with respect to 37 debentures of the Vancouver General Hospital amounting to $37,000. Action dismissed.

G. E. Housser, for plaintiff.

G. E. McCrossan, K.C., for defendant.

MACDONALD, J.:—It appears that the Vancouver General Hospital in 1906, issued 60 debentures of $1,000 each, bearing interest at 4½% per annum, and repayable, as to principal, on June 1, 1921. The power to borrow was only exercisable by the hospital, upon an issue of debentures being guaranteed by the City of Vancouver under the provisions of the Vancouver Incorporation Act and amending Act. The defendant corporation, by by-law, sanctioned such issue and became surety for the due payment of the debentures and interest to the holders thereof. The hospital covenanted, in each debenture, to pay the principal at maturity and, in the meantime, to pay interest on the principal sum to the bearer of every coupon for interest, "upon the same being 'presented' at the Bank of Montreal, Vancouver, or any branch of the Bank of Montreal in Toronto, Montreal,

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New York or London, Eng." The obligation created by the debentures, was stated to be subject to conditions endorsed thereon. Conditions were not so endorsed but appeared above the execution of each debenture by the hospital and included an averment that "the principal moneys and interest secured by this debenture shall be payable at the Bank of Montreal." The interest was duly paid from time to time and when the debentures matured, on June 1, 1921, the plaintiff presented the 37 debentures, of which it was the holder, for payment, at the branch or agency of the Bank of Montreal in the City of New York. It sought payment of the principal of such debentures in American funds, which was refused. Then plaintiff requested payment from the defendant, as guarantor of the debentures, with a like result. It was then arranged that, except as to the difference of exchange between Canadian and American funds, the plaintiff should accept payment in Canadian currency of the amount of such debentures. It now claims to be entitled to such difference amounting, on June 1, 1921, to $4,400. This involves consideration and construction of the document by which the defendant guaranteed the debentures. The terms of the document should not only be considered from the standpoint of a surety, but be governed by the intention of the parties, at the time when the debentures were issued and guaranteed. It is clearly apparent that either for convenience, and perchance, to assist in their negotiation, the annual interest should be payable, not only in Canada, but also in England and in the United States.

A similar provision was not inserted as to payment of the principal, but it is contended that the plaintiff, and presumably all persons holding these debentures, had a right of election and could demand payment at the branch or agency of the Bank of Montreal in New York. In other words, the Vancouver General Hospital, or the defendant, as its guarantor, would be expected to have funds available for payment at that place, not in the currency of the country, where the debentures were issued, but in American currency.

If the debenture distinctly stated, that the payment of principal was to be made in New York, then it might be successfully contended that such payment should be in money amounting to the requisite sum in the legal tender of the United States.

I might discuss, at length, the position taken by the plaintiff and the able arguments submitted by counsel, but I do not deem it necessary. I do not think the contention of plaintiff is

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tenable, that liability exists against the defendant, either in the terms of the guarantee or based on the intention of the parties. If it had been in the contemplation of those interested in the issuance and sale of such debentures that, not only the interest, but the principal should be payable in New York, and in gold or American currency as distinct from Canadian currency, then the instrument, intended to create liability should have so stated.

While there is a principle that the debtor seeks the creditor, still this would be inapplicable under the circumstances, and as against the defendant under its guarantee. It provided for payment only in the event of default by the Vancouver General Hospital for 40 days, and it was only on demand being made in writing for payment within 30 days after such default, that the defendant became liable under its obligation.

It is unreasonable to contend that the undertaking of the defendant, as surety, amounted to an agreement on its part, that the hospital would make banking arrangements, by which the principal of the debentures would, at maturity, be redeemed at the different named branches of the Bank of Montreal. As the document as to principal, provides for payment at "the Bank of Montreal," it might just as reasonably be contended that funds should be available at all its branches for such redemption.

Aside from any contention, that the defendant is a favoured debtor, I think it was the evident intention of the parties that the principal of the debentures should be payable at the Bank of Montreal at Vancouver, and that, upon default on the part of the principal debtor, the defendant should, upon proper demand, make payment at the same place.

Action dismissed. *Action dismissed.*

Re HACHBORN.

Ontario Supreme Court in Bankruptcy, Orde, J. December 13, 1921.

BANKRUPTCY (§ IV—36)—ASSIGNOR'S PURCHASE OF GOODS—REFUSAL TO ACCEPT ON DELIVERY—RE-SALE BY VENDOR — LOSS — DAMAGES—CLAIMS ON THE ESTATE—DISALLOWANCE BY TRUSTEE—APPEAL.

Vendors who have suffered damages by the refusal of the assignor to accept purchases made from them prior to the assignment are entitled to prove their claims against the estate for such damages as they would have been entitled to recover against the insolvent himself.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

APPEAL by certain creditors from the disallowance by the trustee of certain claims against the estate of an insolvent for damages, caused by his refusal prior to the assignment to accept goods for the purchase of which he had contracted.

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RE HACHBORN.

Orde, J.

R. S. Robertson, K.C., *V. O. Matchett*, *G. B. Balfour*, and *H. W. A. Foster*, for the appealing creditors.

A. W. Ballantyne, K.C., and *T. A. Rowan*, for the trustee.

ORDE, J.:—The trustee has disallowed a large number of claims against the insolvent estate for damages caused by the insolvent's refusal, prior to the assignment, to accept goods which he had contracted to purchase, the damages being the loss sustained by the vendors upon the resale of the goods. It is said that the circumstances under which the alleged breaches of the respective contracts arose are not the same in all instances, the trustee taking the ground in certain cases that the vendors acquiesced in the cancellation or repudiation of the contract, so that there was not in fact any breach of contract upon which to base a claim for damages. But the trustee has raised a question which, in the absence of evidence as to the circumstances of any one case, may be regarded as to some extent academic, but which from the statements made upon the motion will in all probability be involved in several of the appeals, and must therefore be disposed of sooner or later. And it is suggested that my ruling upon the point may facilitate the administration of the estate.

The trustee contends that the cancellation or repudiation of the contract for the purchase of the goods and the consequent resale thereof by the vendor, followed shortly afterwards by the bankruptcy of the purchaser, has not only not damaged the vendor, but has in fact enured to his benefit, because, had the goods been delivered to the debtor prior to the assignment, the dividend which the vendor would have received on the administration of the estate upon his claim for the whole purchase-price, would be less than the amount which he has realised upon the resale, and that, having sustained no damage at all, it would be inequitable in such circumstances to allow the creditor to prove for the full damages which he would be entitled to claim against the purchaser had he remained solvent.

Mr. Ballantyne admitted that he could find no authority directly in point, but he based his argument upon the principles laid down in *Griffiths* v. *Perry* (1859), 1 E. & E. 680, and *William Hamilton Manufacturing Co.* v. *Hamilton Steel and Iron Co.* (1911), 23 O.L.R. 270, and the cases there referred to. In those cases the trustee in bankruptcy and the liquidator of an insolvent company sought to enforce the completion by the vendor of his contract to deliver certain goods to the insolvent purchaser or to recover from him the value of the goods, the vendor having at the same time a claim against the insolvent for moneys due for goods already supplied. And it was held

that the trustee could recover no more than nominal damages for the vendor's breach of his contract to deliver the goods, because it would be inequitable to require him to do so except upon payment in full not only of the purchase-price for the goods undelivered, but of the moneys already due by the insolvent purchaser. As Boyd, C., puts it in the *Hamilton* case, 23 O.L.R., at p. 284:—

"It is not equitable to leave the sellers to resort to such dividend as they may get in liquidation, and allow the liquidators to make profit out of the unfulfilled part of the beneficial contract."

The trustee urges that some such equitable principle should be applied here, and that the vendor should not recover other than nominal damages for the bankrupt purchaser's breach of contract. However plausible such an argument may be, I cannot see how it can be applicable here. The fundamental distinction between the two cases is this. In the cases relied upon by Mr. Ballantyne, whether the refusal by the vendor to deliver the goods is based upon a right analogous to that of *stoppage in transitu* as suggested in *Griffiths* v. *Perry*, or upon the right to treat the contract as at an end as suggested by Middleton, J., in the *Hamilton* case, the failure to perform the contract according to its terms arose by reason of the purchaser's insolvency, and because of that the Courts say that the insolvent's estate shall not be allowed to benefit as a result, but that, if the estate seeks to enforce the debtor's contract, it must do so upon the same terms as would be imposed upon the debtor himself. But in the present case the creditor-vendor, who is asserting a claim against the insolvent estate, is in no way in default. The contracts were broken by the purchaser, and in seeking to prove the damages arising from the purchaser's breach there is no foundation for the application of any equitable principle whatever as against the vendor, who has been guilty of no default but is exercising his legal rights. If, in the present case, instead of the purchaser's having repudiated or broken his contract by refusing to take the goods, the circumstances had been such that the vendor had rightfully exercised his right of stoppage *in transitu* or *ante transitum*, the vendor would have been entitled to claim damages for the loss sustained upon the resale and to prove in the bankruptcy therefor: see Halsbury's Laws of England, vol. 25, pp. 263 *et seq.; Ex p. Stapleton, In re Nathan* (1879), 10 Ch. D. 586. If the vendor has that right when he voluntarily exercises his right of stoppage, he is surely not placed in a worse position because the exercise of his right of

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resale has been forced upon him by the purchaser's breach of the contract.

When carefully examined, Mr. Ballantyne's authorities not only do not support, but really answer, his contention. The judgment of Jessel, M.R., in the *Stapleton* case is as applicable to the case of a deliberate repudiation of the contract as it is to the implied repudiation arising from the purchaser's insolvency and consequent inability to buy, to which the Master of the Rolls refers.

The disallowance by the trustee of the claims upon the ground dealt with on this motion must be reversed, and the vendors will be entitled to prove their claims against the insolvent estate for such damages as they would have been entitled to recover against the insolvent himself. The trustee will therefore proceed, under the provisions of sec. 20 of the Bankruptcy Act and Bankruptcy Rule 119, to determine the value of each claim. In so far as it may be necessary to do so, the time for formally appealing from the trustee's disallowance of the claims in question, which has already been extended, will be further extended for such a period as may be necessary to protect their rights and avoid the incurring of costs.

The costs of the creditors who appeared on this motion will be paid out of the estate, as will also the costs of the trustee.

DOWNS v. MANUFACTURERS LIFE INS. CO.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Simmons and Clarke, JJ.A. June 10, 1922.

GUARDIAN AND WARD (§II—11)—LETTERS OF GUARDIANSHIP ISSUED BY SURROGATE COURT—RIGHT OF GUARDIAN TO RECEIVE INSURANCE MONEY TO WHICH INFANTS ARE ENTITLED—LIFE INSURANCE BENEFICIARIES ACT 1916 ALTA. STATS. CH. 25 SECS. 14, 15—CONSTRUCTION.

Under the provisions of the Life Insurance Beneficiaries Act Alta. Stats. 1916 ch. 25, sec. 14, letters of guardianship issued by a Surrogate Court do not entitle the guardian to receive payment of insurance moneys to which the infants are entitled, the object of the section being to commit such moneys to the supervision of the Supreme Court as a Court of Equity. The proper procedure where there is no competent person to receive such moneys is to make an application to a Judge of the Supreme Court under sec. 15 of the Act for an order for payment of such moneys into Court.

APPEAL by plaintiffs from an order of the Master, dismissing an application for summary judgment for the amount of an insurance policy or for judgment under Rule 283, or for an order striking out the statement of defence as being frivolous and vexatious. Affirmed with a variation as to the costs in the Court below.

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DOWNS v. MANUFACTURERS LIFE INS. CO.

Scott, C.J.

H. D. Mann, for appellant.

A. M. Sinclair, for respondent.

The judgment of the Court was delivered by

SCOTT, C.J.:—The deceased in his lifetime obtained from defendant company an insurance upon his life for $5,000, the amount thereof being payable upon his death to his children then living.

After the death of deceased the female plaintiff was duly appointed guardian of the persons and estate of the infants, by the District Court of the Judicial District of Macleod and filed in that Court a bond for $5,000 for the due performance of her duties as such guardian. She charges that she thereby became entitled to recover the amount of the policy after deducting therefrom $234.75, the amount of a lien thereon, which she admits the defendant was entitled to retain.

The defendant paid into Court $4,765.25, being the amount of the policy, less the amount of the lien referred to and alleges that it has always been ready and willing to pay the amount to the person properly entitled to receive it and give a proper discharge thereof, but denies that the female plaintiff is the proper person to whom the money should be paid.

Upon the facts, the plaintiffs applied to the Master in Chambers in Calgary for an order for summary judgment for the amount claimed or for an order for judgment under Rule 283 or for an order striking out the statement of defence as being frivolous and vexatious. The Master dismissed the applications for judgment and made an order for directions as to further proceedings in the action.

The plaintiffs appealed from this order. Harvey, C.J., who heard the appeal, dismissed it with costs and ordered that the action be dismissed with costs. This appeal is from his order.

The issue in this action appears to be dependent upon the construction and effect of the Life Insurance Beneficiaries Act, ch. 25 of 1916 and the amendment by sec. 9, ch. 10 of 1920 of the Infants Act.

Section 14 of ch. 25 of 1916 provides that "if no trustee of the insurance money is named or appointed, shares of infants may be paid to a trust company appointed as trustee by the Supreme Court or a Judge thereof under the provisions of the Trust Companies Ordinance upon the application of the infants or their parents or guardian and such payment shall be a discharge to the insurer." Sub-section 2 provides that "when insurance money not exceeding $2,000 is payable to the wife

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and children or to the children of the assured and one or more of the children are infants, the court may, if the assured is dead and if the widow of the assured is the mother of such infants, appoint such widow as their guardian with or without security and such insurance money may be paid to her as such guardian."

It was admitted by counsel upon the argument of the appeal that no trustee of the insurance moneys in question has been named or appointed.

The provisions referred to are similar to those contained in sub-secs. 1 and 2 of sec. 175 of the Ontario Insurance Act, ch. 183, R.S.O. (1914) and are, undoubtedly, taken therefrom.

In *Re Havey* (1913), 14 D.L.R. 668, 29 O.L.R. 336, and in *Re Rennie Infants* (1913), 15 D.L.R. 838, 30 O.L.R. 6, it was held that the effect of these provisions was that letters of guardianship issued by a Surrogate Court did not entitle her to receive payment of insurance moneys to which the infants were entitled and that their object was to commit such moneys to the supervision of the High Court as a Court of Equity.

Although the cases referred to were decided after those provisions were enacted in this Province and are, therefore, not within the rules that where a statute adopted from that of another country should receive the construction placed upon it by the Court of that country before its adoption, I am of opinion that the effect they give to these provisions is the only reasonable one and should, therefore, be followed here.

Section 9 of ch. 10 of 1920 provides that "the father and mother of an infant or infants shall be jointly guardian of the *estate* of such infant or infants. Provided always that either father or mother may delegate his or her authority over the *estate* of such infant or infants. . . . That "on the death of the father of an infant the mother if surviving shall be guardian of *the infant* either alone when no guardian has been appointed by the father or jointly with any guardian appointed by the father" and that the mother shall have the same rights as the father to appoint a guardian of the estate of the infant after her death.

It is difficult to determine from these provisions whether the mother is under any circumstances constituted the guardian of her infant's estate, but even if she were so constituted, I am of opinion that they do not affect or control the provisions of sec. 14 of ch. 25, which I have quoted. The former deals with the estates of infants in general terms while the latter deals only

with a particular portion of such estates. In *Taylor* v. *Corporation of Oldham* (1876), 4 Ch. D. 395, 46 L.J. (Ch.) 105, 25 W.R. 178, Jessel, M. R. says at pp. 410-411:—"I consider it to be the established rule that when you find general provisions of this sort either in the same Act or in other Acts, they are not to control or repeal the special provisions which are considered to provide for the particular property."

No claim for relief is made by the male plaintiff as executor of the deceased. He does not appear to have any interest in the subject matter of the action and I fail to understand why he was made a party to it.

For the reasons I have stated I am of opinion that the plaintiff was not entitled to recover the moneys in question and I would, therefore, dismiss the appeal with costs.

As to the costs in the Court below, sec. 15 of ch. 25 of 1916 provides that where "there is no person competent to receive the share of an infant . . . and the insurer admits the claim . . . the insurer may, at any time after the expiration of two months from the date of the admission of the claim, ... obtain an order from the Supreme Court or a Judge thereof for the payment of the share . . . into Court . . . . and that such payment will be a sufficient discharge." etc.

The necessary proof that the moneys were payable under the policy was furnished about August 8, 1921. This action was not commenced until more than 9 months afterwards. As there was no person entitled to receive the money the defendant should, in my opinion, have applied within a reasonable time for an order for payment of the insurance moneys into Court. Had it done so the infants would have benefitted by the interest accruing upon the fund while in Court. I would, therefore, direct that it should not receive any costs in the Court below in excess of what it would be entitled to tax upon an application for payment into Court and I would vary the order appealed from to that extent.

I would also direct that the moneys paid into Court by the defendant shall remain therein and be treated as a payment into Court under the provision last referred to.

Judgment accordingly.

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Re CANADIAN CEREAL and FLOUR MILLS Co. Ltd.

Ontario Supreme Court in Bankruptcy, Orde, J. December 13, 1921.

BANKRUPTCY (§ I—11)—ASSIGNMENT OF COMPANY—RIGHTS OF DIRECTORS—EXERCISE OF POWERS—TRANSFER OF STOCK—RETENTION OF CORPORATE ENTITY.

There is nothing in the Bankruptcy Act which destroys the entity of a corporation or interferes with the functioning of the same as such. Stock transfers may be made, given effect to and registered; the same share certificates are to be used, signed by the proper officers, and sealed with the corporate seal. Meetings may be held, and directors may function as before.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

APPLICATION by an authorised trustee in bankruptcy, under sec. 18 (d) of the Bankruptcy Act, as enacted by the amending Act of 1921, ch. 17, sec. 18.

H. J. Stuart, for the trustee.

R. H. Parmenter, for the Montreal Trust Co.

ORDE, J.:—The insolvent company had been incorporated and organised to take over the business of an earlier company, and, as the result of certain arrangements, bonds and shares of the new company were delivered and issued to the Montreal Trust Company; whose duty it was to distribute them among the holders of the bonds of the old company upon the surrender of such bonds. Before this distribution was completed, the new company made an authorised assignment under the Bankruptcy Act.

The questions which are now submitted to the Court involve in a broad sense the question, whether and to what extent the assignment affects the status and corporate powers of the insolvent company, and particularly the powers of the directors and shareholders to meet and to decide by resolution upon certain courses of action on behalf of the company.

The Bankruptcy Act contains no provisions corresponding to those in the Dominion Winding-up Act which in effect deprive the shareholders and directors of all further power in the administration of the company's affairs. Under a winding-up order, the affairs of the company are being wound up, so that, unless some action of the Court revives the company, it necessarily ceases to exist upon the termination of the winding-up proceedings. See secs. 20 and 31, *inter alia*, of the Winding-up Act.

But under the Bankruptcy Act, except in those cases in which the proceedings are continued under the Winding-up Act, by virtue of Bankruptcy Rule 13 (which Rule is given its effectiveness by sub-sec. 2 of sec. 66 of the Act), a company which makes an authorised assignment is to all intents and purposes

in no different position from a natural person. It has parted with all its assets to the trustee, including, by virtue of sec. 36, the right to collect from contributory shareholders. But there is nothing in the Act which destroys its corporate entity or interferes with its power to "function" as a corporation. It is always possible that a corporation may pay its creditors in full, and it is said that that will probably be the result in this case under careful management. It would doubtless be entitled to a discharge in a proper case, though it is obvious that in the great majority of cases the discharge of a company would be a mere formality. Apart from these grounds for believing that an assignment cannot affect the company's status or the powers of the directors and shareholders, there is the fact that under sec. 13 of the Act the insolvent, whether under an assignment or under a receiving order, may always submit to the creditors, through the trustee, a proposal for a composition, or for an extension, or for a scheme of arrangement. And this right is as clearly open to a corporation as to an individual. If so, how can the company authoritatively decide upon or present such a proposal unless its directors and shareholders can meet for the purpose of deliberation? Limited though the scope of the company's activity must necessarily be because of its inability to carry on its business, yet, within the circumscribed ambit of its curtailed powers, it has clearly, in my judgment, still power to continue its corporate existence, and this, not as in a merely dormant or moribund state, but so as to express its corporate decisions for all such purposes as may be expedient or necessary.

With this broad expression of my views as to the effect of the assignment upon the company, I proceed to deal with the questions submitted to me.

1. The company can register and give effect to the transfer of 2,600 shares to the estate of the late Hon. Sidney A. Fisher. There is nothing in the Bankruptcy Act to prevent this.

2.—(a) The form of stock certificate to be issued upon the registration of the transfer ought not to vary from the form heretofore adopted by the company. The certificate should be signed by the usual officers in that behalf, or such officers as the directors may appoint under the by-laws of the company, and, if desired, the corporate seal should be attached. If the seal and the books of the company are in the possession of the trustee, he should permit their use for the registration of the transfer and the issue of the certificate.

(b) The payment of the Dominion and Ontario taxes upon the transfer is a matter with which the company itself would

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not ordinarily be concerned. I understand that for the purpose of completing the re-organisation and the exchange of bonds and shares, the company covenanted to pay the transfer taxes. That, however, would not justify the trustee's paying the taxes as an item of expense in the bankruptcy. If in order to complete the transfer the Montreal Trust Company or the transferees of the shares are called upon to pay the taxes, then they may be able to prove as creditors in the bankruptcy under the company's covenant.

3. The company may deal with all transfers of stock in the way already indicated, if the stock is fully paid-up, or, if not paid-up, the question of contribution by the transferring shareholder ought to be dealt with before the company accepts and registers any such transfer.

4. The calling and holding of meetings of directors and shareholders and the passage of resolutions and by-laws thereat will still be regulated by the charter and by-laws of the company. As to the application of sec. 85* of the Bankruptcy Act, while I think it is primarily intended to apply to corporations having dealings with the company and the trustee, I see no reason why it should not also apply to the insolvent company itself.

5. If the shareholders desire to propose a composition, extension, or scheme of arrangement under sec. 13, which, as I have already held, they have power to do, the method of conveying that proposal to the trustee must be such as the charter and by-laws, or the shareholders themselves, acting within the powers imposed by the charter and by-laws, may provide. The Bankruptcy Act presents no difficulties in this regard.

6. The trustee must be governed by the advice of the inspectors and by ordinary business judgment in delaying the acceptance of any tender for the purchase of the company's assets. The Court has no power to prevent a tenderer from withdrawing his tender, if, by the conditions under which he tendered, he has the right to do so.

7. If creditors have been inadvertently omitted from the list of creditors to whom notices were sent under sec. 11 (4) of the Act, I think the trustee should notify them to file their proofs, and if convenient, notify them of what has already taken place. I do not think he is required to call a new meeting of creditors merely because of the omission.

8. The making of the annual returns to the Provincial Secretary under sec. 135 of the Ontario Companies' Act, R.S.O. 1914, ch. 178, is something with which the trustee is not concerned.

*85. For all or any of the purposes of this Act, a corporation may act by any of its officers authorised in that behalf under the seal of the corporation. . . . .

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If my view as to the continuance of the company's corporate status and powers is correct, then the directors, by failing to make returns, might subject themselves to the penalties imposed by the Ontario Companies Act. If the directors and shareholders desire to keep the company alive, then it would seem to be incumbent upon them to comply with sec. 135, and to pay the fees incidental thereto.

The costs of both parties to this application should be paid out of the estate.

VANCOUVER MILLING CO. v. FARRELL.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. June 6, 1922.

APPEAL (§VIIL—470)—MATTERS OF FACT—DECISION AT TRIAL DEPENDING ON CREDIBILITY OF WITNESSES—REVERSAL BY APPELLATE COURT. Unless it can be shewn that the trial Judge has taken an erroneous view of the facts, or acted under some misapprehension, or clearly come to an unreasonable decision about the facts, an Appellate Court will not overrule his decision on matters of fact which depend mainly on the credibility of witnesses.

APPEAL by defendant from the trial judgment dismissing a counterclaim for damages caused by the sale of impure and deleterious chicken feed. Affirmed.

R. Lennie, for appellant.

C. W. Craig, K.C., for respondent.

MACDONALD, C.J.A.:—The question is one of fact and the evidence is conflicting. The trial Judge attached weight to the evidence of McNeill, to whom defendant's foreman in charge of the hens is alleged to have said, that "he did not know what feed or whose feed caused the trouble." I do not think it makes any difference whether he said "whose feed" or whether he said "what feed." The trial Judge believed this evidence and it is evidence to shew that the foreman was in doubt as to whether it was the food bought from the plaintiffs or other food which caused the mischief.

There is another circumstance which militates against the defendant. He was using food bought from the firm of McLellan and McCarter, which he fed for a few days. He made a claim on this firm for the same cause of action as that upon which he now sues and was paid a considerable sum of money in settlement thereof, but nevertheless he brings this action against the plaintiff for the same damages without reference to those received from McLellan and McCarter. On the whole, I am unable to say that the conclusion come to by the trial Judge was clearly wrong, and would dismiss the appeal.

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GALLIHER, J.A.:—I cannot say upon the evidence that the trial Judge has misdirected himself. There is, in my own mind, a very considerable doubt after reading the evidence, and in such circumstances, I would not be warranted in interfering with the judgment. The appeal should be dismissed.

McPHILLIPS, J.A.:—This appeal has relation to the claim for damages under the counterclaim.

I cannot say that I am absolutely free from doubt in this case—as to the correctness of the judgment under appeal, yet I am not able to advise myself that the case is one which admits of my differing from the judgment of the trial Judge who saw the witnesses and had opportunities to weigh the questions of fact in a much more complete way than I can do. In truth I cannot say that the trial Judge went clearly wrong; therefore, I am not in a position, giving effect to the controlling cases, to disagree with the finding of the Court below. Whatever may have been the real facts, and I cannot but believe that the chicken feed here was not of the quality it should have been—yet to recover special damages by reason of its not being of that quality which the law required—that is, reasonably fit to feed to chickens, it was incumbent upon the plaintiff in the counterclaim, (the defendant in the action) to make out his case, *i.e.*, establish that the damages suffered as being consequent upon impure and deleterious feed supplied to him by the defendant in the counterclaim, (the plaintiff in the action). The trial Judge was evidently not convinced of this, and dismissed the counterclaim.

It is not sufficient to leave the case to "surmise, conjecture or guess"—in *Barnabas* v. *Bersham Colliery Co.* (1910), 103 L.T. 513, the Earl of Halsbury, said:—

"My Lords: I am of the same opinion. Propositions must be proved in a court of law by proof of evidence, and that is not satisfied by surmise, conjecture or guess."

It may well be that it was somewhat difficult to make out the case owing to the different foods used, but yet that was something that must be proved not left in the air. There was the possibility that the damages suffered arose from other causes not attributable to the feed supplied; and even were I of the view that upon the evidence, I might not have come to the same conclusion—it is not the province of the Court of Appeal to interpose its view as against that of the trial Judge, except in such cases as come within the *ratio decidendi* of *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, at pp. 704-5, 67 L.J. (Ch.) 402,

Lindley, L.J., there said:—"The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must re-consider the materials before the judge, with such other materials, as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions, and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

In *Lodge Holes Colliery Co.* v. *Mayor etc. of Wednesbury*, [1908] A.C. 323, at p. 326, 77 L.J. (K.B.) 847, Lord Loreburn said:—"When a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons."

In *Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q.B. 38 at pp. 39-40, 65 L.J. (Q.B.) 100, 44 W.R. 212, Lord Esher, said:—"Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts, was right and that presumption must be displaced by the appellant."

It is indeed, with some regret that I have come to the conclusion that no sufficient case has been made out to entitle the judgment of the Court below being reversed, as I cannot but believe that the feed supplied was not reasonably fit to feed to chickens—but unfortunately the learned Judge was not of

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the view that the damages claimed were consequent upon that state of facts—and in the language of Lord Gorell, in *Canadian Pacific R. Co.* v. *Bryce* (1909), 15 B.C.R. 510, at p. 513:—"Unless it could be shewn that he (the learned trial Judge) had taken a mistaken or erroneous view of the facts or acted under some misapprehension, or clearly came to an unreasonable decision about the facts, he should not, in accordance with well recognised principles, be overruled on matters of fact which depended mainly upon the credibility of the witnesses."

I cannot persuade myself, much as I have the inclination to—that the case is one, bearing in mind the controlling cases, which will admit of it being said upon the evidence that the trial Judge went clearly wrong. I would therefore dismiss the appeal.

Appeal dismissed.

Re HUNT and LINDENSMITH.

Ontario Supreme Court, Appellate Division, Maclaren, and Hodgins, JJ.A., Middleton, J., Ferguson, J.A., and Orde, J. December 16, 1921.

STATUTES (§IID—125)—REPEAL OF AN ACT—ENACTMENT OF ONE IN SUBSTITUTION WITH MORE ONEROUS PROVISIONS—EFFECT OF OFFENCE COMMITTED BEFORE NEW ACT CAME INTO FORCE.

An offence committed before the coming into effect of a new act substituted for an Act repealed, but with more drastic and onerous provisions cannot be dealt with under the new statute, as the same will not be given any retrospective effect by the Court.

[*Upper Canada College* v. *Smith* (1920), 57 D.L.R. 648, 61 Can. S.C.R. 413, referred to.]

APPEAL by Lindensmith from an order of a County Court Judge, made under the authority of the Children of Unmarried Parents Act, 1921, ch. 54, sec. 18 (Ont.), declaring him to be the father of a child born to the complainant, and ordering him to pay her $5 a week towards the maintenance of the child. The appeal was brought, by leave of the County Court Judge, under the provisions of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, sec. 4. The Act relates to orders made by a Judge as *persona designata;* and sec. 4 provides that there shall be no appeal from any such order unless the appeal is expressly authorised by the statute giving the jurisdiction, or unless special leave is granted by the Judge making the order, or by a Judge of the Supreme Court, in which case an appeal shall lie to a Divisional Court.

Gideon Grant, K.C., for appellant.

H. S. White, K.C., for respondent.

The judgment of the Court was delivered by

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MIDDLETON, J. (After setting out the facts as above:—A preliminary objection is taken to the right of appeal. Upon full consideration, I entertain no doubt that an appeal will lie under the Judges' Orders Enforcement Act. The Judge, under the Children of Unmarried Parents Act, 1921, is clearly acting as *persona designata*. The jurisdiction is conferred upon him as Judge, and he is not, in the discharge of his functions, exercising a jurisdiction which has been conferred upon the Court. This, as I understand the cases, is the distinction. This is emphasised when it is found that, by the interpretation clause of the Act of 1921 (sec. 3 (a)), the term "Judge," which is used throughout is defined as including a Police Magistrate or a Judge of the Juvenile Court where the Police Magistrate or Judge of the Juvenile Court has been designated by the Lieutenant-Governor in Council a Judge within the meaning of the Act in question.

It was suggested that, if there was not a right of appeal under this statute, there might be found a right of appeal under sec. 40 of the County Courts Act, R.S.O. 1914, ch. 59, which gives the right of appeal *inter alia* from every decision of a Judge under any of the powers conferred upon him by any statute, unless provision is therein made to the contrary. This section, in my view, has no application to the order in question, because, upon scrutiny of the section, it will be seen that the right of appeal which is thereby conferred is given only to "any party to a cause or matter," and the expressions "cause" and "matter" fall to be interpreted by the interpretation clause of the Judicature Act, R.S.O. 1914, ch. 56, sec. 2 (c) and (n), and would not apply to such a proceeding as this.

For these reasons, I am of the opinion that the appellant is *rectus in curiâ*.

Two questions were argued upon the appeal: first, that the evidence of the complainant was not "corroborated by some other material evidence," as required by sec. 25 of the Act of 1921. There is, in my view, ample evidence to corroborate the complainant's story. The brother-in-law of the girl had two interviews with Lindensmith, accusing him of the paternity. In the first he asked him what he was going to do, as the complainant said that he had promised to pay the hospital fees; his answer was that he would pay as much as he could. He paid $50. After the child was born, he was again asked what he was going to do about the matter, but said he would pay no more; he had given her $50, and would "skip out."

A far more serious objection arises by reason of the fact that the child was born on the 29th May, 1921. The Act received

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the royal assent on the 3rd May, 1921, but did not come into force until the 1st July following.

It is contended that the Act could have no application where the child was born before it came into operation, and in this contention I agree. The Act is drastic in its terms, and for the default in payment of the sum fixed by the County Court Judge, the father may be imprisoned. The Act in many of its terms is more onerous than the Illegitimate Children's Act, R.S.O. 1914, ch. 154, which it replaces. The effect of the repeal of a statute and the enactment in its place of a new statute covering the same ground is provided for by the Interpretation Act, R.S.O. 1914, ch. 1, sec. 14 *et seq.* Under these sections, the repeal of any statute does not completely destroy it, but it remains in force for the purpose of continuing any existing right and its enforcement thereunder. The substituted provisions of the new Act do not create a new right or provide a new penalty with respect to matters then past. If the effect of the new Act is to substitute a less onerous penalty or punishment, the more lenient provision is to prevail, but there is no provision which justifies the imposition of a greater liability, or the enforcement, by reason of a more drastic penal provision, of any right which existed before the new Act comes into operation. The strong leaning of the Court against giving any retrospective effect to legislation is well exemplified by the case of *Upper Canada College* v. *Smith* (1920), 61 Can. S.C.R. 413, 57 D.L.R. 648.

The appeal should, therefore, be allowed, and the order made by the learned County Court Judge should be discharged without costs.

Appeal allowed.

CANADIAN FUR AUCTION SALES CO. v. HANSON AND PIERCE.

Quebec Superior Court, Maclennan, J. March 21, 1921.

ESTOPPEL (§IIIE—70)—PURCHASE OF GOODS AT AUCTION — RESALE — AGREEMENT THAT ORIGINAL PURCHASER TO BE LIABLE—LETTER THAT DRAFTS DRAWN IN ERROR AND REQUESTING RETURN—LIABILITY OF ORIGINAL PURCHASER.

A purchaser at an auction who with the consent of the seller immediately transfers the goods purchased to a third party but subject to a condition that the original purchaser is not released from liability by the transfer, cannot be held liable, where the seller has written a letter stating that a draft has been drawn upon him in error and asking for the return of the draft upon presentation, such letter being inconsistent with the continuing liability of the original purchaser and operating as an estoppel preventing recovery from him.

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Maclennan, J.

ACTION to recover the price of goods sold at auction.

The facts of the case are fully set out in the judgment.

On March 22, 1920, Pierce bought from plaintiff at its auction sale in Montreal seven lots of mink for $7,150.31, but refused to accept delivery. With the consent of plaintiff he, on March 27 last year, transferred the purchase to the defendant Hanson, subject to the terms and conditions set forth in the auctioneer's catalogue. One of the conditions was that the transfer of a purchase did not release the original purchaser. In April last, plaintiff, through its secretary-treasurer, Lionel Lumb, after consultation with the managing director, sent to Pierce in Winnipeg "credit notes" for the amount of the purchase in question, "transferred to J. S. Hanson." Then on May 3, 1920, plaintiff wrote to Pierce that it was drawing upon him for 25 per cent. of the price of the skins. Pierce replied that he was surprised at this, as the skins were transferred to Mr. Hanson, and, he added: "I have credit notes for them." Plaintiff, thereupon, on May 14, acknowledged its error and told Pierce to return the draft when presented by the bank.

The action was taken, on the 27th March 1920, against both defendants demanding a condemnation, jointly and severally, for $7150.31 and $200 for storage and insurance.

The defendant Hanson did not appear.

The defendant Pierce pleaded several defences, one of the grounds set forth was that he has been released by plaintiff from any obligation in the matter.

Weinfield, Sperber & Levine, for plaintiff.

L. Fitch, for defendant.

MACLENNAN, J. dismissed the action as to Pierce as follows:—

Considering that, on March 22, 1920, defendant Pierce bought from plaintiff at its auction sale, in Montreal, seven lots of mink skins for the price of $7,150.31, but refused to accept delivery thereof and, with the consent and approval of plaintiff, on or about March 27, 1920, transferred and assigned said purchase to the defendant Hanson, subject to the terms and conditions set forth in the catalogue prepared by plaintiff for said auction sale, one of which conditions was that such transfer did not release the original purchaser;

Considering that, subsequently, about the middle of April, 1920, the company plaintiff, acting by and through Lionel Lumb, secretary-treasurer of plaintiff, after consultation with the managing director, sent to plaintiff in Winnipeg credit notes for the amount of each of said purchases "transferred to J. S. Han-

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son" to wit, the defendant Hanson, and which credit notes were received by defendant Pierce on 16th April, 1920;

Considering that, on May 3, 1920, the plaintiff wrote to defendant Pierce that it was drawing upon him for 25% of the price of said goods, to which letter Pierce replied, on May 6, 1920, by letter stating:—"I beg to acknowledge receipt of your letter of the 3rd instant, and am surprised that you are drawing on me as those goods were transferred to Mr. Hanson while I was in your city and have credit notes for same";

Considering that defendant Pierce received in reply from plaintiff a letter dated May 14, 1920, stating: "We are in receipt of your communication of the 6th instant and regret that our letter to you of May 3rd was in error. When this draft is presented by the bank, kindly return. Regretting any inconvenience you may have been caused, we are yours very truly";

Considering that plaintiff's letter of May 14, 1920, was written and signed by an assistant book-keeper of an accounting firm rendering temporary service in plaintiff's office, upon instructions received from officer of plaintiff and the said letter came to the knowledge of plaintiff's secretary-treasurer and its responsible executive officers shortly thereafter and was never repudiated, withdrawn or explained, and no further demand was made by plaintiff upon defendant Pierce in connection with said purchase until the plaintiff's attorneys wrote him, on September 18, 1920, demanding payment of the purchase price with interest and storage charges on the said goods;

Considering that the forwarding by plaintiff to defendant Pierce of credit notes for the amount of the purchase price of said seven lots of goods which had been transferred, with the plaintiff's approval, to defendant Hanson, accepting thereof, was inconsistent with the continuance of Pierce's obligation on his purchase of said goods;

Considering that the said credit notes were accepted by defendant Pierce as evidence of his discharge by plaintiff from liability on said purchase;

Considering that the sending of said credit notes, the plaintiff's letter of May 14, 1920, and the silence of plaintiff's responsible executive officers after they had obtained knowledge of said letter, operates as an estoppel and prevents plaintiff denying that said letter had been authorised and that it had acquiesced in the stand taken by defendant Pierce, in his letter of May 6, that he had been released and discharged from liability in connection with said goods;

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Considering that the facts and circumstances attending the said transfer from Pierce to Hanson, the issue to Pierce of credit notes for the amount of the purchase price, the subsequent correspondence between the parties in May, 1920, and plaintiff's acquiescence therein, establish that it was the intention of plaintiff to discharge and release defendant Pierce from the said price, and that novation was effected as the result of said transfer; (C. C., 1171, 1172, 1173; 5 Mignault, Droit Civil 600, and D., 1902, 1, 76);

Considering that plaintiff has failed to establish its claim against the defendant Pierce who has established a release from said claim;

Considering that plaintiff has established its claim to $7607 against the defendant Hanson for the price of said goods, interest and charges to the date of the institution of the action; doth dismiss plaintiff's action against the defendant Richard M. Pierce, with costs; and doth grant acte to plaintiff of its offer to deliver said goods to defendant James S. Hanson, and doth condemn defendant James S. Hanson to pay plaintiff the sum of $7607 with interest from the date of institution of action against him, and with costs.

Judgment accordingly.

PEARCY v. FOSTER.

Ontario Supreme Court, Middleton, J. December 17, 1921.

APPEAL (§ IIC—50)—RULINGS BY MASTER—ORDER OF PROCEEDINGS—CERTIFICATE OF MASTER—QUESTION OF APPEAL.

There is no appeal to a Judge in Court from a ruling of the Master in Ordinary in a mechanic's lien action where the hearing has not been concluded.

AN appeal by the defendant Foster, the owner, from a certificate of the Assistant Master in Ordinary of certain rulings and proceedings made and taken by him in the course of the trial of an action to enforce a mechanic's lien and of the claims of other lienholders, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

R. S. Robertson, K.C., for the appellant.
C. B. Henderson, for the plaintiff.
William Proudfoot, jun., for certain claimants.
John J. Grover, for another lienholder.

A preliminary objection was taken that there was no right of appeal.

Ont.
S.C.

MIDDLETON, J.:—The trial has been opened before the Assistant Master, and he has not yet concluded the hearing. Objection is taken to his mode of proceeding.

There are many liens filed against the property in question, and what is complained of is that the Master is proceeding to hear all evidence tendered by all lienholders without requiring pleadings on the part of the different claimants other than the plaintiff, in whose action the trial is actually taking place.

The Master has adjourned the trial to allow notice to be given to the present owners of the equity of redemption, who were apparently not notified in the first place, and has given certain directions as to the filing of certain statements in order to elucidate the issues which he has tried.

It is also argued that he is about to determine an issue not properly before him.

I think the preliminary objection is well taken. The statute the Mechanics and Wage-Earners Lien Act, sec. 40 (2), provides for an appeal to the Divisional Court (if the amount involved is in excess of that mentioned in sec. 40 (1)); no other right of appeal is contemplated. It is true that the Consolidated Rules are made applicable where there is no other provision, but I do not think that this is sufficient to import into the mechanic's lien proceedings the same right of interlocutory appeal as there may be in ordinary actions.

If a certificate can be obtained as to the Master's ruling at an interlocutory stage, and an appeal can be had from that to a single Judge, a curious state of affairs will arise, for the same question may go directly to a Divisional Court if the parties await the final determination of the matter before the Master.

The appeal is therefore quashed. I think it is inexpedient to make any order as to costs.

Appeal quashed.

Re TORONTO CANADIAN BUILDING Co.

Ontario Supreme Court, Middleton, J. December 19, 1921.

LAND TITLES (§ III—30)—REGISTRATION OF CHARGE—RIGHT TO RETRANSFER—CONDITIONS—UNREGISTERED AGREEMENT REFERRED TO—RULE 28—LAND TITLES ACT, R.S.O. 1914, CH. 126.

A charge under the Land Titles Act, R.S.O. 1914, ch. 126, containing a proviso for retransfer under certain conditions may be registered, as long as the conditions are clearly stated in the transfer itself.

A question which arose in the Land Titles Office, in which

counsel for the applicants was not able to agree with the views of the Master, was informally argued before MIDDLETON, J., under the provisions of the Land Titles Act R.S.O. 1914, ch. 126, relating to appeals from rulings of the Master.

A. J. Thomson, for the applicants.

The Master of Titles appeared in person.

MIDDLETON, J.:—The question involved is of practical importance. Rule 28 (2) of the Rules made under the Land Titles Act provides as follows:—

"A transfer of a charge may contain an agreement that, upon the payment of a sum of money therein named or upon the performance of any condition therein stated, the charge shall be re-transferred to the transferor."

The document tendered for registration was a transfer of a charge containing this clause: "It is agreed by and between the above named transferor and transferee that the above described charge shall be held by the transferee as collateral security for the balance owing by the transferor to the transferee under a certain agreement dated the 1st March, 1913."

The learned Master objects to the registration of this transfer of charge because it purports to embody in it the terms of an unregistered agreement.

Upon the argument before me, the discussion took a somewhat wider scope.

After a conference with my Lord the Chief Justice of the Province, he agrees with me in the conclusion arrived at. I think that the learned Master is right in emphasising the words "therein named" and "therein stated" in the Rule in question, and that a transfer which is not absolute should not be recorded unless the terms of redemption are therein stated or therein named; and I do not think that this requirement of the Rule is satisfied by a reference to an unregistered agreement between the same parties.

I agree with Mr. Thomson in the view that he puts forward, that it is not the intention that the clause quoted should restrict the property-right of the owner of a charge: he may transfer it subject to an agreement for re-transfer upon payment of a definite sum of money therein named, or he may transfer it subject to an agreement for re-transfer "upon the performance of any condition therein stated"; there is nothing to limit the generality of the term used so long as the condition for re-transfer is clearly stated in the transfer itself.

This, I think, covers everything that was argued.

B.C.

C.A.

HAY v. ALLEN.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. January 10, 1922.

ESTOPPEL (§III I—118)—FRAUD ON BANK—NOTE GIVEN TO BANK MANAGER TO MAKE APPEARANCE OF ASSETS—INSOLVENCY OF BANK—ACTION BY BANK COMMISSIONER OF STATE OF WASHINGTON—LIABILITY OF MAKER OF NOTE.

The defendant gave a promissory note to make an appearance of assets, so as to deceive the bank examiner in the state of Washington in connection with the account of a certain company. In an action by the bank commissioner of the State of Washington on the insolvency of the bank to recover on the note, the Court held that the case must be decided by the law of the State of Washington and under that law the defendant was estopped from alleging want of consideration for the note, although the manager of the bank with whom the transaction was made had agreed, at the time the note was given, that he should not be liable.

[See Annotation 21 D.L.R. 13.]

APPEAL by defendant from the trial judgment in an action by the bank commissioner of the State of Washington to recover on a promissory note. Affirmed.

C. W. Craig, K.C., for appellant; *A. Alexander*, for respondent.

MACDONALD, C.J.A. (dissenting):—The transaction between the defendant and Phillips, the manager of the bank, when defendant gave the note and took back the letter that the note was to create no liability, is otherwise so senseless, that the only reasonable inference is, that it was entered into for the purposes of making a false appearance of assets of the bank. The Judge does not, in express terms, find fraud on his part. He evidently took the more charitable view that the plaintiff did not apprehend what he was doing, but apart from the letter and independently of it, it has been proven that the transaction was a voluntary one, that is to say, the defendant received no consideration for the note. It was therefore a *nudum pactum*, and the question is, whether the plaintiff, who holds the office under the laws of the State of Washington known as Bank Commissioner, and who, in pursuance of his duty in that behalf, closed the bank and is administrating its assets for the benefit of those entitled thereto, can maintain this action. The onus is upon him to shew that he is in a more favoured position than an ordinary receiver and he has attempted to satisfy this onus by giving evidence by an expert witness of laws of the state of Washington, which governs the construction of this contract. A witness was also called of the same character by the defendant, but in the last analysis the question is one of estoppel. The

onus was upon the plaintiff to shew that he suffered a loss by reason of the existence of this apparent asset. The only thing which is suggested is that the bank could have been closed at an earlier time than it actually was closed. Estoppel *in pais* arises when it is proved that a representation has been made with the intention that it should be acted upon; that it was false to the knowledge of the party making it, that the party to whom it was made believed it to be true and acted upon it to his prejudice. It is a question of evidence and, therefore, one where the law of the forum applies.

Now the plaintiff himself gives no evidence as to what effect the absence from the assets of the bank of $7,500, the amount remaining unpaid on the note, would have had on the decision to close the bank in September, 1916, when it may be said to have become a matter for discussion. C. S. Moody, who was the bank's examiner and the plaintiff's predecessor in office, under a different title in September, 1916, was called and gave evidence which was finally summed up in these words:—"Q. Now, if the assets had been $7,500 less by reason of that note not having been exhibited to you, will you swear that you would have done anything more than you did do?

A: No, I don't think I would."

It is not suggested that any one ever saw or was aware of the existence of the note other than the plaintiff or his predecessor in office and the bank officials, so that the note did not influence the customers of the bank. In these circumstances, the existence of the note made no difference whatever in the course pursued by the bank examiner or commissioner and did not prejudice either the bank or the bank's creditors or depositors.

The onus of proving all the elements necessary to make a complete estoppel is upon the plaintiff and in this case he has entirely failed to shew any prejudice by reason of the giving of the note. If the note had not been given plaintiff would have been in the same position precisely as he is in today. The element of prejudice necessary to an estoppel is, therefore, wanting.

I would allow the appeal.

GALLIHER, J.A.:—The only point upon which I entertain some doubt is whether one of the essentials necessary to raise estoppel, *viz.*, whether the plaintiff acted upon the representation of the defendant to the prejudice of the creditors, is present here. The evidence upon this point is not as clear as it might be, but I think it can fairly be gathered from same that he did. That

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being the case, and the Judge below having taken that view, I am not prepared to say he is in error. If then, estoppel is rightly set up, and as I think want of consideration is the only substantial defence which defendant had to this action, it follows that the appeal should be dismissed.

I have some regret in coming to this conclusion on account of the unfortunate position the defendant finds himself in by trusting too much in his friends.

McPHILLIPS, J.A.:—In my opinion the judgment of Macdonald, J. should be affirmed and the appeal dismissed.

The case is one which must be decided upon the law of the State of Washington—and the evidence given and the authorities quoted by the witnesses, being members of the Bar of that State, leave no doubt upon my mind that the plaintiff in the action, the Bank Commissioner, has a status very different to that which the Northern Bank and Trust Co. would have had, had it been the plaintiff—not that I am prepared to say that the bank would have necessarily failed if it had been the plaintiff. The evidence discloses, in my opinion, a palpable case of fraud, it is idle contention upon the part of the appellant to put any other complexion upon the transaction, it was the case not only of giving one promissory note, but the renewal of it at a lesser amount, a payment on account being shewn—yet it is contended that throughout there was no liability; the attempt to escape liability being put upon the ground that officers of the bank so contracted and agreed; the very manner of carrying out the transaction indicates the intent to put in the hands of the bank negotiable paper for the use in the way of banking and to be used for the benefit of a customer of the bank. The trial Judge well indicates the state of mind of the defendant when he quotes in his judgment an excerpt from a letter of the defendant to the State bank examiner; it was not the case of no thought of the effect of giving negotiable paper that would by any possible circumstance deceive; but an appreciation that it might deceive. He wrote:—"The only thing that I paused about was the possible fooling of the examiners, and I was assured that they knew the note was for the Issaquah Coal Co."

It is clear that the defendant knew the possible result of things and, nevertheless, took the chances, and now he must be visited with the responsibility he took, he has no possible legal escape. It would seem to me that *Lyons* v. *Benney* (1911), 79 Atl. Rep. 250, and *Pauly* v. *O'Brien* (1895), 69 Fed.

Rep. 460, well indicate the principle of law which controls in the State of Washington and which must be given effect here. Shortly, the Bank Commissioner is not incommoded in the slightest degree by the claimed indemnity from the officers of the bank—it would be a fraud upon the creditors of the bank to so hold, and as I read the law, and as expounded by the legal witnesses, liability is clearly imposed upon the defendant upon the true reading of the controlling cases.

The counsel for the respondent referred to two very recent cases bearing upon the point requiring consideration that would seem to still further accentuate the position that upon the facts of this case there is liability upon the defendant, one case being that of *Moore, State Bank Examiner* v. *Kildall* (1920), 191 Pac. Rep. 394 (C.A.)—a decision of the Supreme Court of Washington, the judgment was that of Mount, J. concurred in by Holcomb, C.J., Fullerton, Tolman and Bridges, JJ.; and quoting from the headnote we find this statement:—"One giving a note as 'live paper' to make an appearance of assets so as to deceive the bank examiner, is estopped on the insolvency of the bank, to allege want of consideration."

The present case is exactly that upon the facts. The defendant gave "live paper" to make an appearance of assets in connection with the account of the Issaquah Coal Co., and appreciated that he was doing this, as is well indicated by the quotation from his letter hereinbefore quoted.

The other case referred to is *Golden* v. *Cervenka* (1917), 116 N.E. Rep. 273, a decision of the Supreme Court of Illinois, and at p. 281, Dunn, J. said:—"Where notes or other securities have been executed to a bank for the purpose of making an appearance of assets, so as to deceive the examiner and enable the bank to continue business although the circumstances may have been such that the bank itself could not have collected the securities, it has been held that the receiver representing the creditors could maintain the action and the makers were estopped upon the insolvency of the Bank to allege want of consideration."

It was admitted by counsel at this Bar that the case had to be determined by the law of the State of Washington, that being the case, I do not find it necessary to further pursue the enquiry or to in detail refer to many of the cases cited. The appeal is in small compass; if there is estoppel, the defendant cannot be heard to say that the promissory note was given without consideration.

Ont.

S.C.

Then as to the claimed indemnity; that is valueless when the action is as here, the action of the Bank Commissioner in the interests of creditors, as held in the *Pauly* case, *supra*, at p. 461: "When parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason as well as pure justice, to leave him bound who has bound himself. It will never do for the courts to hold that the officers of the Bank, by the connivance of a third party, can give to it the semblance of solidity and security, and when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. Undoubtedly, the transaction in question originated with the officers of the bank, but to it the defendant became a willing party."

The present case is one that exactly fits into the above statement of the law, and it would appear to be a statement which has the force of law in the State of Washington.

I do not find it necessary to travel further afield and analyze the matter at any greater length—the case resolves itself into the determination of whether the defendant is or is not liable upon the promissory note sued upon, and that liability must be determined upon the existent law of the State of Washington. One must always feel some hesitancy in determining a question of this nature, where there is any contestation or variance of view upon the part of the witnesses qualified to testify; but applying my mind to that determination, I cannot, in the end, see any real divergence of view when the special facts of this case are weighed. In truth, in my opinion, there can be only one answer and that is, that the defendant is liable; and further, it is a matter of gratification to have the support of learned judgments defining the state of the foreign law, *i.e.*, the law of the State of Washington—which carry out true principles of justice. It would be unconscionable upon the facts of the present case to admit of the defendant escaping liability.

EBERTS, J.A. would dismiss the appeal. *Appeal dismissed.*

RE HODGSON.

Ontario Supreme Court, Middleton, J. July 7, 1921.

HUSBAND AND WIFE (§IIA—52)—BANK ACCOUNT—JOINT CREDIT—LETTER TO BANK—JOINT SIGNATURES—SURVIVORSHIP—DEATH OF HUSBAND—RIGHTS OF WIFE.

The opening of a bank account and the placing of money to the credit of husband and wife is a voluntary bestowment in joint tenancy and on the death of the husband the widow is entitled thereto.

[Review of the authorities.]

Ont.

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RE HODGSON.

Middleton, J.

ORIGINATING motion, by the executors of the will of George L. Hodgson, deceased, for an order determining a question arising in the administration of the estate of the deceased.

R. S. Colter, for the executors..

H. Arrell, for the widow.

S. E. Lindsay, for the adult beneficiaries..

F. W. Harcourt, K.C., for the infants.

MIDDLETON, J.:—The question is as to the right of the widow to $1,100 on deposit at the time of the death of the testator on the 23rd June, 1920.

On the 2nd January, 1914, the testator drew from the bank money standing to his credit and deposited it under the terms of a memorandum addressed to the bank:—

"Please open a deposit account in the name of George L. Hodgson and Christie A. Hodgson or either of them. We authorise you to pay and charge against this account all sums evidenced by cheques drawn on your branch or other vouchers signed by George L. Hodgson and C. A. Hodgson or either of them."

This memorandum was signed by both husband and wife, and the account was opened in the names of both.

Some time after this, on the 20th January, 1917, the testator made his will. He gave all his "property" (which from the context means real and personal property) to his wife for life. He also gave to his wife: "All moneys in the bank or cash on hand subject to the payment by her out of same of all my just debts, funeral and testamentary expenses."

On the death of the wife the "estate" is to be sold and divided among his brothers and sisters and their children. The provision for the wife is in lieu of dower.

The wife claims that the money to the joint credit passed to her by virtue of her right of survivorship. There was no other money left, and if this claim succeeds resort must be had to the farm chattels and possibly to the land to pay debts and funeral and testamentary expenses.

Many cases have arisen as to the effect of joint accounts which at first sight are not easy to reconcile. Some transactions have been regarded as *donationes mortis causâ*—some as gifts *inter vivos*, some as abortive attempts at a testamentary disposition, and some as mere arrangements for the convenience of the owner of the money, conferring no beneficial right upon the other party.

As said by the late much lamented Chancellor in *Weese* v. *Weese* (1916), 37 O.L.R. 649, 651:—

"The requirements to establish a gift *inter vivos* or a gift

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RE HODGSON.

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mortis causâ are distinct from those which go to create a voluntary bestowment in joint tenancy."

There is here no ground for suggesting a gift *inter vivos*, for it is clear that the wife could not become the owner; nor was the transaction in any way *mortis causâ;* so the only thing to be determined is, was the placing of the money in the names of the husband and wife "a voluntary bestowment in joint tenancy?"

The law upon the question is most satisfactorily dealt with in the notes to *Dyer* v. *Dyer* (1788), 2 W. & T. L.C., 8th ed., 820. Where real or personal property is voluntarily placed in the name of the owner and another there will be a resulting trust in favour of the transferor if the other is a stranger, but this presumption is changed where the other is the wife or a child. It is then presumed that the intention was to create a joint tenancy and that the survivor would take beneficially, this being the ordinary incident of the joint interest created. The affection presumed takes the place of a money consideration.

The result arises from the equitable presumption as to the intention of the transferor at the time of the transfer, and this presumption may be rebutted by evidence as to the actual intention—but the intention must be the intention at the time, and any alteration of intention is not material: *Groves* v. *Groves* (1829), 3 Y. & J. 163; *Re Gooch, Gooch* v. *Gooch* (1890), 62 L.T.R. 384.

Fowkes v. *Pascoe* (1875), L.R. 10 Ch. 343, is a leading case. Stock was purchased by the testatrix in the names of herself and the son of her daughter-in-law. The presumption would have been against the idea of a gift, and the Master of the Rolls so held, but on appeal the Court found enough evidence to reverse the finding and held that a gift had been shewn.

In *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328, Sir George Jessel, M.R., whose decision had just been reversed in *Fowkes* v. *Pascoe*, had before him the case of a bank account changed from the name of the husband to the joint names of the husband and wife. He states the result of the decision upon the appeal thus at p. 329.

"The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of the wife or child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So in the case of a stranger, you

may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust."

Applying this to the facts proved before him, he found that there was not a gift but "a mode of conveniently managing the testator's affairs."

Where there is an attempt to cut down the *primâ facie* joint ownership by the introduction of parol evidence an antidote is often found in the words of the document. Here the instrument signed makes no mention of survivorship. Where, as in *Weese* v. *Weese* (*supra*), *Re Ryan* (1900), 32 O.R. 224, and *Schwent* v. *Roetter* (1910), 21 O.L.R. 112, the terms of the deposit provide that the bank may pay on the cheque of the survivor, then it would seem to me that this parol evidence would contradict the terms of the writing and might well be rejected unless it is proved that the document is not intended to define the rights of the parties as between themselves and is a mere memorandum defining the rights and duties of the bank.

The Irish case of *Talbot* v. *Cody* (1875), I.R. 10 Eq. 138, collects all the earlier cases and is a most satisfactory discussion of the law. The New York decision *West* v. *McCullough* (1908), 123 App. Div. 846, determining that a transfer of a bank account from the name of the husband to that of the husband and wife shews, in the absence of evidence to the contrary, an intention to create a right of survivorship in the wife, is also of weight.

Turning to the Ontario cases, *Payne* v. *Marshall* (1889), 18 O.R. 488, was a case in which there was a gift *inter vivos* to the wife, and the deposit to the joint credit as a matter of convenience only, so that the money might be drawn if she became ill. The wife took either as the owner or as the survivor of the joint owners.

Everly v. *Dunkley* (1912), 8 D.L.R. 839, 27 O.L.R. 414, and *Southby* v. *Southby* (1917), 38 D.L.R. 700, 40 O.L.R. 429, are examples of cases where upon parol evidence it was found that the account was an arrangement for convenience only and was not intended as a joint account.

Smith v. *Gosnell* (1918), 43 O.L.R. 123, follows on much the same line, but is complicated by an attempt to make a testamentary provision.

The recent case *Re Reid* (1920), 18 O.W.N. 97, affirmed (1921), 64 D.L.R. 598, is one depending upon the effect to be given to parol evidence.

In the case in hand there is no evidence of any great value save that found in the document itself and the surrounding circumstances.

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Two factors make against the wife's contention. Neither is sufficient to prevail.

The account is not strictly a joint account, for either spouse may draw: Hart's Law of Banking, 2nd ed., p. 238. While this points to a banking arrangement for convenience only, it is not enough to rebut the inference arising from the placing of the funds to the credit of both. If this was not intended to give the wife some right, the result might have been readily accomplished by instructions to the bank to honour the cheque of the wife.

The other fact is that the instructions to the banker were to open the account in the name of both or either. This may only mean to open an account to answer the cheques of both, but the account was in the name of both, and stood that way for many years.

There remains the question whether the will puts the widow to her election. There is not enough in the will to shew that the husband was dealing with his wife's property. *Primâ facie* he speaks of his own. There is nothing in the surrounding circumstances to indicate that he would endeavour to impose the burden of the debts and testamentary expenses on his wife in exoneration of his collateral relatives by compelling her to meet these out of their joint savings.

The costs may come out of the general estate.

PEERS v. S.S. "TYNDAREUS." *

Exchequer Court of Canada, B.C. Admiralty District, Martin, L.J.A. April 26, 1921.

COLLISION (§IA—3)—BETWEEN CRIB AND SHIP—NO NEGLIGENCE ON PART OF COLLIDING VESSEL—FAILURE OF SHIPS TO DISCOVER EACH OTHER ON ACCOUNT OF SMOKE CLOUD—LIGHTS ON CRIB INADEQUATE—LIABILITY.

Where a collision between a ship and a crib in tow of a tug is due to the vessels not discovering each other in time because of an unsuspected obstruction to the view, caused by a low lying smoke cloud, or to the absence of or inadequate lights on the crib, there being no negligence on the part of the colliding ship, an action for damages will be dismissed.

ACTION to recover damages due to collision between the ship "Tyndareus" and the tow of the "Alcedo" off Port Atkinson, B.C.

E. C. Mayers, and *R. M. Maitland*, for plaintiff.

E. A. MacDonald, K.C., and *A. C. DesBrisay*, for defendant.

*To be appealed to the Exchequer Court of Canada.

MARTIN, L.J.A.:—This is a collision action to recover damages against the S.S. "Tyndareus" (length 535 ft.; tonnage *circ*, 14,000; E. B. Francis, master) for the loss of a crib with shingle bolts off Point Atkinson, which was being towed by the tug "Alcedo" (John A. Seeley, master) towards Prospect Bluff, about 1 a.m. on August 15, last. The weather was calm and the night was clear but dark and hazy from smoke in places towards the north shore of English Bay, and the tide at the point of collision was nearly slack on the ebb. The crib which was 90 ft. long, 40 ft. wide, and stood about 15 ft. out of water at the top of the shingle bolts, was being towed about 575-600 ft. astern of the tug, and it is alleged that while the "Alcedo" was proceeding on a course east magnetic at a rate through the water of one knot an hour, a large ship (the "Tyndareus") suddenly appeared on her port quarter about 25 yards from the crib into which she crashed before anything could be done to avoid the collision. No signals were given by either vessel nor did either of them change her course or speed till after the collison. The "Tyndareus" contends she was on a true west course to clear Port Atkinson, *en route* for Union Bay, at a speed of something over 12 knots, and her story in brief is that despite a bright look out, both forward and from the bridge, she saw nothing to indicate the presence of a vessel in dangerous proximity and there was no light near her except one white light, first noticed about half way between Prospect Bluff and Point Atkinson, about half a point on her port bow which she later took to be the stern light of a small steamer heading in a southerly direction, and shewing no other lights, and that this was the apparent state of things for 8 minutes before the collision, when suddenly, just before the impact, the vessel ahead swung round till she shewed her port light forward of the port beam of the "Tyndareus" which passed the vessel but ran into the crib beyond her which could not be seen and had no light upon it. It is obvious that if the two accounts of the courses taken are correct there could have been no collision, and the case, apart from the important question of the adequacy of the light on the crib, really comes down to a question of fact upon very conflicting evidence.

It is a strange case and has occasioned me much difficulty because I am satisfied that each vessel had the proper lights displayed and it seems incredible that if they were on the courses alleged they could not have seen one another in ample time to avoid a collision, unless they were temporarily obscured from

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PEERS v. S.S. "TYNDAREUS."

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view by a low-lying cloud bank of smoke coming imperceptibly from the north shore, smoke from that quarter being spoken of by the signal operator at Prospect Bluff from which elevation of 250 ft. he could easily see the outstanding high light at Point Atkinson and yet vessels at water level might be concealed from one another by such a smoke cloud as aforesaid.

I have no doubt whatever that a bright look-out was kept on the "Tyndareus" to which at least 5 creditable witnesses have testified, nor have I reason to doubt the statement of the mate of the "Alcedo" to the same effect. I am inclined to think, however, that the light on the crib had by some means become extinguished or dislodged so as to become invisible from the "Tyndareus," very shortly before the collision, the evidence, both positive and negative, of several witnesses on the "Tyndareus" that there was no light on the crib at the time of the impact is almost irresistible. But if it had been burning I am not satisfied that it was sufficient for the purpose, having in mind my observations on the point in *Paterson Timber Co.* v. *S.S. "British Columbia"* (1913), 11 D.L.R. 92, 16 Can. Ex. 305, 18 B.C.R. 86. Here the light was only an ordinary cold blast lantern with a visibility of "about two and a half or three miles," which I do not think conveys that reasonable intimation of the true state of affairs that I held was necessary in the *Paterson* case as a matter of good seamanship and safe navigation apart from any regulation on the subject of boom or crib lights. (I pause here for a moment to express my regret that nothing has yet been done to regulate such lights, though the necessity for it was pointed out at p. 90 of said case, and the present action confirms my observations). In the case at bar I cannot help thinking that the accident might well have been avoided if there had been a light on the crib of the same visibility, 5 miles, as that required by art. 2 (a) for "Bright white lights" in general. I can see no good reason why a boom or crib light should not be of the same visibility as a ship's white light; indeed, there is more reason why it should be of greater power, if anything, because of its lying so much nearer the water, with a consequent reduction in visibility.

As to the submission that if the tug is to be considered as an overtaken ship then art. 24 requires the overtaking vessel to "keep out of the way," I am unable to find that in fact the "Tyndareus" was an overtaking vessel, though she thought she was for a time; and then she did in fact clear the tug but ran into the boom the existence and position of which she was un-

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aware for reasons which I am unable to find were negligent on her part. There is in my mind uncertainty about the position of the tug and I am inclined to think she was not where her mate and master have deposed to, but probably drifted laterally with the tide, while going at so slow a speed, in an imperceptible manner. As to the position of the "Tyndareus" I can entertain no doubt in view of the cross-bearing taken just after the collision, viz., one mile south from Point Atkinson.

On the whole case, without attempting to state more than in outline the principle facts which have engaged my prolonged consideration and re-consideration (having found it indeed one of the most perplexing and difficult in all my experience) I can only come to the conclusion that I am unable to find the "Tyndareus" guilty of negligence and therefore the action against her must be dismissed. In so doing I feel bound to say, in the unusual circumstances, that I do not wish it to be understood that I doubt the integrity of the witnesses on behalf of the "Alcedo;" indeed, I am glad to be able to say that I was much and pleasantly impressed by the evident sincerity and good faith of the witnesses on both sides, and I am satisfied that, except as to the boom light, every reasonable precaution was taken that good seamanship suggested, and yet, despite the assistance of able counsel on both sides, who conducted their respective cases exceptionally well, and expeditiously, I am unable to understand how each of these vessels failed to discover the true position of the other in due time, unless it was because of the unsuspected obstruction to the view caused by the low-lying smoke cloud already referred to. It follows therefore that judgment should be entered in favour of the defendant ship and the costs will follow the event as usual.

Judgment accordingly.

CASTLE v. BILSKY.

Ontario Supreme Court, Master, J. June 8, 1921.

RELEASE (§IIB—10)—JUDGMENT AGAINST SEVERAL DEFENDANTS—PART PAYMENT BY TWO—RELEASE—PRESERVATION OF RIGHTS AGAINST OTHERS—PROCEEDINGS ON JUDGMENT.

Where several debtors are bound jointly or jointly and severally by a judgment, a release given to one will discharge the others unless the rights of the creditor are reserved, and it specifically states so in the release.

[*Re E. W. A.*, a debtor, [1901] 2 K.B. 642, followed; *Bogart* v. *Robertson* (1904), 8 O.L.R. 261; (1905), 11 O.L.R. 295, referred to.]

APPEAL by the defendant Mackie from an order of the Master in Chambers.

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CASTLE v. BILSKY.

Masten, J.

B. H. L. Symmes, for the appellant.

W. Heighington, for the plaintiff.

MASTEN, J.:—This is an appeal from the order of the Master in Chambers dated the 5th May, 1921, whereby it was ordered that the plaintiff might issue a writ of execution against the defendant Mackie for the balance remaining due to the plaintiff under a judgment dated the 24th April, 1912.

The amount of the original judgment and costs was $1,277.64, and the balance now alleged to be owing on the said judgment, after deducting therefrom certain payments heretofore made by the defendants Black and Bilsky, amounts to the sum of $566.06 plus interest.

The defence set up by Mackie is that the judgment is a joint and several judgment against all the defendants, and that two of his co-defendants, namely, Samuel Bilsky and John Black, have been released by the plaintiff, and that such releases effect a total discharge of the judgment, so that no claim is now enforceable against him.

Each of the releases contains the following clause: "Reserving all my rights as against the said defendants (other than the said Black or Bilsky) to prosecute the said judgment and collect the balance thereof from the said defendants (other than the said Black or Bilsky) as I may be advised."

In the case of *In re E. W. A., A Debtor*, [1901] 2 K.B. 642, it was held that the rule of law that the release of one of two joint debtors under a joint and several obligation operates as a release of the other, applies as much to a judgment debt as to any other obligation; and the rule has been laid down in many cases which will be found collected in Halsbury's Laws of England, vol. 7, para. 929, note (*n*), that "where several debtors are bound jointly or jointly and severally, a release given to one of them discharges the others, unless the creditor, when granting the release, reserved his rights against them. In that case the release is merely equivalent to a covenant not to sue one of the parties and does not discharge the others."

The rule so stated is in entire conformity with the decision in our own Courts in the case of *Bogart* v. *Robertson* (1904), 8 O.L.R. 261, in the Court below, and in the Court of Appeal (1905), 11 O.L.R. 295. I think that the appellant may have been misled by the statement of Moss, C.J.O., in 11 O.L.R. at p. 299, where he says:—

"From the reports of the cases in the books it appears that the form of plea of discharge by a release to a co-debtor contained the allegation that it was given without the knowledge or consent of the defendant, for instance, *Nicholson* v. *Revill* (1836), 4 Ad.

& El. 675, 111 E.R. 941, and *North* v. *Wakefield* (1849), 13 Q.B. 536, 116 E.R. 1368. That the same form of plea was adopted in *Mercantile Bank of Sydney* v. *Taylor*, [1893] A.C. 317, appears from Lord Watson's statement of the case on p. 318. The absence of knowledge or consent seems to be deemed a material element of the defence."

The real application of the principle there stated is that, even though the release contains no saving clause such as here exists, yet, if it was given with the knowledge and consent of the remaining debtors, they are not discharged; but here, where there is a plain reservation of the right to proceed against the other defendants for the balance of the judgment, and the debtor who is being released accepts the release and pays money upon that understanding, it is plain that he is not injured and that his co-defendants will have a right of contribution against him, if otherwise so entitled, notwithstanding the release given by the plaintiff.

The appeal should be dismissed with costs.

Appeal dismissed.

ERIKSEN BROS. v. THE "MAPLE LEAF"

Exchequer Court of Canada, B.C. Admiralty District, Martin, L.J.A. June 26, 1922.

ADMIRALTY (§II—8)—CANADA SHIPPING ACT R.S.C. 1906 CH. 113 SEC. 191—ARREST OF SHIP FOR NON-PAYMENT OF WAGES—PRACTICE.

It is not necessary under sec. 191 (b) of the Canada Shipping Act R.S.C. 1906 ch. 113, for a plaintiff in the affidavit upon which the warrant for the arrest of a ship for non-payment of wages, to shew such circumstances as would bring the action within one or more of the exceptions reserved by the section. He has the right to prove his status at the trial or any prior time if necessary.

[*Letson* v. *The "Tuladi"* (1912), 4 D.L.R. 157, 17 B.C.R. 170, 15 Can. Ex. 134; *Momsen* v. *The "Aurora"* (1913), 13 D.L.R. 429, at 430, 18 B.C.R. 353, applied.]

MOTION by defendant to dismiss an action for want of jurisdiction. Motion dismissed.

H. B. Robinson, for motion; *E. A. Lucas, contra.*

MARTIN, L.J.A.:—This is a motion by defendant to dismiss this action for want of jurisdiction.

It appears that on May 19 last one Henry Eriksen issued a writ against the defendant ship endorsed as follows:—The plaintiff as ships carpenter on board the ship "Maple Leaf" claims the sum of $97.20 for wages due to him and for his costs.

And the ship was arrested the same day, and next day a writ was issued by the present plaintiffs for $487, for work done in Vancouver for "repairing and equipping" the said vessel.

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An appearance was entered on May 30 to Henry Eriksen's action and it was later discontinued for reasons which do not appear.

It is conceded that unless the ship can legally be said to have been "under arrest," within the meaning of sec. 191 (b) of the Canada Shipping Act, R.S.C. 1906, ch. 113, in the action of Henry Eriksen there is no jurisdiction to entertain this action. It does not appear that Henry Eriksen is one of the plaintiffs in the present case who are indefinitely styled "Eriksen Brothers."

The defendant's counsel submits that an examination of the proceedings will disclose that this Court really had no jurisdiction to entertain the suit of Henry Eriksen because it was under the sum of $200 required by said sec. 191, and that the affidavit upon which the warrant for the arrest issued should have shewn such circumstances as would have brought it within one or more of the exceptions reserved by that section. But it is to be observed that there is nothing in that section which requires the plaintiff to shew at the time the suit is instituted that he is within an exception, and hence it must be assumed that it was intended that he should have the right to prove his status at the trial or any prior time, if necessary. Moreover, the warrant for arrest was issued by the registrar, and I have already held in *Letson* v. *The "Tuladi"* (1912), 4 D.L.R. 157, 17 B.C.R. 170, 15 Can. Ex. 134, that, under our rules, even where particulars are prescribed the registrar may dispense with them, and *a fortiori* where particulars are not prescribed, it is difficult to see upon what principle they should be insisted upon *ab initio*. In *Momsen* v. *The "Aurora"* (1913), 13 D.L.R. 429, at p. 430, 18 B.C.R. 353, I held (under the corresponding sec. 165 of the Imperial Merchants Shipping Act, 1894, ch. 60), that:—

"As soon as a creditor finds a ship or the proceeds thereof are under arrest of the Court in pursuance of its valid process issued to the marshal in that behalf, then he may without further ado bring his action for, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the litigant to shew to this Court now that the original action under which the ship was arrested must eventually succeed."

Here there is nothing before me to warrant me in holding that the arrest under Henry Eriksen's suit was not by valid process. Of course, there might be circumstances so strong as would

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justify the Court in saying that the action under which the arrest was made was only a sham proceeding, and, therefore, could be disregarded, but the facts here would not justify me in coming to such a conclusion.

There is nothing in the *Evangelistria* (1876), 3 Asp. M.L.C. 264, which is contrary to this view, because it merely held that the arrest should be *de jure*, and it is in that light that the arrest in question here must be regarded.

With respect to *Ex parte Andrews* (1897), 34 N.B.R. 315, it is to be observed, first, that that is a decision on a section of a very different character relating to summary actions in certain specified Courts and it would be very unsafe to deduce from it any general principle relating to ordinary actions for wages in this Court: second, that the statute there required as a condition precedent to the exercise of summary jurisdiction that a complaint on oath should be laid and it is only legally to be expected that such a complaint should *ab initio* disclose all facts necessary to confer jurisdiction, but there is no condition of that kind imposed by the statute in question here; and third, that the rule for *certiorari* was granted as arising out of the summary proceeding itself and not as an indirect attack in another action as here. That case should obviously be restricted to the statute and facts upon which it was decided.

I am, therefore, of opinion that the motion should be dismissed with costs to the plaintiff in any event.

Motion dismissed.

PIGEON RIVER LUMBER Co. v. PULPWOOD Co. AND RUSSELL TIMBER CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. June 1½, 1921.

LOGS AND LOGGING (§II—3)—LOGS FLOATING ON STREAM—OBSTRUCTION—DRIVE BEING CONDUCTED—RIGHT OF USER—DAMAGES—ACTION—SAW LOGS DRIVING ACT R.S.O. 1914 CH. 131 SEC. 3—REMEDY BY ARBITRATION.

The question of damages owing to the obstruction of a floatable stream by logs, when the drive is unfinished must be settled by arbitration under the provisions of sec. 3 of the Saw Logs Driving Act.

[*Cockburn* v. *Imperial Lumber Co.* (1899), 30 Can. S.C.R. 80, distinguished.]

APPEAL from the judgment of Lennox, J. in an action to recover damages caused by the defendants obstructing the Black Sturgeon river, a floatable tributory of Lake Superior, and pre-

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venting the plaintiff company from floating pulpwood and other timber thereon. Reversed.

The judgment appealed from was as follows:—

It was objected that the jurisdiction of the Court was ousted by statute. I have not changed the opinion, expressed tentatively at the trial, that this Court has jurisdiction to entertain the action notwithstanding the statute.

On the 28th April, 1919, the plaintiff company notified the defendants of its need and desire to use this waterway during the spring freshets, and requested the defendants to discontinue the use of the mouth of this river as a storage-basin for their pulpwood, ties and lumber, and permit the plaintiff company to have access to Lake Superior. The defendants undertook to accede to the plaintiff company's request, and probably at the time intended to act reasonably, but in the end applied themselves to the removal of other pulpwood; and, owing to this and other causes, all going to a consideration of their own interests and gains and to a disregard of the convenience and interest of the plaintiff company, continued to monopolise and obstruct the river and prevent the plaintiff company from using it—as that company had a right to do—for many months.

It was suggested that the plaintiff company was not prompt in availing itself of the spring freshets, and that all the delay was not occasioned by the defendants. I have not overlooked the evidence upon this question, but a defendant who appropriates to himself the exclusive use of a highway, to the injury of others having equal rights, must not rely upon refined arguments and the distant possibility that some loss might have resulted to the persons whose rights he ignored, even if the wrongdoer had complied with the laws of navigation and the user of rivers and streams. While the defendants continued to block the river for, it is said, 5 miles up-stream, and as they had done in 1918 with part of the same cut, there was no encouragement to the plaintiff company to be alert in getting its lumber towards the mouth of a blocked river, holding gangs of men in idleness for an uncertain period of time, and running the risk of a "mix-up" of its lumber with that of the defendants.

It was faintly suggested that the delay was in some way owing to the equinoxes or the dangers of the equinoctial storms. I cannot see any foundation for this suggestion. The time marked as the culmination of the defendants' wrongdoing was about as distant from either equinox as it could be. It was repeatedly stated that on some occasion a vessel of the defendants, or of some one else, was lost in a gale in the month of June.

Well this proves nothing: vessels have been lost in every month of navigation for as long as Lake Superior has been used as a great waterway. It was an easy thing, if they desired the record to contain it, for the defendants to obtain from the public records and put in evidence the history of Lake Superior and its gales and disasters for the last quarter of a century, and to have established, if the facts will establish it, a basis for this hazy suggestion of impossibility or danger.

The tug employed by the defendants was, within its class, an efficient little craft. The bay at the mouth of Black Sturgeon river, where the defendants' lumber was rafted, is a peculiarly boisterous and treacherous sheet of water, and it is especially difficult and hazardous work to take a raft from it out into the open lake—even if the raft is of a reasonable size. The defendants, in order to save expenditure of their own money, and without regard to the rights of the plaintiffs and others having occasion to use Black Sturgeon river, collected an enormous raft at the mouth of the river to be taken by a single haul across the lake to Appleton, in the State of Wisconsin, but they wholly neglected to make proper provision for getting the raft from the mouth of the river and out of the bay into the open waters of the lake. To do this required an exceptionally powerful tug—possibly more powerful than any on the lakes—or two tugs of the drawing and holding power of the one employed, at least. The result was what almost any one—certainly any one familiar with this class of work—would know was likely to happen: the tug was not able to pull the raft out of the bay, and as the winds began to play upon the raft the raft pulled the tug back in the direction of its drift instead. Of course, if the winds had blown towards the tug and helped it, this portion of the delay complained of might have been eliminated, but this was not to be counted on—the wind came from a quarter that experience shews it might be expected to come from any day in that section of the region of Thunder Bay.

The plaintiff company claims very large damages. I think its claim is somewhat extravagant. It has sustained very serious inconvenience and heavy financial loss through the wrongful acts and omissions of the defendants. There will be judgment for $6,500, with costs.

I. F. Hellmuth, K.C., for appellants.

H. J. Scott, K.C., for respondent.

FERGUSON, J.A.:—Appeal by the defendants from a judgment of Lennox, J., awarding the plaintiff $6,500 damages.

The plaintiff and defendants are lumbermen, operating timber limits on the head waters of the Black Sturgeon river. Both

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parties float their timber down the river to Lake Superior, and there raft it and tow it across the lake.

The plaintiff alleges that the defendants did not remove from the mouth of the river all or part of their drive for the season of 1918, but, wrongfully and to the injury of the plaintiff, in the fall of 1918 boomed their drive in the mouth of the river, and did not remove it until late in the summer of 1919; that, by reason of the defendants' said wrongful blocking of the river, the plaintiff was prevented from floating its 1919 log-drive to Lake Superior, and there rafting and towing it across the lake.

The plaintiff pleads that the defendants made an unreasonable and unlawful use of the river, and did so in breach of the plaintiff's common law and statutory right to use the said river to float its drive.

Mr. Hellmuth argued that, while not so expressly worded, the plaintiff's claim against the defendants was that they did not, as required by sec. 3 of the Saw Logs Driving Act, R.S.O. 1914, ch. 131, run and drive their logs so as not unnecessarily to delay or hinder the removal, floating, running, or driving of other logs, or unnecessarily obstruct the floating or navigation of the waters of the Black Sturgeon river; that sec. 16 of the Saw Logs Driving Act requires that such claim shall be submitted to arbitration—and he referred to *Cockburn v. Imperial Lumber Co.* (1898), 26 A.R. (Ont.) 19; (1899), 30 Can. S.C.R. 80, and *Central Contracting Co.* v. *Russell Timber Co.* (1919), 15 O.W.N. 415, and the evidence at pp. 48, 62, 63, 89, 93, 94, 300, and 305, as supporting his contention. This defence was pleaded and argued at the trial.

Mr. Scott, for the plaintiff, respondent, contended:—

(*a*) That the Black Sturgeon river was in its natural state a navigable river, and that the blocking of the river was the blocking of a highway which the plaintiff had a common law right to use; that the acts of the defendants were an infringement on the plaintiff's common law right, by reason of which the plaintiff suffered special damage, for which it could sue.

(*b*) That, even if the evidence does not establish that the Black Sturgeon river is a navigable river, yet by sec. 3 of the Rivers and Streams Act, R.S.O. 1914, ch. 130, the plaintiff was given the right to float and transmit timber in and upon the waters of the said river, and that the acts of the defendants complained of were a breach of the rights conferred upon the plaintiff by the Rivers and Streams Act, entitling the plaintiff to sue.

(*c*) That sec. 16 of the Saw Logs Driving Act does not apply to claims for damages for the infringement of the plaintiff's common law rights or its rights under the Rivers and Streams

Act, but applies only to claims for rights conferred by the Saw Logs Driving Act, such as compensation for breaking jams, opening booths, sorting logs, which rights are expressly conferred by that statute, for the purpose of facilitating the lumbering operations of the different persons or companies operating on the same river or stream.

(*d*) That the defendants' drive of the river had finished, and the logs were not being floated within the meaning of the Saw Logs Driving Act, but were, on the contrary, being stored in the mouth of the river, thereby blocking navigation and interfering with the plaintiff's rights of floatage, and that for these reasons the claim of the plaintiff cannot be said to arise under or be governed by the Saw Logs Driving Act, but, on the contrary, arises at common law, or under sec. 2 of the Rivers and Streams Act.

These contentions were raised by the pleadings, and fully argued at the trial, but the learned trial Judge, without stating his reasons therefor, was of opinion that the Court had jurisdiction, and, having heard the evidence, awarded the plaintiff judgment.

If the defendants' objection to the jurisdiction of the Court be well-founded, no good purpose will be served by our expressing an opinion on the merits.

There is practically no evidence on the question as to whether or not this Black Sturgeon river is or is not by nature a navigable river. See *Maclaren* v. *Attorney-General for Quebec*, 15 D.L.R. 855, 20 Rev. Leg. 248, [1914] A.C. 258, at p. 278; but it seems to me unimportant whether the plaintiff's cause of action is founded on an infringement of its common law right of navigation, distinguished from the right to float logs, as conferred upon it by the Rivers and Streams Act (its right under the Act is clear—*Caldwell* v. *McLaren* (1884), 9 App. Cas. 392), for it seems to me the preliminary questions are:—

(1) Does sec. 16 of the Saw Logs Driving Act apply to a claim arising out of a dispute between lumbermen operating on the same stream, as to whether one of them has or has not, in floating his log-drive, made an unreasonable use of the river to the injury and damage of the other?

(2) Were the defendants' logs, in the circumstances adduced in evidence, being "floated" within the meaning of the Saw Logs Driving Act, or had the drive ended, so that the defendants in holding the logs at the mouth of the river could be said to be doing something not authorised by the Saw Logs Driving Act?

Assuming for the moment that the defendants' logs were

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being floated within the meaning of the Saw Logs Driving Act, and that a claim for an abuse of the floating privileges conferred by the Rivers and Streams Act may be litigated, it would seem to follow that sec. 16 was intended to apply only to claims for damages or compensation under the rights conferred upon them by secs. 4, 5, and 13 of the Saw Logs Driving Act.

Section 16 reads:—

"All claims, disputes and differences arising under this Act shall be determined by arbitration and not by action."

Reading the section by itself, it would appear that the claims that are to be arbitrated are claims that arise under the Act, and out of the rights conferred by the Act itself, and not claims founded on rights arising outside of the Act; but it is argued by the appellants that the Supreme Court of Canada in *Cockburn* v. *Imperial Lumber Co.* held that the section applied to a claim for damages for delay, where the claim is founded upon an allegation that one of two lumbermen did not drive his logs so as not unnecessarily to hinder the other, and that it is not now open to this Court to put any other construction upon the Act.

I have carefully perused and considered the opinions in the *Cockburn* case, and I think that both Mr. Justice Gwynne and Mr. Justice King, in whose opinions all the other members of the Court concur, express the opinion that if the damages claimed were suffered by the plaintiffs by reason of the manner in which the defendants assumed to act, in the assertion of the authority of the statute, the Saw-Logs Driving Act, then the claim would be in reference to a dispute and difference arising under the Saw Logs Driving Act, and a claim recoverable by arbitration under sec. 16 of the Act; and it would appear to follow that, if and in so far as the plaintiff's claim is based upon the defendants' failure to comply with the provisions of the Saw-Logs Driving Act, i.e., to drive their logs in manner provided by sec. 3, it is a claim arising under the Act, and determinable by arbitration; but, if the claim is based upon an act done outside the floating and driving of the logs, that is, blocking the river after the floating and driving was over, then the claim does not arise out of failure to float and drive properly, and does not arise under the Saw Logs Driving Act, but arises and is founded on an unlawful interference with the rights conferred by sec. 3 of the Rivers and Streams Act, and for the enforcement of which no special tribunal has been named, and consequently is a claim enforceable by action.

That brings us to the question: Had the defendants' drive and floating of logs on the Sturgeon river ended when the logs reached a point at or near the mouth of the river where they

were held by a boom across the mouth, until such time as the defendants let, drove, or dragged them out for the purpose of gathering them into rafts and towing them across the lake? It is clear that the logs had not reached the end of their journey, that the defendants intended to float them over the remaining few miles of the river journey, and asserted, and before us urged, that they were just as much entitled to float the logs on and over the last few miles or yards of the stream as they were over any other part of the river, that they might have halted or stayed the drive at any point on the river, and that consequently the drive of the river could not be said to have finished till the logs were floated or taken out of the waters thereof.

I am of opinion that the evidence is that the logs of the defendants were boomed and held at or near the mouth of the river, in the course of the driving of the river; that the drive had not finished; and that consequently the dispute was as to whether what the defendants did was or was not an unreasonable thing to do in driving the river, and as to what, if any, injury and damage the plaintiff suffered; and that the plaintiff's claim is one arising under the Saw Logs Driving Act, which, under sec. 16, must be submitted to arbitration.

I would allow the appeal.

MACLAREN and HODGINS, JJ.A., agreed with FERGUSON, J.A.

MAGEE, J.A.:—Whether the defendants had completed their drive or not, it appears clear that the plaintiff intended to carry its drive past where the defendants' logs were lying. Section 3 of the Saw Logs Driving Act, R.S.O. 1914, ch. 131, enacts that any person putting logs into any water for the purpose of floating the same in, upon, or down such water, shall run and drive the same so as not unnecessarily to delay or hinder the floating, running, or driving of other logs, or obstruct the floating or navigation of the river. The defendants had put logs into the water for the purpose of floating the same in this river, and it was their duty under this Act to run and drive them so as not to hinder the plaintiff, whose drive was unfinished. Section 3 seems to me plainly to apply. If so, then sec. 16 prevents an action and requires arbitration; and it would follow that the appeal should be allowed.

MEREDITH, C.J.O. (after briefly stating the nature of the action, dissenting):—The principal question discussed on the argument was that raised by the appellants, that no action lies, but that the respondent's remedy was by arbitration as provided by sec. 16 of the Saw Logs Driving Act, R.S.O. 1914, ch. 131, which provides that "all claims, disputes and differences arising

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under this Act shall be determined by arbitration and not by action."

The right to float the timber of the respondent is not conferred by that Act, but by R.S.O. 1914, ch. 130, and the appellants had doubtless a similar right as to their timber.

The argument on the part of the appellants is that, inasmuch as what is complained of is a breach of their duty to "run and drive" their logs "so as not unnecessarily to delay or hinder the removal, floating, running or driving of other logs, or unnecessarily to obstruct the floating or navigation of such water" (sec. 3), the claim is one coming within the provisions of sec. 16 of the Saw Logs Driving Act.

The view of the learned trial Judge was, that sec. 16 does not apply; that what the appellants did was, instead of continuing their drive, to use the mouth of the river as a storage-basin for their pulpwood, ties and lumber—using it in that way from August, 1918, to September, 1919.

I agree with the view of my brother Lennox. Granting that, had the appellants boomed their timber in the river on account of the difficulty of floating it into Lake Superior, they would not have invaded the respondent's rights, and granting also that a claim for unreasonable delay is not recoverable by action, what the appellants did was a very different thing from this: for their own convenience and under no compulsion from the elements, they used the mouth of the river and the river for about 5 miles up-stream as a basin in which to store their timber for the period I have mentioned, thereby preventing the respondent from exercising its right; that, I think, is a very different thing from what sec. 3 of the Saw Logs Driving Act was designed to prevent. To illustrate—by an extreme case, it is true—had the appellants deliberately determined never to continue the drive, but to leave the timber to rot where it lay, can there be any reasonable doubt that an action would lie by one who suffered from what they had done, and that he would not be driven to proceed to arbitration? If it be answered that in the supposed case the drive is at an end, my reply is that what the appellants did was to discontinue the drive, intending to resume it when it suited their convenience to do so.

I see no reason for differing from my learned brother's estimate as to the damages, and would dismiss the appeal with costs.

Appeal allowed.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., and White and Grimmer, JJ. February 24, 1922.

LANDLORD AND TENANT (§IIID—95)—RENT OF PREMISES—CONTRACT TO REMOVE GOODS—FAILURE—REBATE OF RENT—USE AND OCCUPATION IN LAW—IMPLIED CONTRACT.

A contract to pay a fair compensation for use and occupation is implied by law from the fact that lands belonging to the plaintiff have been occupied by the defendant by the plaintiff's permission. The amount of the compensation depends upon the value of the premises and the duration of the occupation.

APPEAL by defendant from a verdict of the trial Judge in an action to recover from the defendant for the use and occupation of certain premises. Affirmed.

G. H. V. Belyea, K.C., for defendant, supports appeal.

H. A. Powell, K.C., *contra*.

The judgment of the Court was delivered by

GRIMMER, J.:—This is an appeal from a judgment entered in the Kings County Court against the defendant for $44.40 in the month of July last. The plaintiff rented a building from the defendant for 11 months at the rate of $200 per year. When possession was given the plaintiff there was a quantity of lumber and other goods on the second floor practically occupying the full space. These, the defendant agreed to remove in a few days, but although importuned and required from time to time by the plaintiff to take them away allowed them to remain there for 8 months, whereby the plaintiff lost the use of that part of the building. The action was brought to recover from the defendant for the use and occupation of the space mentioned. The jury found for the plaintiff, and judgment was entered as above. The trial Judge left five questions to the jury, which with their answers are as follows:—"1. Did the plaintiff rent from the defendant both up and downstairs flats of this building in question, that is, in the arrangement that was made between them was it understood that Heaton was to have both places? A. Yes. 2. Did the plaintiff ever enter into or get possession of the upstairs flat? A. Yes. 3. Were the goods stored upstairs the goods of Joseph Roderick or of Fred Roderick? A. The goods belonged to both men. 4. Was it understood between the plaintiff and Fred Roderick when the building was rented that the goods were to remain there without charge? A. No. 5. Was there an implied contract that the defendant would pay a reasonable compensation for the use of the upstairs? A. Yes."

On the question of damages, the jury replied as follows: "We

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believe that Roderick should return one-third of the monthly rental while the goods remained upstairs."

At the conclusion of the trial, counsel for the defendant moved to enter a verdict for the defendant, which after argument was refused, and later on he obtained from the trial Judge an order requiring the plaintiff to show cause why a verdict should not be entered for the defendant, or why a new trial should not be granted, which in due course after argument was dismissed.

The defendant now appeals upon a number of grounds, the first of which, it seems to me, is the only one of any importance, and is as follows:—

"The learned Judge was in error in not ordering judgment entered for the defendant non obstante veredicto, the facts in evidence not showing use and occupation in law of premises by the defendant belonging to the plaintiff for which it was intended rent should be paid by the one and received by the other or facts from which the same could be implied."

The trial Judge was of the opinion there was evidence upon which the jury could base the findings they made, and having carefully read and examined the same, I am of the opinion he was quite correct in so holding. I am also of the opinion the action for use and occupation may properly be maintained under circumstances such as apparently existed in this case.

In *Churchward* v. *Ford* (1857), 2 H. & N. 446, 157 E.R. 184, 26 L.J. (Ex.) 354, 5 W.R. 831, it was held by Pollock, C.B., at pp. 448-449, that—"There are authorities to the effect that, where nothing appears except that one person is entitled to land which another has occupied and enjoyed, an action for use and occupation may be maintained because a contract may be implied."

See *Hellier* v. *Silleox* (1850), 19 L.J. (Q.B.) 295; *Leigh* v. *Dickeson* (1883), 12 Q.B.D. 194, 53 L.J. (Q.B.) 120.

Gibson v. *Kirk* (1841), 1 Q.B. 850, 113 E.R. 1357, 10 L.J. (Q.B.) 297, and *Sloper* v. *Saunders* (1860), 29 L.J. (Ex.) 275, are authorities holding that a contract to pay a fair compensation for use and occupation is implied by law from the facts that lands, etc., belonging to the plaintiff have been occupied by the defendant by the plaintiff's permission. The amount of compensation in such cases depends upon the value of the premises and on the duration of the occupation. As soon as the occupation ceases the implied contract ceases and as no express time is limited for payment the compensation accrues from day to day. *Hellier* v.

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Sillcox, supra, and *Levy* v. *Lewis* (1861), 9 C.B. (N.S.) 872, 142 E.R. 343, 30 L.J. (C.P.) 141, 9 W.R. 388, hold that the mere fact of the plaintiff's ownership of the land, etc., and of the occupation by the defendant is sufficient prima facie evidence of a contract to support the action of use and occupation.

Tew v. *Jones* (1844), 13 M. & W. 12, 153 E.R. 5, 14, L.J. (Ex.) 94, it was held there must be some evidence of a holding by permission of the plaintiff. The evidence clearly establishes that the goods of the defendant were left in the building under and by the permission of the plaintiff, who upon one occasion, at least, was allowed a discount upon his monthly rent by the defendant in consideration of the goods so remaining on the premises, thus bringing the case well within the purview of the authorities above referred to.

I am, therefore, of the opinion as stated the action was properly brought and that there was sufficient evidence to justify the findings of the jury, and the appeal should be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. December 16, 1921.

BRIBERY (§ I—4)—ALLEGED BRIBERY—PEACE OFFICER—CRIMINAL CODE, SEC. 157 (b)—INTERPRETATION—INTENT.

A person cannot be said to corruptly or otherwise bribe a peace officer so as to interfere with the administration of justice unless he has the knowledge that such officer is a peace officer, and knowing so intends to bribe him.

[*The King* v. *Kalick* (1920), 53 D.L.R. 586, 33 Can. Cr. Cas. 274, 13 S.L.R. 372, affirmed (1920), 55 D.L.R. 104, 61 Can. S.C.R. 175, 35 Can. Cr. Cas. 159, distinguished; *Reg* v. *Prince* (1875), L.R. 2 C.C.R. 154, *The Queen* v. *Tolson* (1889), 23 Q.B.D. 168, referred to.]

CASE stated by Logie, J., on a trial with a jury on an indictment for corruptly offering money to a peace officer, with intent to interfere corruptly with the due administration of justice.

The question asked in the stated case was this: "Was I right in law when I stated to the jury as follows: 'It matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned?' "

Section 157 of the Criminal Code is as follows:—

157. Every one is guilty of an indictable offence and liable to 14 years' imprisonment who,—

(*a*) being a justice, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, corruptly accepts or obtains, or agrees to accept or

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attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place, or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime; or

(*b*) corruptly gives or offers to any officer aforesaid any such bribe as aforesaid with any such intent.

H. J. Scott, K.C., and *R. L. Brackin*, K.C., for the prisoner.

Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.C.P.:—The one question expressly asked in this case is: whether knowledge that the person, said to have been offered a bribe, was a peace officer, is an essential element in the crime of which the prisoner has been convicted.

The offence is expressed in the Criminal Code thus: corruptly offers, to a justice, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, any money or valuable consideration, office, place, or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime.

The gravity of the offence is in the attempt to bribe such an officer, in this case a constable, who is, under sec. 2 (26) of the Criminal Code, a "peace officer." There is no offence under the Criminal Code unless the person offered the bribe is a police, peace officer, or other officer, employed as before mentioned, even though the intention of the briber be all, and even more, than that expressed in the enactment; and this prosecution is based altogether upon that enactment, sec. 157 of the Criminal Code.

There cannot be corruption under this enactment unless there be such an officer; and there can be no intention to corrupt such an officer unless the person to whom the offer of a bribe is made is known or believed to be such an officer so employed as before mentioned.

The essence of the crime in this case must be an attempt to facilitate the commission of a crime by corrupting a peace officer whose duty it was to prevent it.

All that being so, it is impossible for me to consider that the prisoner is guilty though he did not know that the person to whom money is said to have been offered was a peace officer or in any way charged with the prevention or detection of crime.

As every one is to be considered innocent until proved to be guilty, it must be taken, for the purposes of this appeal, that the

prisoner did not know that Allen was a peace officer, the trial Judge having prevented him going to the jury on that question.

That there must be same *mens rea*, some evil intention, in such a case as this—as there must generally in crimes—should be indisputable. There must be, as the enactment expressly provides, among other things, an intention to facilitate the commission of a crime; and, if there must be an evil mind in that respect, why not the graver one of corrupting those in office for the prosecution and detection of crime, who should, far above their fellowmen, generally be uncorrupted and uncorruptible in such things? And, as the giving or offering of the bribe must be with a view to misconduct by the officer as such, how can there be any offence without knowing that he is such an officer? The cases to which we were referred do not help us much, if at all, in determining this case.

But the very question we have to consider has been determined in the State Courts of several of the United States of America; and the rule invariably laid down there is said to be that: knowledge by the accused of the official character of the person to whom the bribe is offered is an essential element of bribery; *Colson* v. *The State* (1916), 71 So. Repr. 277; *Commonwealth* v. *Bailey* (1904), 82 S. W. Repr. 299; *The State* v. *Howard* (1896), 66 Minn. 309; *Pettiti* v. *The State* (1912), 121 Pac. Repr. 278; and I am quite in accord with the Judges who decided those cases in the conclusion they reached, that knowledge is essential in such a case as this.

If that were not so, then the prisoner would be liable to 14 years' imprisonment, though both he and Allen really believed that the latter was not a peace officer, and though Allen had expressed his willingness to make oath that he was not and never had been; and though the prisoner's story, that he believed Allen to be only a servant of the express company, to which servants it was usual to give money to expedite the delivery of goods, be true.

And, if that be not so, then the word "corruptly," most prominently employed by Parliament in expressly creating the offence of which the prisoner has been convicted, is superfluous, useless, and misleading; "gives or offers to any officer aforesaid any such bribe as aforesaaid with any such intent" amply covered the crime.

The officer is corrupted when he accepts a bribe; the briber is corrupted when he attempts thus to pervert justice. It is corruption of the mind, not of the fingers, to which the word "corruptly" is applicable.

And I feel bound to add that the trial, as disclosed in the re-

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porter's notes of it, seems to me to have been quite unsatisfactory. There is no evidence that the prisoner did, or intended to do, anything unlawful with the liquor, or in regard to it; there is no evidence that it should have been unlawful if he had received it from the express company; if the purpose were, as it was sworn to have been, to export it, that was lawful. But, had it been unlawful, it could not have been a crime, and facilitation must be of the commission of a "crime" to bring the case within sec. 157. Nothing like a "crime" has been, or can be, suggested.

Then the punishment is an extraordinarily severe one; greater than that generally imposed upon those who commit grave crimes of a violent or vicious character; and that in a case in which it must now be taken that the offence was committed quite unwittingly.

I would answer the question asked, "No," and would direct a new trial, admitting the prisoner to bail in the meanwhile.

LATCHFORD, J.:—The general principle applicable to such questions as that submitted in the stated case is that, unless the Legislature has indicated a contrary intention, the infliction of penalties for breach of a statute is to be presumed to be confined to cases where the offender has the *mens rea*: Maxwell on the Interpretation of Statutes, 6th ed., p. 188.

In *Cundy* v. *Le Cocq* (1884), 13 Q.B.D. 207, a publican was convicted under the Licensing Act of 1872, which, by sec. 13, makes it an offence for any licensed person to sell intoxicating liquor to any drunken person. It was proved upon the trial that neither the accused nor his servants had noticed that the person served was drunk; that while on the licensed premises the person to whom the liquor was sold had been quiet in his demeanour, and had done nothing to indicate inebriety; and that there were no apparent indications of intoxication. The magistrate held that the offence was complete on proof that a sale had taken place, and that the person served was drunk, and deemed it unnecessary to determine whether there had been on the part of the accused and his servants a knowledge or means of knowledge of the drunkenness. He accordingly convicted the publican. The question stated for the opinion of the Court was whether the construction placed by the magistrate on the section was right, or whether in arriving at his decision it was necessary for him to consider whether or not the appellant or his servants knew or had the means of knowing, or whether they could with ordinary care have detected, that the person served was drunk. Sir James Fitzjames Stephen, in delivering the judgment of the Court, said (p. 209): "I am of opinion that the words of the section amount to an absolute prohibition of the

sale of liquor to a drunken person, and that the existence of a *bonâ fide* mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed."

That conclusion was based on the general scope of the Act, which was for the repression of drunkenness, and on a comparison of the particular section with other prohibitory sections in which the word "knowingly" was used.

The latter consideration is not, however, what chiefly determined the mind of the learned Judge. He makes only the passing reference to it which I have alluded to, and proceeds (pp. 209, 210): "The clause we are considering says nothing about the knowledge of the state of the person served. I believe the reason for making this prohibition absolute was that there must be a great temptation to a publican to sell liquor without regard to the sobriety of the customer, and it was thought right to put upon the publican the responsibility of determining whether his customer is sober. Against this view we have had quoted the maxim that in every criminal offence there must be a guilty mind; but I do not think the maxim has so wide an application as it is sometimes considered to have."

Then, after referring to *Reg.* v. *Prince* (1875), L.R. 2 C.C.R. 154, and *Regina* v. *Bishop* (1880), 5 Q.B.D. 259, he continues (p. 210): "The substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created."

The object of the section of the Criminal Code under which the appellant was convicted was to prohibit and punish any person who "corruptly gives or offers to a peace officer employed in any capacity for the prosecution of offenders any such bribe as money with intent to interfere corruptly with the due administration of justice.

Kalick v. *The King* (1920), 55 D.L.R. 104, 61 Can. S.C.R. 175, 35 Can. Cr. Cas. 159, decides that an attempt to bribe a peace officer not to proceed against the party offering it, for breach of a statute analogous to the Ontario Temperance Act, manifests an intention to interfere corruptly with the due administration of justice within the meaning of the section of the Code under which the appellant was prosecuted.

In that case there was no question of the knowledge of the accused that the person bribed was a peace officer.

Here the evidence (incredible as it may seem) is that Smith did not know the person to whom he offered the bribe of $2,000

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was a peace officer. The question for decision is whether the learned trial Judge was right in telling the jury that the prisoner's want of knowledge was immaterial. I would agree in his opinion but for the use in sec. 157 (*b*) of the introductory word "corruptly" and the inclusion, by reference to para. (*a*), of the words "with the intent to interfere corruptly."

I am quite unable to see how any person can be said corruptly or otherwise to bribe a peace officer with the corrupt intent of interfering with the administration of justice unless he knows that the person whom he bribes is in fact a peace officer. Intent is an act or state of the mind resulting from a conscious exercise of the will. Necessarily it implies knowledge.

Hence I think the question submitted must be answered in the negative. There should be a new trial of the appellant.

MIDDLETON, J.:—The mental element essential to different crimes differs very widely. In the case of common law crimes it has been defined by an eminent author as a general intention to break the laws which prohibit the criminal act in question: Stroud's Mens Rea, pp. 16, 20. Where the offence is statutory, the same author, in a recent article in 37 L.Q.R. 488, speaks of the *mens* as an intention to do the act forbidden by the statute.

There has been much confusion of thought resulting from the failure to distinguish that state of mind which constitutes a defence to a charge of crime at common law from the absence of the specific intent made essential to a particular crime by the statute creating the offence.

The distinction is clearly drawn in the judgment of the Privy Council in *Bank of New South Wales* v. *Piper*, [1897] A.C. 383, where it is first pointed out (p. 389) that it is competent for a Legislature "to define a crime in such a way as to make the existence of any state of mind of the perpetrator immaterial," in which case, if the offence of which the offender is convicted is a venial one, the Judge in the exercise of his discretion may award nominal punishment only. It is then said (pp. 389, 390): "It was strongly urged . . . . that in order to the constitution of a crime, whether common law or statutory, there must be mens rea on the part of the accused, and that he may avoid conviction by shewing that such mens did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of mens rea in the accused, are questions entirely different, and depend upon different considerations. In cases in which the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is

not proved. On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent."

To much the same effect is the statement of Cave, J., in *Regina* v. *Tolson* (1889), 23 Q.B.D. 168, 181, where he says:—

"At common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the prisoner is indicted an innocent act has always been held to be a good defence. . . . So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication."

This statement, if taken to apply to all statutory offences, is rejected by the Court of Criminal Appeal in the recent case of *Rex* v. *Wheat*, [1921] 2 K.B. 119. This was a case of bigamy, where the accused on reasonable grounds and in good faith believed that he had been validly divorced from his first wife, when in fact he had not.

The result of this decision is in effect to adopt the view of Wills, J., in *Regina* v. *Tolson*, 23 Q.B.D. at p. 173, that most statutes creating offences "are properly constructed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril."

The tendency of the more modern decisions, as is pointed out by Mr. Justice Stephen in *Cundy* v. *Le Cocq*, 13 Q.B.D. 207, is to regard all statutory offences as being strictly defined by the words of the statute, more particularly when one finds in the statute anything indicating the legislative intention with reference to the motive. In *Cundy* v. *Le Cocq* it was pointed out that the word "knowingly" was used in the definition of certain offences against the Act, while in others it was omitted, and the finding was that this signified an intention on the part of the Legislature that knowledge should be an essential ingredient of the offence only when so provided.

Turning now to the statute in question: in my view, the only matter open for argument is the ascertaining exactly what the statute requires. Eliminating that which is not material and transposing the words of the section (Criminal Code, sec. 157), we find that "every one is guilty of an offence who corruptly gives or offers to any peace officer any bribe with the intent to interfere corruptly with the due administration of justice." The searching by a police officer for information upon which he

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may lay an information for some supposed breach of the Temperance Act is part of the administration of justice, within the meaning of this section, according to the recent decision of the Supreme Court of Canada in *Kalick* v. *The King*, 55 D.L.R. 104, 61 Can. S.C.R. 175, 35 Can. Cr. Cas. 159.

The other statutory requirement essential to guilt is that what is done shall be done "corruptly," i.e., with the object of procuring the police officer to abstain from the discharge of his duty by reason of the bribe tendered or promised to him.

This statutory requirement seems to me to import a moral element into the offence, and I think the learned trial Judge erred when he charged the jury as he did, and that the accused cannot be said to have attempted corruptly to bribe a police officer with the intention of corruptly interfering with the administration of justice unless he had knowledge of the fact that the individual with whom he was dealing was a police officer.

From the evidence given in this case this knowledge might well have been inferred, but this was a question to be determined by the jury, and the Judge could not withdraw the matter from them.

I greatly regret that a new trial must be directed. The accused is now in custody. I do not think that we should deal with the application for bail; but if, on a proper application, bail is granted, care should be taken to see that it is of a most substantial character. The charge is by no means a trivial one; if the accused is guilty his offence calls for severe punishment, and it is most desirable in the public interest that there should be a trial, and bail should be in such an amount as to make it certain that the accused will stand his trial.

LENNOX, J.:—The indictment upon which the prisoner was tried and convicted was that he "did corruptly offer to one William Allen, a peace officer engaged in the execution of his duty, a sum of money with intent to interfere corruptly with the due administration of justice."

The indictment and trial were under sec. 157 of the Criminal Code, para. (*b*). This paragraph does not speak for itself; to make it intelligible parts of para. (*a*) must be carried down and incorporated with it. This cannot be evaded, and, having to do this, I take it that this is what the statute specifically declares, namely: "Every one is guilty of an indictable offence and liable to 14 years' imprisonment who corruptly offers to any peace officer employed in any capacity for the prosecution or detection or punishment of offenders, any money or valuable consideration, with the intent to interfere corruptly with the due

administration of justice." I have included *in extenso* what is incorporated by reference in para. (*b*).

The question submitted by the stated case is: "Was I right in law when I stated to the jury as follows: 'It matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned?'"

The answer, I think, largely depends upon what else the learned Judge said to the jury, or omitted to say, and, in some degree, upon the evidence and the whole course of the trial, including comments of the trial Judge in the hearing of the jury. I have read it all very carefully.

The case was argued as if everything turned upon the construction of the statute upon one point only, namely, whether the word "knowingly" is to be implied, and supplied, or not. I am of opinion that the answer to the stated case does not depend upon this point alone. Assuming, for the moment, without deciding, that knowledge that the person to whom the money is offered is a peace officer is not per se essential, that the crime may be complete without knowledge, still, in my opinion, it would not at all follow that the learned Judge "was . . . . *right in law*" in instructing the jury that "It matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned." With respect, I am of opinion that it matters a great deal as regards whether or not the prisoner made the offer with intent corruptly to interfere with the administration of justice.

I am of opinion that this statement of the learned Judge, taken by itself, was wrong in law, whether knowledge is or is not essential, and, unless corrected in other parts of the charge, was misleading and calculated to divert the attention of the jury from other considerations and findings of fact essential to a fair trial of the offence charged in the indictment.

It is therefore necessary to follow out carefully what else was said or omitted by the learned Judge in instructing the jury.

Section 157 was read to the jury, as it is, with all its "aforesaids," and the dictionary meaning of "corruptly" was also read to them. It was not pointed out what is to be read into para. (*b*) in order to understand its various references to para. (*a*), as, for instance: "bribe as aforesaid" is to be read as the equivalent of "any bribe with intent," etc., at least, and probably of all the subsequent words of para. (*a*).

I was not able to satisfy myself as to the completed form and substance of the skeleton (*b*) without resorting to the device set out; and, making allowance for the "diversity of gifts," I have been wondering whether the jurymen, whether each juryman,

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clearly grasped on a single reading what I have found it quite difficult to be clear about, after many readings and a good deal of steady thinking. Did they, for instance, understand or even think about the circumstances that for "offers to any officer aforesaid," they were to substitute "offers to any peace officer employed in any capacity for prosecution or detection or punishment of offenders," and that it was a fundamental condition that they should find as a fact, guided by the instruction of the Judge, of course, as to the legal meaning of peace officer, that Allen was in fact a peace officer, and that, at the time of the alleged offence he was in fact so employed for the prosecution, detection, or punishment of offenders, before they could bring in a verdict of guilty? Subject to what I have said as to the meaning of "peace officer," these are all questions of fact, and exclusively for the jury; whether a determination of these essential facts was easy or difficult does not matter; they are basic conditions of a conviction, and the jury must be allowed to pass and must pass upon them in reaching a verdict. Did the jury understand, in fact did the jury advert to, these questions at all? I need not answer this question either, for all this was disposed of before the jury retired to consider their verdict. The learned Judge said: "Now, Allen was an officer, I tell you, as a matter of law—Allen was an officer within sec. 157. He was in fact a county constable." These important questions being eliminated, I confess I find it difficult to make out just what was left to the jury to determine, if anything. The offer of money was admitted and sworn to by the prisoner. It was essential to a verdict of guilty that the jury should reach the conclusion that as a matter of fact a corrupt offer "with the intent to interfere corruptly with the administration of justice" was made. This was not in any direct or explicit way submitted to the jury—it was not submitted to the jury at all except by a verbatim reading of the whole section; and the jury were left to apply the statute to the facts as best they could. With respect, I do not think this is enough; I do not find in it any guarantee that the jurors were put in a position to consider the relevant facts, and to apply intelligently the provisions of the statute to the facts as they found them. It is quite as important that the trial should be fair as that the verdict should be right. Without a legally fair trial a theoretically *just* verdict of guilty is impossible. It may be that this man is an old offender. He was being tried where his operations, whatever they were, had been carried on, and by a jury drawn from a locality where his reputed doings were notorious. He came to his trial under unfavourable conditions, and he made no attempt to shew that he

was a man of general good character. In the case of a man of bad repute, it is, manifestly, more necessary to be on the alert to see that nothing is dragged in that ought to be excluded, than in the case of a man of hitherto unblemished character. What the people are saying outside should be kept outside the court-room during the trial of an issue, whether civil or criminal.

To the end that this man should have a fair trial, and neither more nor less, it was not essential, I would think, to remind the jury of the supposedly evil reputation of "the border towns," but there is room for a difference of opinion as to this, and quite frequently Judges advert to external conditions to impress upon the jury the gravity of the question they have to deal with.

But the improper admission, and the admission of improper evidence, is quite another matter. I have pointed out that there was no attempt by the prisoner to pose as a man of previously good character. The course pursued by the Crown at this trial is unheard of in our Courts. It was both irregular and illegal. Where it is competent to give evidence of previous conviction, and when the time arrives for giving it, the method is regulated by secs. 982, 963, and 964 of the Code. The manner of the giving of this evidence is the least serious phase of the question—there was no right to put in the evidence at all at the trial stage of the proceedings. Sections 963 and 964 are intended to meet cases where the offender is liable to a specific additional penalty by reason of having committed a second offence of the same character, and the chance of prejudice to the accused, by a premature disclosure of the previous conviction, is carefully guarded against in these sections. Here, the object was obviously to blacken the character of the prisoner in advance, a thing for which there is no legal sanction except where character-evidence is given to offset previous evidence of good character: Roscoe's Criminal Evidence, 11th ed., p. 94; Phipson on Evidence, 6th ed., pp. 186, 187. *Kalick* v. *The King*, 55 D.L.R. 104, 61 Can. S.C.R. 175, 35 Can. Cr. Cas. 159, is authority for holding that, although proceedings had not been instituted, the offer of a bribe to an officer employed in the carrying out of the Ontario Temperance Act, other conditions of the section being present, comes within the provisions of sec. 157.

The Chief Justice was good enough to refer me to a number of American decisions, *Pettiti* v. *The State*, 121 Pac. Repr. 278; *The State* v. *Howard*, 66 Minn. 309; *Colson* v. *The State*, 71 So. Repr. 277, and other cases, and I have read them. They establish that, under apparently similar legislation, knowledge that the person bribed was an officer, juror, or as the case may be, is essential and must also be charged in the indictment. I have

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not found it necessary, as above indicated, to come to a conclusion as to whether knowledge is essential under sec. 157, and have therefore not compared the American statutes with ours. It is to be noted, of course, that the offenders referred to in para. (*a*) necessarily have knowledge, and para. (*b*) is in pari materiâ. As the question of a new trial arises, I have examined the whole charge and inquired into the trial generally more fully than I would otherwise have done.

Except in the case of a challenge for the defence improperly disallowed, "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." Criminal Code, sec. 1019.

I am of opinion that, within the terms and conditions of sec. 1019, the prisoner Cecil Smith is entitled to a new trial. I am naturally disposed to concur in whatever terms the Chief Justice and my brothers, of greater experience than I have, may impose. As yet I do not know what conclusion they may reach, and it is necessary to be definite, therefore, speaking for myself, I would think there is no hardship in retaining the prisoner in close custody until the trial—the only absolute guarantee, to my mind, that he will appear for trial when called upon. There should be no escape from this, if he is alive.

RIDDELL, J. (dissenting):—At the recent sittings of the Supreme Court at Sandwich, Cecil Smith was indicted, the indictment charging "that at the city of Windsor, in the county of Essex, on the 28th day of February, 1921, Cecil Smith did corruptly offer to one William Allen, a peace officer engaged in the execution of his duty, a sum of money with intent to interfere corruptly with the due administration of justice."

Smith was found guilty and was sentenced by my learned brother Logie to five years' imprisonment.

The main defence was that Smith did not know that Allen was a peace officer.

My learned brother in his charge to the jury said:—

"It matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned. If he knew, so much the worse; but, if he did not know, then the offence is nevertheless completed if he corruptly with intent aforesaid, actually offered a bribe to a man who was in fact a peace officer."

Counsel for the defence asked for a reserved case upon the

question of law "in order that we might take the opinion of the court of appeal upon that." Mr. Justice Logie refused, and a motion was made to this Court successfully, resulting in the following case:—

"Was I right in law when I stated to the jury as follows:—'It matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned?'

And I make a certified copy of the evidence and also the papers and exhibits at the trial, part of the stated case."

The only point before us is the simple one "To constitute an offence against the statute, must the accused have known that the person whom he was attempting to bribe was a peace officer?"

At the common law it was a well-known maxim "Actus non facit reum nisi mons sit rea": and "ignorantia facti excusat" as the civil law puts it, "regula est, juris quidam ignorantiam cuique nocere, facti vero ignorantiam non nocere." But this rule does not necessarily apply in the case of acts forbidden by statute. Where Parliament enacts a law for the protection of public morals, health, or welfare of any kind, the statute may forbid any act without reference to the intent, to the purpose, or to the knowledge of the actor.

Cases will no doubt be found in which the Court has imported a requisite of the knowledge of fact—for example, the famous case of *Regina* v. *Tolson*, 23 Q.B.D. 168, decided by nine Judges against five: *Regina* v. *Sleep* (1861), 8 Cox C.C. 472; *Regina* v. *Cohen* (1858), 8 Cox C.C. 41. The argument for this course has never been put more forcibly or ably than in the dissenting judgment of Brett, J., in *Regina* v. *Prince*, L.R. 2 C.C.R. 154, (44 L.J. M.C. 122)—the fact that he stood alone against fifteen Judges makes his judgment none the less cogent and interesting—in another field "Athanasius contra mundum."

But the whole trend of modern authorities is toward a literal interpretation of statutes—it is supposed that Parliament knew what it meant to prohibit and was sufficiently acquainted with the English language to express its meaning clearly.

In Regina v. *Prince, ut supra*, Blackburn, J., giving the judgment of ten Judges, refused to give effect to the argument that "in general, a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime, the intention of the legislature should be presumed to include 'knowingly' in the definition of the crime, and the statute should be read as if that word were inserted, unless the contrary intention appears." In that case the charge was of taking a girl of sixteen out of her

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father's possession and against his will: and Blackburn, J., said (L.R. 2 C.C.R. at pp. 171, 172): "It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril." Bramwell, B., giving the judgment of eight Judges (Pollock, B., and Denman, J., having also concurred in the judgment of Blackburn, J.), says (p. 174): "The question is, whether we are bound to construe the statute as though the words 'not believing her to be over the age of sixteen' were there, on account of the rule that the *mens rea* is necessary to make an act a crime. I am of opinion that we are not, nor as though the word 'knowingly' was there, and for the following reasons: The act forbidden is wrong in itself if without lawful cause; I do not say illegal, but wrong."

The case of *Regina* v. *Tolson* and the maxim "actus non facit reum nisi mens sit rea" have been considered in the Court of Criminal Appeal in England in two cases in the present year. The first is *Rex* v. *Wheat*, [1921] 2 K.B. 119. The statute 24 and 25 Vict. (Imp.), ch. 100, sec. 57 provides: "Whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony," with three exceptions, the second being when there has been a divorce of the original spouses. Wheat was found by the jury "to have believed on reasonable grounds" that he had been divorced from his lawful wife. The trial Judge, Mr. Justice Sankey, held that this was no defence; and his decision was sustained by the Court of Criminal Appeal (Bray, Avory, Shearman, Salter, and Greer, JJ.). In giving the judgment of the Court, Avory, J. (p. 125), says:—

"In the case of the second exception there is no indication in the statute that any presumption or belief is to afford any defence; the words do not admit of any such qualification and the only defence under this head appears to be that the accused has in fact been divorced from the bond of the first marriage. If he has not, then at the time of the second marriage he is a person who, being married, intends to do the act forbidden by the statute, namely, 'to marry during the life of the former wife.'" At p. 126, referring to the mens rea maxim, the learned Judge says: "In our opinion the maxim in its application to this statute is satisfied if the evidence establishes an intention on the part of the person accused to do the act forbidden by the statute."

A still more recent case is *Horton* v. *Gwynne*, [1921] 2 K.B. 661. The Larceny Act of 1861, 24 and 25 Vict. (Imp.), ch. 96,

sec. 23 provides: "Whosoever shall unlawfully and wilfully kill . . . . any house dove or pigeon under such circumstances as shall not amount to larceny at common law" shall be liable to a penalty. Gwynne believed that a homing pigeon which he saw sitting on the ground in a field some distance from him was a wild one, and shot it, thinking that he had the right to shoot it. The Justices of Herefordshire held that he did not thereby incur the penalty of the Act, but reserved a case. Their decision was reversed by the Court (Darling, Avory, and Horridge, JJ.). The argument for the appellant was (p.662): "No doubt the section does not apply to a wild pigeon . . . But a person who shoots at a pigeon under the belief that it is a wild one takes the risk of its turning out to be a house pigeon." Darling, J. (p. 663): "A person who shoots a pigeon which turns out to be a house pigeon must take the consequences of his act." The other Judges agreed. *Taylor* v. *Newman* (1863), 4 B. & S. 89, 122 E.R. 393, was referred to as supporting the conclusion, as in that case the defendant escaped only because he was acting in defence of his property.

I do not think that the defendant can derive assistance from the case of *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918. The appellant, keeper of a public-house, had sold liquor to a policeman without his armlet, and believed by the publican to be off duty; he was convicted under the Licensing Act (1872), 35 & 36 Vict. ch. 94, sec. 16 (2), for supplying liquor to a constable on duty. The Court (Day and Wright, JJ.), quashed the conviction; but in doing so Wright, J., took occasion to say that the presumption that *mens rea* is a necessary ingredient in a crime is liable to be displaced by the wording of the statute creating the offence.

I am unable to see the relevancy of the case of *Chisholm* v. *Doulton*, (1889), 22 Q.B.D. 736. There the defendant was held not liable in the police court for the negligence of his servant. This decision was sustained. "It is a principle of our criminal law that the condition of the mind of the servant is not to be imputed to the master," *per* Cave, J., at p. 741.

A collection of recent American cases on this point, supporting the conclusion at which I have arrived, will be found in 20 Michigan Law Review (November, 1921), pp. 109, 110.

The evidence in the present case wholly justified the jury in finding that the act was done corruptly with intent to interfere with the due administration of justice—the administration of the Ontario Temperance Act. It is not objected, nor do I think it could be validly objected, that the learned trial Judge told the jury that interference with the due administration of the

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Ontario Temperance Act is an interference with the due administration of justice: *Rex* v. *Kalick*, 53 D.L.R. 586, 33 Can. Cr. Cas. 274, 13 S.L.R. 372 a judgment of the Court of Appeal for Saskatchewan, affirmed in the Supreme Court of Canada, *Kalick* v. *The King*, 55 D.L.R. 104, 61 Can. S.C.R. 175, 35 Can. Cr. Cas. 159.

I can find no ground for holding that the statute contemplated *mens rea* at all. Taking the test suggested in *Regina* v. *Prince*, by Bramwell, B., "the act forbidden is wrong in itself if without lawful cause; I do not say illegal, but wrong." "One who does such an act does it at his peril," *per* Blackburn, J., L.R. 2 C.C.R. at p. 172.

Nor can the defendant derive any advantage from the word "corruptly." The meaning of this word is explained in *The Bewdley* case (1869), 1 O'M. & H. 16, at p. 19, by Blackburn, J., following the judgment of Willes, J., in *Cooper* v. *Slade* (1858), 6 H.L.C. 746, at 773, 10 E.R. 1488 at 1499.

The defendant did the act corruptly in the legal sense, and undoubtedly with the intent aimed at by the section; the absence of *mens rea* (if it was in truth absent) is immaterial, and I think the charge unobjectionable.

The question submitted to us should be answered in the affirmative.

Question answered in the negative and new trial ordered (RIDDELL, J., *dissenting*).

COMMERCIAL LOAN AND TRUST Co. LTD. v. MACAW.

Manitoba King's Bench, Dysart, J. June 10, 1922.

COMPANIES (§VA—173)—RESTRICTIONS ON SALE OF SHARES—BY-LAW—VALIDITY—COMPANIES ACT R.S.M. 1913, CH. 35, SEC. 46—CONSTRUCTION.

The by-laws of a company contained a clause that "No shareholder of the company shall be entitled to transfer any share or shares in this company without the consent of the directors by by-law, until he shall have paid to the company the full value of the share or shares." The Court held that in this clause the absolute right to transfer fully paid up shares was implicitly recognized and that the restrictions imposed therein did not aim to prevent transfers but rather to prevent loss by transfer, and that the clause was not in conflict with sec. 46 of the Companies Act and was therefore *intra vires*.

COMPANIES (§VF—253)—SALE OF SHARES—EFFECT OF FRAUD OF DIRECTOR SHAREHOLDER IN SALE OF SHARES—COMPANIES ACT R.S.M. 1913, CH. 35, SECS. 59, 60, 61—CONSTRUCTION.

In general, a director of an incorporated company may deal with his shares as freely as an ordinary shareholder; such shares being personal property and transferable subject only to the restrictions referred to in sec. 46 of the Companies Act R.S.M. ch.

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35, but an ordinary shareholder cannot transfer his unpaid shares without the consent of the directors, and a director shareholder cannot take advantage of his own wrongful act and breach of duty as director in misleading his co-directors to obtain the transfer of his shares to a purchaser to whom it was his duty in the interests of the company to refuse his consent and a transfer under such circumstances will be set aside especially where the consent to the transfer has never been given by a motion duly made and seconded, carried and recorded in accordance with the by-laws of the company.

[*Hutchings* v. *Canada National Fire Ins. Co.* (1917), 33 D.L.R. 752, 27 Man. L.R. 496, at 503, affirmed by the Privy Council 39 D.L.R. 401, [1918] A.C. 451; and *Hutchings* v. *Great West Permanent Loan Co.* (1917), 33 D.L.R. 750, 27 Man. L.R. 496, affirmed by Privy Council 39 D.L.R. 401, [1918] A.C. 451, 87 L.J. (P.C.) 106, considered. See Annotation on Company Law, 63 D.L.R. 1.]

APPLICATION by the liquidator to place the name of the defendant upon the list of contributories of the King's Park Company, Limited, in process of winding-up. Application granted.

A. M. S. Ross, and *F. R. Sproule*, for plaintiff.

W. P. Fillmore, and *R. T. Robinson*, for defendant.

DYSART, J.:—The insolvent company was incorporated by letters patent issued by the Province of Manitoba on March 19, 1912, with a capital of $300,000, for the purpose of carrying on a real estate business. On May 21, 1912, the defendant became a shareholder by subscription, and received a certificate for 105 shares of the par value of $100 each, upon which he eventually paid 25%, leaving a balance of $75 per share unpaid to this date. There are no calls unpaid on these shares, and no lien or other claims against them.

At a meeting of the directors on February 26, 1919, the defendant, who was also a member of the board, told his co-directors that he had sold his shares to one Williams and asked to have their transfer approved. The approval, however, was not given, and the meeting adjourned until the following day for further consideration. At this adjourned meeting the minutes record that "the secretary reported the transfer" from the defendant to Williams. The old certificate for the shares was surrendered and a new certificate issued; certain entries were made in the stock ledger of the company, and, thereafter, the defendant ceased to attend meetings either as a director or shareholder.

The question is—Was a valid and effective transfer made of these unpaid shares so as to relieve the defendant from liability for the unpaid balance?

The defendant had become a director of the company very shortly after he became a shareholder, and continued as a direc-

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tor until after the secretary had "reported" his transfer on February 27. It is true that a resignation by him dated February 25 had been produced, but it is not referred to in the minutes until after the transfer was reported when the resignation was "read and accepted," he "having sold his stock." Notwithstanding the argument that a director may resign at any time, and cannot be held on the board against his will or by reason of non-acceptance of resignation, the fact remains that the defendant attended the meeting of the 26th as a director and acted throughout in that capacity. And there is no evidence that the resignation was tendered before the conclusion of the meeting of the 27th, and this was only after he had sold his stock. For all the purposes involved in the validity of this transfer, I am satisfied that the defendant was a director throughout.

A knowledge of the financial condition of the company in the period leading up to this "transfer" is enlightening. The company had originally purchased on the outskirts of the city a large tract of vacant land which it subdivided into building lots, and upon which it owed a very large portion of the purchase-price. To meet this obligation, it relied upon the receipts from the sale of these lots, and, as a last resource, upon the unpaid stock subscriptions. When speculative values subsided the company's lots became unsalable and its agreements difficult and in many cases impossible to collect. In spite of the efforts of the directors the company drifted slowly but surely towards the cataract of insolvency which steadily loomed larger as the days went and finally engulfed it in May, 1920. The more optimistic of the directors hoped that catastrophe might be averted or at least postponed; but they all had reason to fear, and frequently discussed, the approaching insolvency, their own obligations as holders of unpaid shares; and how they might escape the liability. When, therefore, at the meeting of February 26, the defendant told his co-directors that he had sold his shares, they knew and he knew that he was attempting to get rid of his liability; they knew and he knew that the holder of his shares would in all probability be eventually called upon to pay the unpaid balance. Indeed he did not conceal it and has since frankly admitted it.

This brings us to consider whether or not a director-shareholder may transfer shares to escape his liability on them. Section 46 of our Companies Act R.S.M. 1913, ch. 35, reads:—

"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."

Subject to these "conditions and restrictions" the shares are transferable as a matter of absolute right, and the holder may compel registration of his transfer on the books of the company; and this is so even though his transferee is wholly undesirable, or even positively objectionable to the directors: See authorities collected in Mitchell on Canadian Commercial Corporations, p. 778; and Masten and Fraser on Company Law, 2nd ed., p. 328.

The transferability of shares is by sec. 46 circumscribed and restricted by the Act itself, the company's charter, and the company's by-laws. What then are these restrictions? None are to be found in the letters patent. In the Act itself, sec. 61 declares that no transfer is valid until duly entered in such books as are prescribed by sec. 59. These two sections deal with the formalities and registration of transfers, and will be considered hereafter. Section 60 confers on the directors a discretionary power to "refuse to allow the entry into any such book of any transfer of stock whereon any call has been made which has not been paid in."

The by-laws of the company contain three regulative or restrictive provisions; two of them relate to secs. 59 and 61, and the third, being art. 8, supplements sec. 60, and reads as follows:—

"Restrictions on shares; no shareholder of the company shall be entitled to transfer any share or shares in this company without the consent of the directors by by-law until he shall have paid to the company the full value of the said share or shares."

The term "full value" as used in this by-law means, in my opinion, the full par value of the shares, and not, as was argued by the defendant, the actual or market value of them. The by-law itself was enacted pursuant to powers conferred on the directors by sec. 32 of the Act, authorizing them among other things " to make by-laws . . . . to regulate . . . . transfer of stock . . . ."

Having been duly confirmed by the shareholders this by-law if *intra vires* became permanently binding upon the company, and so far as it relates to the matters in dispute herein, is to be considered as having the same force and effect as it would have, if embodied in the Act itself. It is argued, however, that "to

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regulate" as used in sec. 32 cannot be extended to mean "to restrict," as used in sec. 46, and therefore that the directors had no power to enact Art. 8 as a restriction upon transfers. But sec. 46 contemplates that "conditions and restrictions" on the transferability of shares may be "contained" in the by-laws, and unless we give to the word "regulate" a meaning wide enough to include "restrict" sec. 46 must be narrowed down to apply only to formalities, and it has been so interpreted by our own Courts and the Privy Council in the case of *Hutchings* v. *Canada National Fire Ins. Co.* (1917), 33 D.L.R. 752, 27 Man. L.R. 496 at 503; affirmed by the Privy Council, 39 D.L.R. 401, [1918] A.C. 451; and *Hutchings* v. *Great West Permanent Loan Co.* (1917), 33 D.L.R. 750, 27 Man. L.R. 496, affirmed by the Privy Council 39 D.L.R. 401, [1918] A.C. 451, 87 L.J. (P.C.) 106.

"Regulation," says Sir W. Phillimore, in delivering judgment of the Privy Council at p. 405, "does not mean restriction, still less subjection, to an arbitrary veto." The shares in that case, and indeed in all the cases relied upon, were fully paid, and consequently the attempted restriction was one which substantially nullified the quality of transferability conferred upon the shares by the same section. In our case the shares are not fully paid, and the restriction is much less onerous. Where the by-law enacted under the authority to "regulate" attempts to confer upon the directors a power to prevent at their caprice the transfer of fully paid shares, it takes away from the owner the power to comply or to put himself into a position where he can enforce the registration of his transfer. But where, as is the case here, that by-law attempts nothing further than to prevent a transfer of unpaid shares, which is made to enable the holder to escape a liability and to saddle the company with a corresponding loss, it does not prevent transferability, because the owner may always put himself into a position to compel the entry of his transfer by either (1) paying up the shares in full, or (2) securing a transferee whose responsibility for the unpaid balance is known to the directors. The two cases are very different both in their purposes and effects. Restriction means curtailment but not prevention. It seems to me on the authorities that under the power to "regulate," the directors may pass valid by-laws to govern the formalities to be complied with, and to impose other restrictions provided these restrictions do not "refuse or prohibit" the transfer of fully paid shares. In art. 8, the absolute right to transfer fully paid shares is implicitly

recognized, and the restrictions therein imposed do not aim to prevent transfers, but rather to prevent loss by transfer. While the validity of this by-law is not beyond doubt, my opinion is that it ought to be upheld as *intra vires*.

The discretionary power to refuse to enter transfers of shares does not, we see, apply to all transfers but only to those of shares, in respect of which some money is owing or due. The grounds upon which the discretion should be exercised ought, therefore, to be nothing less than money considerations. The object of the provision must be looked at. It is apparently to prevent the lessening or weakening of the company's chances of collecting the outstanding moneys owing in respect of stock. That should be the principal consideration of the directors in exercising their discretion; see *Re Ceylon Land and Produce Co.; Ex parte Anderson* (1890-1), 7 Times L.R. 692. This discretion is a fiduciary power to be exercised in a reasonable manner and for the interest of the company alone: *Re Coalport China Co.*, [1895] 2 Ch. 404, 64 L.J. (Ch.) 710; *Re Peterborough Cold Storage Co.* (1907), 14 O.L.R. 475. In this latter case, Boyd, C., says at p. 477:—

"But, again, the directors, in the consideration of applications for the transfer of shares under sec. 28, were in a fiduciary position, and are called upon to act with due regard to the interests of the company. They are given discretionary powers to guard against transfers being made of stock not paid in full to persons of apparently insufficient means . . . . it was incumbent upon them to exercise special care and precaution in procuring responsible transferees. Reading the evidence and regarding all the circumstances and the absolute inability of making anything out of their transferees, I think the conclusion is most persuasive —nay, irresistible—that they acted to the manifest detriment of the company, and . . . . contrary to their duty to guard against improper and illusory transfers."

And again at p. 480, he says:—

"The proper rule of law is that a director is so far in a fiduciary position towards the company, that he cannot exercise or refuse to exercise the powers vested in him as director against the interests of the company, and that he must exercise his powers for the general intersts of the company: per Cotton, L.J., in *Re Cawley & Co.* (1889), 42 Ch. D. 209, at p. 233, 58 L.J. (Ch.) 633. The intent of the 21st section may be expressed by adopting the language of Turner, L.J., in *Bennett's* case (1854), 5 DeG.M. & G. 284, at p. 299, 43 E.R. 879, 24 L.J.

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(Ch.) 130, namely, that 'the directors of the company should be placed in a position which would enable them upon each proposed transfer to secure to the company a solvent and responsible transferee.' ''

There is in the principal case no suggestion that the defendant is not financially able to pay the company all the moneys owing in respect of these shares, and the inference I draw from the evidence is that he is financially responsible and that the directors have all along known it. Likewise, from the evidence, it is fair to say that Williams is probably unable to pay these moneys, and, in any event, he cannot be located; for all purposes of discharging the liability on these shares, therefore, he is equivalent to a common insolvent, and this the directors also knew or ought to have known when the transfer in question was tendered for entry.

The defendant argues, however, that he was as free to deal with his shares as any ordinary shareholder, and having secured the entry of his transfer, and the issue of a new certificate, he is fully released from liability, and the company must now look to Williams alone. It does not follow, however, even if the company may hold Williams, that it has necessarily released the defendant. It may be that the company has now two strings to its bow instead of one. Section 46 contemplates such a possibility in the case of a transfer not duly entered. When a man becomes a shareholder he remains a shareholder until he has in some lawful way ceased to be a shareholder: *Addison's* case (1870), L.R. 5 Ch. 294, at p. 297, 39 L.J. (Ch.) 558. The onus, therefore, of showing that he has lawfully rid himself of his shares and liability, rests in the final analysis and after challenge, upon the defendant.

While it is true that under sec. 63 of the Act all entries made in the prescribed books of the company are *prima facie* true (from which it is argued that the entry was complete) nevertheless, it is established beyond doubt that the transfer in question was not complete at the time of entry; in fact is still incomplete, in that it lacks both the name, the address and the calling of the transferee; is not dated, and does not bear the signature of any subscribing witness. It is not such a transfer as directors ought to register, but assuming the information was otherwise supplied to the company and the transfer then registered, none of these defects would be considered fatal of themselves: See *Re Goldfields Ltd.* (1911), 2 O.W.N. 1373. Again it is argued that there was no acceptance by Williams of this transfer, and that

without such acceptance no transfer is or can be completed. The transfer bears the signature "A. Williams," which from the evidence I find, inferentially, to be that of Allan Williams, the intended transferee, and to have been attached without conditions. But Williams has never communicated with the company either directly or indirectly since his certificate was issued, and so far as the company or liquidator can ascertain, he is no more available than if he had not accepted. But I will assume that he has accepted. Then as to the registration: the entries in the books on their face seem to comply substantially with the requirements of the Act. Williams' name, however, does not appear in the alphabetical list of shareholders while the defendant's name still remains there. In my opinion, however, this is not a vital matter of entry, but rather one of regulation, and I take it that the entry is sufficient.

If then we assume that the transfer was sufficiently complete, that the acceptance was shown and the entry substantially made, are we to assume that the consent of the directors was given so as to bind the company, or may we enquire whether or not that consent was actually given and if given whether it was obtained by proper means?

It seems well settled in jurisdictions where directors have power to refuse entries, that a shareholder may transfer his unpaid shares to escape his liability upon them, provided that he makes an out-and-out sale of them, reserving to himself no contingent or beneficial interest in the shares, and provided further that by open and honest means he secures the consent of the directors to enter such transfer: *Re Discoverers Finance Corpn.; Lindlar's* case, [1910] 1 Ch. 312, 79 L.J. (Ch.) 193. Inadequacy of consideration is no objection to the conclusiveness of such sale, nor does it matter that the vendor even paid the purchaser a sum for assuming the liability, or even guaranteed him against loss resulting from it. See *Lindlar's* case at pp. 319-320. In our case the consideration of $1 for each share upon which $25 had already been paid, does not prejudicially affect the absoluteness of the sale. The evidence itself is otherwise quite convincing that the sale was in fact an out-and-out sale.

But as was stated by Buckley, L.J., in *Lindlar's* case, at p. 321:

"The transferor cannot escape liability if he has actively by falsehood, or passively by concealment, induced the directors to pass and register a transfer. They would have refused to register .... the question is one of fact .... The Court must arrive

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at the conclusion that therefrom resulted such a state of things as that if the directors had known the truth they would not have registered the transfer."

This seems to be the accepted rule and is relied upon as the proper test in this case, subject to this qualification that the language seems to apply to an ordinary shareholder and not to a director-shareholder.

The defendant is, as we have seen, a director as well as a shareholder, and as a director he assisted in passing upon his own transfer, while in possession as a shareholder of some knowledge which he did not impart to his co-directors. Besides he is open to any complaint that may fairly be made against the directors as a board for failure to exercise their discretion reasonably in the interests of the company.

In general a director is the holder of his shares in the same sense as an ordinary shareholder and may deal with them as freely. His rights as such are derived from the ownership of the shares themselves, which are a personal property and transferable subject only to conditions and restrictions referred to in sec. 46. These conditions and restrictions do not divide shares for the purpose of transferability into two classes—those owned by ordinary shareholders, and those owned by director-shareholders. Nor do they discriminate between ordinary shareholders and director-shareholders. A director-shareholder is not a trustee of his shares for the other shareholders, and is as free as they are to transfer his shares; *Thompson* v. *Can. Fire & Marine Insur. Co.* (1885), 9 O.R. 284. But no ordinary shareholder of the company is entitled, merely as a shareholder, to transfer his unpaid shares without the consent of the directors, and the defendant's right is no greater. If the consent ought to have been refused by the board to such a transfer presented by any ordinary shareholder, then it ought also to have been refused in this case; and the defendant as a member of that board should have taken part in such refusal. If his duty in considering a transfer from an ordinary shareholder in such case would be to refuse the consent, then the same duty binds him in dealing with his own transfer. The directors as directors are charged with a duty to exercise their honest judgment in the interests of the company, to see that the company is not prejudiced by transfer of unpaid shares. But if a shareholder who is not a director secures the consent of the directors to his transfer and has it registered even through mistake or error of judgment on the part of the directors, he may, as we have seen,

escape his liability; and that is so where the directors without influence from him disregarded or violated their duty. But a director-shareholder differs from the ordinary shareholder in that he is one of those who in such a case has violated the duty or become liable perhaps for a misfeasance. Should he be allowed to reap the advantage of his own wrongful act and breach of duty? In my opinion he should not.

Let us now look to some of the details of the transaction resulting in this alleged consent and entry. More than a fortnight prior to the meeting of February 26, the defendant had received a letter from a local solicitor concerning the proposed sale of these shares, intimating that he had found a purchaser for them in the person of "a young man here who is willing to take a gamble on this" and who "is returning to England shortly." The letter concludes by asking "to have the matter attended to immediately." The defendant "attended" to the matter by affixing his signature to the transfer of his shares in blank, and forwarding his share certificate with the blank transfer to the solicitor and receiving the consideration of one dollar per share. Having made no enquiries whatever concerning this "young man" other than to ascertain that his name was Allan Williams, the defendant appeared at the meeting referred to and asked his co-directors to join with him in consenting to the transfer. In reply to their enquiries about Williams he told them that he knew nothing whatever about Williams as the matter had been arranged through Williams' solicitor, whose name he furnished. The co-directors did not press the enquiries nor institute any on their own account. They let the matter stand at that. The defendant, however, did inform the director-secretary that Williams' address was 806 McArthur Building, which was the address of the solicitor in question, and this information was transferred to the subsequent entry of the transfer in the stock ledger. It does not appear that this address was supplied by the defendant to his co-directors but it seems they were allowed to believe that Williams might be found at the address of his solicitor. It is quite clear that the defendant did not disclose to his co-directors anything from which they might infer or suspect that Williams was not a resident of Manitoba or that he was about to return to England, and I feel satisfied that had he disclosed the information contained in the letter to the directors they would not have allowed the entry of the transfer.

But the board did not at that meeting consent to the trans-

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fer. Some of the members were afraid that personal responsibility would attach to them if they allowed the entry of a transfer of these unpaid shares, and in order to secure advice on the matter the meeting was adjourned until the following day. The defendant himself volunteered to secure the legal advice, which he did; and when the meeting reassembled a written opinion from counsel was produced, assuring the board that they might safely consent to the transfer. Two grounds were mentioned as the basis of this opinion: (1) That no restrictions on the transfer of unpaid shares was to be found in the Act itself, and (2) That the adviser understood that there was "nothing in the by-laws to prevent directors allowing stock to be transferred before it is fully paid."

The letter apparently was written without any knowledge of the existence of art. 8, and I infer that the defendant told the legal adviser that the by-laws contained no such restriction. After reading this opinion, the directors hesitated to express any consent and the device was finally hit upon to leave the matter to the secretary (as is done in certain companies) to enter and to report the matter to the directors. This method of escaping responsibility, while perhaps not effective, indicates clearly the attitude of the board. They were unwilling or afraid to consent to this transfer; and, erroneously believing that the defendant had a legal right to have his transfer entered, they thought to wash their hands of responsibility by leaving it to the secretary. Of course the board did not in fact escape its liability. It could not shirk its duty by casting it upon an unauthorized agent. Nevertheless their conduct explains their attitude; whatever might be the legal effect of their action, they did not, in fact, consent to the transfer.

Accordingly the minutes which were subsequently prepared contained no reference to any discussion or consideration given to this transfer, nor to any consent by the directors. They merely state "the secretary reported a transfer" from the defendant to Williams. The entries in the stock ledger were made showing the transfer from the defendant on February 26. In some items of the entries confusion arises between the dates 26th and 27th. The new certificate is dated the 26th. It would seem, therefore, that these entries were either all made before the conclusion of the meeting of the 27th, and were therefore unauthorized; or that they were made after and ante-dated, in which case they did not correctly record the transaction. In any event, within a day or so after the meeting, the defendant himself

called at the company's office, and either supervised or examined the entries. From the letter itself, and from absence of anything leading to the contrary, I infer that Williams had already returned to England, and yet the entries give his address as in the city of Winnipeg.

Williams has never communicated with the company. The defendant produced the old certificate and received the new one. Williams has never attended a meeting of the shareholders either in person or by proxy. His calling, his position, his responsibility, are all wholly unknown to the company. His real address is veiled behind the silence imposed by privilege upon his solicitor. His whereabouts are entirely unknown and unascertainable by the company or the liquidator. He is evidently seeking safety in his obscurity and if this transfer is valid, the company is the loser of $7,875.

These things are what might well have been anticipated by the directors had they known or suspected that Williams' address was simply England. Had they not been misled it would have been a violation of their duty to give consent to this transfer, and such consent if given must be ineffective.

But can we interpret their silence, their permission, their acquiescence, as the equivalent of consent, as required under art. 8. That consent must be expressed by by-law. It is true that in dealing with a score of transfers in the several years that elapsed between the formation of the company and the defendant's case, the consent to transfers was never expressed by by-law; but in every case it was given by a motion duly made and seconded, carried and recorded. In this case, there is not even that motion. There is nothing to show their consent in the minutes of the meeting.

Nor can the defendant successfully claim that the company is estopped from denying the entry. He is the one official of the company chiefly responsible. His whole conduct is so closely interwoven into the circumstances of the "transfer" that he cannot disengage himself from the company's rights or liabilities in the matter. If the company is wrong, he is wrong; if the company has been misled into making a mistake he has misled it. I say this without impugning his motives in seeking to rid himself of his undesirable liability in the shares.

The conclusion I reach, therefore, is that the transfer could not be entered without consent of the directors; that the directors never gave their consent, nor any equivalent of consent; that the entry of the transfer was secured through defendant

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misleading his co-directors; that the company is not estopped as against defendant from repudiating the entry; that even though consent of directors was not necessary, the company, through its liquidator, is entitled on the facts of this case to a declaration that the transfer has not been "duly entered," and that the defendant is still liable to the company for the unpaid balance in the shares.

The defendant's name should, therefore, be placed upon the list of contributories. The plaintiff is also entitled to costs of this action.

Judgment accordingly.

COLE v. MERCHANT'S FIRE INSURANCE Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. December 16, 1921.

INSURANCE (§IIA—30)—GOODS HELD IN FACTORY TO BE "MANUFACTURED"—OWNED BY ANOTHER PARTY—INSURED BY MANUFACTURER—POLICY ASSIGNED TO OWNER—LOSS—RIGHTS OF OWNER.

A party holding goods to be manufactured may insure the same, and assign the policy to the owner of the goods, who has an insurable interest, and must be re-imbursed on a loss occurring.

[*Davidson* v. *Waterloo Mutual Ins. Co.* (1905), 9 O.L.R. 394; *Keefer* v. *Phoenix Ins. Co.* (1900), 31 Can. S.C.R. 144, referred to.]

APPEAL from the judgment of Kelly, J. in an action upon two fire insurance policies. Reversed.

The judgment appealed from is as follows:—F. E. Wray, in trust, who at the time carried on business as the Canada Overall Company for John Pringle, made a contract of the 17th June, 1920, with the plaintiff Cole to manufacture certain garments out of material to be supplied from time to time by him, sufficient to enable Wray to manufacture 100 dozen garments per week for a period of three months; the material was supplied accordingly.

Pringle's introduction into the transaction was brought about in this way. In March, 1920, Wray, who was then carrying on this business on his own behalf, made an assignment for the benefit of his creditors, and the assignee sold the assets to Pringle, who was then Wray's creditor to a substantial amount. Pringle then entered into arrangements with Wray by which the latter was to carry on the business for him. After the contract of the 17th June had been entered into, Cole inquired of Wray about insurance, and he replied that he had insurance in force which covered Cole's goods. When Cole made this contract with Wray, he was aware that Pringle was interested in the business, and even had Pringle's assurance that he could safely

deal with Wray, who, Pringle said, was running the business for him; and he thus was aware that "F. E. Wray in trust" meant Pringle.

On the 19th September, 1920, the goods in the premises which Wray occupied were seriously damaged by fire. A considerable part of these goods was Cole's. Wray at that time was carrying insurance aggregating $6,000 or thereabouts, including $2,000 in the defendant company, represented by two policies, one for $1,500, dated the 17th July, 1920, and the other for $500, dated the 17th August, 1920, both issued in the name of F. E. Wray in trust, on "machines and machinery of every description, tools, shafting, gearing and belting; office furniture and fixtures, typewriting and other machines, on stock in trade of every description, manufactured, unmanufactured and in process thereof, manufactured or dealt in by the assured, their own, held in trust or on consignment or sold but not delivered or removed, all while contained in the three-storey first-class roofed building situate and being Nos. 389-393-395 on the west side of Talbot street," etc.

On the 20th September, Wray assigned to Cole two policies of $500 and $1,500 respectively (said to be the two policies now sued upon) and all moneys payable thereunder; and on the 4th October, 1920, he made a further assignment to Cole of all his claims and demands under the two policies of the defendant company (and other policies) and all moneys due him thereunder. Both of these assignments were made without Pringle's consent. In attempting to take over these policies, Cole intended to claim thereunder and apply any moneys so received upon his loss, and he says that he learned that Pringle also claimed these same moneys. The total of Pringle's claims then amounted to $645.50.

This action was begun by Cole on the 1st February, 1921, to recover the full amount of the two policies issued by the defendant company. By reason of these conflicting claims, the company interpleaded, and on the 16th March, 1921, an order was made adding Pringle as party defendant, and granting liberty to the defendant company to pay into Court $645.50, on which payment the company would be discharged from liability under the policies sued on in respect of certain goods and chattels alleged to be the goods and chattels of F. E. Wray & Co. in trust, in the proofs of loss dated the 8th January, 1921. These proofs of loss set forth part of the goods destroyed or damaged as the property of F. E. Wray in trust, and the remainder as the property of Cole. The company paid into Court $645.50.

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By the contract of the 17th June, 1920, Wray agreed also to purchase machinery to the value, as Wray puts it, of $575. At that time there was insurance upon the goods in the premises occupied by Wray; and at a later date, when the policies were about to expire, Cole and Wray both understood and agreed that the insurance would be continued; and, as the former was the owner of some of the goods then in the premises, a suggestion was made that he should pay part of the premium. Policies were issued accordingly by the defendant company and other companies to an aggregate amount of over $5,000, the defendant company's part being the $1,500 policy now sued upon. In August, 1920, in consequence of Cole's goods in Wray's premises increasing in amount, it was proposed that an additional $500 insurance be issued. The $500 policy now sued upon was then issued. Wray, prior to his agreement of the 17th June, 1920, had been making up into garments material supplied by other persons; and as early as 1919 the insurance which he carried was in the form above quoted from the policies now sued upon. Jackson, the defendant company's agent at London, with whom this insurance was negotiated, had knowledge in a general way of the manner in which Wray carried on business.

In his statement of defence, Pringle claimed to be entitled to the $645.50 paid into Court; and, though there is evidence that he had previously repudiated Wray's right or authority to assign any interest in these policies, in his pleadings he ratified and confirmed the assignments to Cole of the policies and the moneys claimed in this action. This of course was long after the commencement of the action. It is not established that Wray had any right or authority to make the alleged assignments to Cole unless with Pringle's consent, of which there is no evidence except as it appears in the latter's statement of defence. Moreover, there was no direct privity of contract between Cole and the defendant company. To meet the dubious position in which Cole then found himself, application was made at the trial to add Wray as a party plaintiff, his written consent thereto being filed, and I granted the application.

On the facts so far set forth, and summarising the effect of the evidence, the position is that what the defendant company, through its agent Jackson, intended to contract for, was insurance to Wray to cover and protect him against all personal loss from destruction of or damage to goods in which he was personally interested or in which he had an insurable interest, and to the extent of such interest, including any such interest of Pringle, for whom he carried on the business. Had he rendered himself liable for the return to Cole of goods delivered by the

latter for the purposes of manufacture, liability of that character would have constituted an interest of his in Cole's goods for which he would have been entitled to recover upon these policies. I have been unable to find any sufficient evidence to establish liability of that character; and, while something was said by Cole and Wray about the former contributing towards the premium, I can find no agreement binding on Wray rendering him liable to Cole to make good the loss of the latter's goods sustained through the fire. Cole may have relied on Wray's statement that he carried insurance sufficient to protect him, and it may be that both believed that there was such protection, but in what occurred between Wray and the company's representative, Jackson, there is nothing from which an inference can be drawn that the company undertook or understood or had any belief or knowledge that the policies should cover anything in excess of Wray's insurable interest personally and as representing Pringle. The nature of Cole's interest in the goods, or that he had any interest therein, was not communicated to the company or its representatives, nor indeed that any one but Wray and Pringle was interested either when the application was made or the policies issued.

There is nothing in the present case, as there was in *Davidson* v. *Waterloo Mutual Fire Insurance Co.* (1905), 9 O.L.R. 394, excluding the application of the statutory condition, here found in condition 6 (*a*), which declares that the company is not liable for the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy. I appreciate the importance of considering whether the policies are by their terms limited to Wray's interest (personally and as representing Pringle), and whether the contract is sufficiently broad to include the interest of others in the goods destroyed or damaged. The policies insured F. E. Wray in trust against direct loss or damage by fire or lightning to the goods as above particularly described. In the absence of a specific reference to goods of others than Wray or Pringle, for whom he held in trust, and having regard to the circumstances in which these contracts are made, I am of opinion that the protection was limited to the interest of Wray and of Pringle, for whom he held in trust.

In *Castellain* v. *Preston* (1883), 11 Q.B.D. 380, Bowen, L.J., said (p. 398), that "a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions: first of all, the form of his policy must be such as to enable him to recover the total value, because the

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assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and, secondly, he must intend to insure the whole value at the time." That proposition is favourable to an assured in cases where the two conditions have been complied with. Unless statutory condition 6 (*a*) is to be disregarded—and I have already said that it is applicable here—and, for the reasons I have already indicated and on the facts as I have found them, I think the case is not within the conditions so laid down in the *Castellain* case, and that the interests covered by the policies are those of Wray, or Wray in trust, and the defendant Pringle.

The difficulties of this action were increased by the manner in which it was instituted and came down to trial, the defendant Pringle not having been added as a party until after delivery of the defence by the defendant company, and Wray not having been added as party plaintiff until the trial was in progress.

In Wray's proof of loss he apportioned the loss as between the defendant company and the other companies whose policies covered the same goods, and fixed the defendant company's portion of the loss on the property of "F. E. Wray in trust" at $645.50, the amount which the defendant company afterwards paid into Court, and which Pringle accepted in extinction of his claim. This statement of Wray's, subject to and without prejudice to any rights he may have against the other companies, establishes, so far as he is concerned, the amount for which recourse can be had against the defendant company in respect of damage or loss to the goods of Wray and Pringle. The defendant company in its pleadings admitted an indebtedness on the machinery, goods and chattels, the property of F. E. Wray in trust, to the amount of $645.50, but alleged that at the time the action was commenced 60 days had not elapsed after the completion of the proofs of loss in respect of the property of F. E. Wray in trust, evidently having in mind statutory condition 22, that the loss shall be payable in 60 days after the completion of the proofs of loss, unless a shorter period is provided for by the contract of insurance. The most prominent statement on the very page of these contracts on which the statutory conditions are printed is, "Loss, if any, under this policy shall be due and payable within 5 days after receipt of proofs herein required." So far as they related to Wray's claim for himself and Pringle, the proofs were completed and delivered more than 5 days before the action was commenced, and I am not aware that they were otherwise objected to by the defendant company.

Cole, in my opinion, is not entitled as beneficiary suing under sec. 89, sub-sec. 2, of the Ontario Insurance Act, R.S.O. 1914,

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ch. 183, and has no status to sue in that character; and there was no sufficient assignment to him entitling him to sue upon the claim of Wray or Pringle. When Wray was added as a party plaintiff, the defendant company had already paid into Court the portion of the loss on the goods of Wray and Pringle which Wray in his proofs of loss apportioned to and claimed against the defendant company.

In any view of the case, I am unable to decide in the plaintiffs' favour, and the action will therefore be dismissed with costs to the defendant company against the plaintiff Cole, and against the plaintiff Wray from the time he was added as a party plaintiff. I make no order as to Pringle's costs.

J. A. E. Braden, for appellants.

R. S. Robertson, K.C., for the defendant company, respondents.

MEREDITH, C.J.C.P.:—Beside the bailment of the goods in question, for the purpose of having them made into clothing for the owner, and the rights and obligations arising out of such a bailment; the bailee agreed to insure them for the owner's benefit and at his expense: and that was intended to be done in the policy of insurance upon which this action is brought.

The right of the bailee so to insure them cannot be questioned, and is not.

The defence to the action is that the policy does not cover them: and in support of that defence part of the sixth "statutory condition" is mainly relied upon. The part of that enactment, so relied upon, is in these words: "6. The company is not liable for the losses following, that is to say: (*a*) For the loss of property owned by any other person than the assured unless the interest of the assured is stated in or upon the policy; . . . ."

In the policy, the insurance is stated to be of "F. E. Wray in trust, against direct loss or damage by fire or lightning . . . on property as per form attached hereto;" and, in the form attached, the "description" contains these words, among others: "on stock in trade of every description, manufactured, unmanufactured and in process thereof, manufactured or dealt in by the assured, their own, held in trust or on consignment or sold but not delivered or removed . . . ."

The loss sustained was a direct loss by fire; nothing is claimed for except that which was the direct result of fire.

So that the only real question, as to liability, upon the policy, in respect of the goods owned by the plaintiff Cole, but in which, especially in their manufactured state, the insured has very sub-

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stantial rights and interests, is, whether "the interest of the insured is stated in or on the policy."

And at the threshold of a threshing out of that question, it must be stated, and must always be borne in mind, that the defendant company, through its agent who effected the insurance, knew that it was intended to cover goods which the insured did not own, but had to be manufactured by him, as he had the goods of the plaintiff Cole; and that the words used in the "description" are those of the company and were intended to cover such goods.

And why are they not sufficient? Their own, or not their own, but held in trust by them "but not delivered or removed," and "manufactured, unmanufactured, or in process thereof."

It may be said that held "in trust" means held in trust by Wray for the real owner of the business carried on in the name of F. E. Wray in trust; but, even if that be so, why may it not mean, and more plainly mean, in trust for the plaintiff Cole? A bailee is commonly, and not improperly, called a trustee for the person whose goods he has in bailment.

I find no difficulty in giving effect to the insurance which the parties intended to effect; nor in the plaintiff Cole maintaining this action. He has an assignment of the policy; but it is said that Wray had no power to make it; but why not? He had power to effect the insurance, and did effect it, for the plaintiff Cole's benefit. Not only was there power to assign it, but, if it were necessary, an assignment of it should be enforced in this action, in so far as it was made for the plaintiff Cole.

I would allow this appeal; and, if the parties cannot agree, out of Court, as to the amount the plaintiff Cole should recover upon the policy, would refer it to the proper local officer to ascertain and state such amount; and direct that judgment be entered for the plaintiff Cole in that amount, with costs of action, after the confirmation of the report. The plaintiff Cole should have his costs of this appeal forthwith after taxation; and he should have the costs of the action, if the parties agree out of Court upon the amount the plaintiff Cole should recover.

RIDDELL, J.:—One Wray was the proprietor of a business in London, the business name being Everybody's Overall Company; he made an assignment for the benefit of creditors, and the assignee sold the business, etc., to Pringle, in March, 1920. Pringle had advanced Wray $1,650; he paid $4,800 for the bankrupt stock, and engaged Wray to run the business for him for the purpose of winding it up and getting his money out of it—the arrangement being on the terms of a letter from Wray to Pringle in the following words:—

"I believe if the stock and plant of Everybody's Overall Company could be bought at 80 cents on the dollar or say $4,800, a good profit could be made on the transaction. If you care to make the purchase, I will undertake, as trustee for you, to dispose of the goods already made up and make up the balance of material and dispose of it together with the plant when no longer required, and turn over to you the entire sum or sums as received from time to time."

Wray adopted the name of "F. E. Wray in trust" as the business name under which Pringle's business was carried on for him—so that "F. E. Wray in trust" was an *alias* for John Pringle.

In order to "make up the balance of material and dispose of it," it was necessary to obtain quantities of material from other tradesmen. Cole, in the same kind of business, the overall trade, under the name of the Canada Overall and Shirt Company, had more orders than he could fill from his own factory: and he entered into a contract on the 17th June, 1920, with Wray (acting for Pringle) whereby Wray agreed to manufacture for the Canada Overall and Shirt Company materials which were to be furnished from time to time, and he was to be paid according to the terms set out in the contract.

Cole continued to supply Wray with material, cloth and trimmings, and found the amount running up; he asked Wray about the insurance, and was assured that there was ample insurance. But Wray kept asking for more and more goods; Cole said that there was not enough insurance, and Wray agreed to put on another policy for him; afterwards he said he had done so, and assured Cole that his goods were fully covered. A fire took place in September; Wray assigned to Cole his two policies, one in the Gore and the other in the Merchants—Cole brought this action against the Merchants company; Mr. Justice Kelly, the trial Judge, dismissed the action on statutory condition 6 (*a*); and Cole now appeals. One, and perhaps the chief, objection of the defendant company is that Cole was not insured at all, nor were his goods covered by the policy.

The policy insures "F. E. Wray in trust against direct loss or damage by fire . . . machines and machinery of every description . . . stock in trade of every description, manufactured, unmanufactured and in process thereof, manufactured or dealt in by the assured, their own, held in trust or on consignment or sold but not delivered or removed, all while contained in the three-storey . . . building . . ." It is contended that the goods of Cole were not "held in trust" by "F. E. Wray in trust," i.e., Pringle. I cannot agree in this contention. The word "trust"

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has no technical meaning. "Goods held in trust" is a well-known expression in insurance matters, and means "goods held by the insured for which he is responsible to others"—and insurance in this form has always been considered to insure, first, the bailee insuring to the extent of his liens or advances, etc. (if any); and, second, the owner of the goods. See *California Insurance Co.* v. *Union Compress Co.* (1889), 133 U.S. (Supreme Court of the United States) 387, which carries the proposition farther and makes such a policy enure to the benefit not only of the actual owner of the goods but also of all who have an insurable interest in them, because they are to that extent owners (p. 409).

In the present case the insurance was taken out under an agreement between Wray and Cole; and, so far as Cole's interest in the goods goes, was in effect taken out by him (p. 409).

Under the circumstances of this case, "F. E. Wray in trust" was entitled to take out insurance in that name on goods of Cole held by "F. E. Wray in trust," and, unless the statute interferes, can recover the whole amount up to the value of the goods, "holding the excess over its own interest in them for the benefit of those who have entrusted the goods to it," (p. 409).

The statutory condition 6 (*a*) is found by my learned brother Kelly to be a fatal stumbling block in the way of the plaintiffs.

It reads as follows:—

"6. The company is not liable for the losses following, that is to say:

(*a*) For the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy."

This statutory condition is not new—it was in the original Act of 1876, 39 Vict. ch. 24, as 10(*a*), and has not been changed. It was in existence when *Keefer* v. *Phœnix Insurance Co.* (1901), 31 Can. S.C.R. 144, was decided. In that case Keefer, who had been the owner of buildings, agreed to sell to Cloy for $2,000, agreeing to keep them insured for $2,000 until the purchase-price should be paid. Keefer insured the buildings in his own name, and when Cloy had paid all but $700 a fire occurred. Cloy assigned to the Quebec Bank, and Keefer and the bank brought an action on the policy. Keefer had not disclosed the fact of his having made an agreement for sale, nor had the insurance company any knowledge of the fact until the day before the fire. Mr. Justice Ferguson held (1898), 29 O.R. 394, that Keefer could recover the full amount of the loss, the recovery "over and above the amount of his own loss being a recovery as trustee for the purchaser" (p. 399). The Court

of appeal reversed this decision, holding that the policy covered only Keefer's own interest ((1899), 26 A.R. (Ont.) 277)—the Chief Justice saying (p. 278):—

"It is clear that a person having a limited interest in property may insure, nevertheless, on the total value of the subject-matter of the insurance, and that he may recover the whole value, subject to this, that the form of the policy must be such as to enable him to recover the total value, and that it must have been the intention at the time, both of himself and the insurers, to insure the whole value."

Mr. Justice Osler (p. 282) quotes from *Castellain* v. *Preston*, 11 Q.B.D. 380, as follows:—

"It is well known, of course, that a person with a limited interest may insure and recover the whole value of the thing insured, but then his policy must be apt for the purpose, and he must have intended so to insure."

The learned Judge adds (p. 282):—

"To the extent of what he recovers beyond the amount of his own interest, where the insurance is not so limited, he is trustee for others whose interests were intended to be covered."

There was no difference of opinion in the Court as to the law that a person having an interest could insure for and obtain the full amount of the loss, but the majority of the Court considered that the form of the policy was not apt to cover the full loss.

This was reversed in the Supreme Court of Canada, 31 S.C.R. 144, where it was held that the fact that Keefer was not the sole owner need not be stated in the policy or disclosed to the insurer; and that the form of the policy was sufficient. The two conditions mentioned by Bowen, L.J., in *Castellain* v. *Preston*, 11 Q.B.D. 380 at 398, were accepted by the majority of the Court, "first of all, the form of his policy must be such as to enable him to recover the total value . . .; and, secondly, he must intend to insure the whole value at the time" (31 Can. S.C.R. at p. 150).

The policy sued on in that case was only to "indemnify and make good to the assured, his heirs or assigns, all direct loss or damage not exceeding in amount the sum or sums as above specified, nor the interests of the assured in the property." See per Osler, J.A., 26 A.R. (Ont.) at p. 283; Supreme Court Cases in Library, vol. 194 (1899), p. 12; and it was these words which caused the trouble and influenced the Court of Appeal in the decision. Had the wording of the policy been as in the present case, the decision would no doubt have been different.

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In any event, the principle laid down in the Court of Appeal, that a person having a limited interest may insure for the full value if the policy is in apt form, cannot be gainsaid. That Pringle, the assured, had an interest in the goods is plain; he was "trustee," responsible for them to Cole, and had undertaken to keep them insured.

Whatever may be the meaning of statutory condition 6(*a*), it does not cover the present case.

The assignment to Cole has been attacked: it is said to have been repudiated by Pringle. What is said does not in my mind amount to a repudiation but rather a grumble. But, in any event, making Pringle a party defendant, the plaintiff is *rectus in curiâ*.

I would allow the appeal.

We said at the hearing that we should not consider the question of quantum—if the parties cannot agree, there must be a reference.

LATCHFORD, J., agreed that the appeal should be allowed.

MIDDLETON, J., agreed in the result and in the reasons given by RIDDELL, J.

Appeal allowed with costs.

PRUDENTIAL TRUST CO. v. NORMAN.

Quebec Court of King's Bench, Guerin, Tellier and Rivard, JJ. December 7, 1921.

COMPANIES (§VC—185)—COMMON STOCK—TRANSFER TO MANAGER IN RECOGNITION OF SERVICES—GIFT BY MANAGER TO SUBSCRIBER TO PREFERRED STOCK—ORDINARY COURSE OF BUSINESS—VALIDITY.

It is not illegal for an incorporated company in recognition of the services and ability of its manager, to transfer a number of shares of the common stock of the company to him, and the manager may also give these shares as a bonus to a subscriber to the preferred stock of the company so long as the transaction is in good faith and in the ordinary course of business.

[See Annotation on Company Law, 63 D.L.R. 1.]

APPEAL by defendant from the judgment of the Superior Court (Que.) in an action to recover the balance of the purchase price of certain preferred shares. Affirmed.

The judgment of the Superior Court, which is affirmed, was delivered by Martineau, J. on May 26, 1921.

On September 6, 1916, the appellant subscribed for 50 shares of preferred stock, at par, of the Metro Pictures Ltd., and he received as a bonus 25 shares of common stock fully paid. The transaction was made in the following manner. The appellant was one of the directors. On account of the ability and resourcefulness of one Sawyer, the directors appointed him the

general manager of the company with a salary of $1,300 a week and a commission on the receipts. Furthermore, they voted him 500 shares of common stock fully paid, at par value of $50,000 for services rendered. Sawyer transferred to appellant the aforesaid 50 preferred shares with the above bonus. The claim against the appellant was transferred to respondent, and the action is to recover the sum of $1,767, balance of the price of these preferred shares.

The defendant-appellant's plea is that his subscription is illegal and null because the company could not give him a bonus of the 25 shares of the common stock, as the law does not allow a company to dispose of its common stock unless at par.

C. M. Cotton, for appellant.

Brown, Montgomery & McMichael, for respondent.

GUERIN, J.:—If they were willing thus to pay him $65,000 a year and a commission on the receipts, it is conceivable that they would be willing to go a step farther and to part with 500 shares of common stock to recompense him for his services, and retain his good will. Experience teaches us that business men do not always trouble themselves very much about the cost of administration, when business is booming, and money is pouring into the treasury.

If it be true that Sawyer received this common stock as an equivalent in money for his services; what he thus received, was really stock for which he paid the equivalent of cash.

Later on, he was apparently willing to surrender part of this stock as a bonus to purchasers of preferred stock, on a basis of 50 common for 100 preferred paid for 100 cents on the dollar in cash. There is no evidence that he was obliged to do so, nor is there evidence that he would have been obliged to return any of his common stock to the treasury, in case he did not utilize it by giving it away as a bonus to subscribers to the preferred stock sold for cash. He could keep it as his own property and do with it what he willed.

All the directors of the Metro Pictures Limited including the appellant were agreeable to vote him this stock fully paid up for services rendered.

If Sawyer was so interested in the success of the enterprise as to surrender his common stock to subscribers of preferred stock, he was helping the company which was paying him princely rewards for his services, and which really was in need of money to carry on its business.

The proof of this is seen in the fateful crash which eventually

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put the Metro Pictures Limited into insolvency and liquidation.

The common stock which was offered as a bonus to the defendant was not common stock taken directly from the treasury, but stock which came from Sawyer, for which he had paid an equivalent of money satisfactory to the Board of Directors. It matters not from what source the defendant received his bonus stock, so long as this bonus stock was so issued from the treasury, that the title thereto was not tainted by fraud or by the absence of a good and valid consideration paid therefor. The transaction of the Metro Pictures Limited in voting the 500 shares of common stock to Sawyer was not, under the circumstances, *ultra vires;* the transfer which he made of the shares to the defendant was not illegal, and events proved that it was very much in his interest to do what he did, in order to encourage Norman to pay for the preferred stock for which he had subscribed.

The important feature of this case is that the 25 shares of common stock representing the bonus for which the defendant stipulated, when he subscribed for 50 shares of preferred stock, were originally issued to Sawyer from the treasury of the Metro Pictures Ltd., for a valid consideration, and were duly tendered to the defendant in fulfilment of the stipulation for this bonus contained in his subscription for 50 preferred shares. Norman has received his due and has no just cause to complain. I would confirm the judgment with costs.

TELLIER, J.:—The subscription form signed by the defendant states on its face that he is to receive a bonus of 50% in common stock in addition to his 50 preferred shares, that common stock to the value of $50,000 has been issued and allotted and that 375 more shares of a value of $37,500 are to be issued as bonus. That is what the defendant relies on in support of his contention that the said subscription form is null. According to him, he is not bound because the consideration for which he contracted is illegal.

Can this form be considered as null and non-existing? That is just how the question must be put; for if it is merely annullable the Court has no power to annul it, because that has not been asked. It is to be noticed that the defendant's plea does not ask the Court to declare his contract null, but merely concludes for the dismissal of the action.

The evidence shews that Metro Pictures Ltd. employed one Sawyer to sell its preference stock, at a salary of $1,300 per week. Later the company issued to him, in consideration of

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his services, 500 common shares of a face value of $50,000. It was this same Sawyer who, of his own free will, provided the bonus of 50% given to every subscriber to preferred stock out of these same common shares.

Was all this done in good faith in the ordinary course of business or was it a pretence intended to cloak an evasion of the law? The question would doubtless merit attention if the Court were called upon to declare the nullity of the arrangement made between the said Sawyer and the company or at least if the resolutions of the Board of Directors of the latter were attacked. But there is no conclusion to that effect. It would, therefore, be useless to inquire into the causes of nullity or rescission if any exist.

As to the subscription form, if it is null on its very face, if it is tainted with absolute nullity as being contrary to law, the Court may, and indeed must, declare it null even though it is not asked to do so.

As a matter of fact, is it null on its very face? Is it absolutely illegal? Can it be considered non-existent? No, I do not think so. It is not necessarily null. It all depends on the circumstances. It is not null as long as it was Sawyer who furnished the bonus. Now that fact has been proven, and it was allowed to be proved because of what is contained in the answer to plea. Besides, it is safe to say that the defendant himself knew very well that the bonus came from Sawyer since he was a member of the Board of Directors and participated generally in all that was done in this regard.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

Re TORONTO R. Co., and CITY of TORONTO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Latchford, Middleton and Lennox, JJ. December 16, 1921.

COURTS (§ IIA—150)—QUESTION SUBMITTED TO COURT UNDER SEC. 29 OF THE ACT—JURISDICTION—JUDICATURE ACT, SECS. 12 AND 43 AND 67.

Proceedings directed by any statute to be taken before the Court come before the Appellate Division following practice where the decision is final.

[*Re Geddes and Cochrane* (1901), 2 O.L.R. 145, followed. See also *Re McConkey Arbitration* (1918), 43 D.L.R. 732, 42 O.L.R. 380.]

CASE stated by arbitrators appointed under the Ontario Statutes, 55 Vict., ch. 99, and 11 Geo. V, ch. 126, sec. 11, to determine the amount to be paid by the city corporation to the railway company for plant, etc., taken over by the city corpora-

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tion. The opinion of the Court was asked upon a question arising in the course of the arbitration proceedings, viz., whether the ruling of the arbitrators confining the production for inspection of the books of the Toronto Railway Company, shewing details of the cost of the property taken over, to the books and records of the company since the 1st January, 1913, was right. The case was stated pursuant to sec. 29 of the Arbitration Act, R.S.O. 1914, ch. 65, which provides that "an arbitrator . . . may at any stage of the proceedings and shall, if so directed by the Court, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference." Section 12 of the Judicature Act, R.S.O. 1914, ch. 56, provides as follows:—

12.—(1) The Appellate Division shall exercise that part of the jurisdiction vested in the Supreme Court, which, on the 31st day of December, 1912, was vested in the Court of Appeal and in the Divisional Courts of the High Court, and such jurisdiction shall be exercised by a Divisional Court of the Appellate Division, and in the name of the Supreme Court.

(2) Except as provided by the next preceding subsection, all the jurisdiction vested in the Supreme Court shall be exercised by the High Court Division in the name of the Supreme Court.

Section 67 (1) of the Judicature Act in force in 1912, R.S.O. 1897, ch. 51, provided as follows:—

67.—(1) Subject to Rules of Court, the following proceedings and matters shall be heard and determined before a Divisional Court of the High Court:

(*a*) Proceedings directed by any statute to be taken before the Court in which the decision of the Court is final.

Section 43 (1) of the Judicature Act, R.S.O. 1914, ch. 56, provides as follows:—

43.—(1) Every action and proceeding in the High Court Division, and all business arising out of it, except as herein otherwise expressly provided, shall be heard, determined and disposed of before a Judge, and where he sits in Court he shall constitute the Court.

C. M. Colquhoun, for the city corporation.

N. W. Rowell, K.C., and *Frank McCarthy*, for the railway company.

MEREDITH, C.J.C.P., and LATCHFORD and MIDDLETON, JJ., were of opinion that the proper forum for the hearing of the case was a Divisional Court of the Appellate Division.

MEREDITH, C.J.C.P., dealing with the preliminary objection, said:—

We should, I think, follow the ruling in the case of *Re*

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Geddes and Cochrane (1901), 2 O.L.R. 145, on the question whether this case should be heard here or in the High Court Division: many matters of much less importance come to this Division: and it is not well to upset a practice which has been followed since that case was decided and has become a settled one: indeed, such applications as this are very few in number; and they involve—as in this case—matters of much moment always; and they generally—as in this case also—come from arbitrators, some of whom are prominent lawyers; so that I cannot but think it more fitting, helpful, and convenient that they should be heard by this Court rather than by a "single Judge" in the High Court Division, even if there were a right of appeal from his decision. Present-day legislation and practice make it plain that everything of appellate character should come to the Appellate Division.

LENNOX, J., referring to the preliminary objection, said:—

A majority of the Court being of opinion that we have jurisdiction, I have not found it necessary to consider the question; and, indeed, if the most careful research inclined me to an opposite conclusion, I could have no great confidence in the result, in the face of the conclusion reached by my more experienced and learned brothers.

Objection overruled.

CAMPBELL BROS. v. KEAST & ROE.

Saskatchewan Court of King's Bench, Bigelow, J. June 15, 1922.

MORTGAGE (§IV—53)—TRANSFEREE—RIGHTS OF—SUBJECT TO THE STATE OF ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE—LAND TITLES ACT R.S.S. 1920, CH. 67, SECS. 123, 125—CONSTRUCTION.

Section 125 of the Saskatchewan Land Titles Act R.S.S. 1920, ch. 67, has not changed the law that a transferee of a mortgage takes subject to the state of accounts between the mortgagor and mortgagee at the date of the transfer, unless some act of the mortgagor has enabled the mortgagee to deceive him or has given him reason for inferring that the mortgage was still a security for a larger amount.

[*Dixon* v. *Winch* (1899), 68 L.J. (Ch.) 572, 47 W.R. 620; *Swan* v. *Wheeler* (1909), 2 S.L.R. 269, applied; *Union Bank of Canada and Phillips* v. *Boulter-Waugh Ltd.* (1919), 46 D.L.R. 41, 58 Can. S.C.R. 385, distinguished. See Annotation 25 D.L.R. 435.]

ACTION to obtain a discharge of a mortgage.

A. C. Stewart, for plaintiff; *W. A. Doherty*, for defendants.

BIGELOW, J.:—One Harry McIntyre was the registered owner of the north-west quarter of 34-34-32, W. 1, and gave three mortgages on said land, which according to priority of registration were as follows: (1) To Louis F. Campbell and Milton

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N. Campbell, $492 with interest at 10%, dated December 28, 1914, registered December 30, 1914; (2) To E. A. W. Mackenzie, $254.31 and interest at 8%, dated December 31, 1914, registered January 13, 1915; (3) To George H. Bridgman, $655 and interest at 7%, dated December 29, 1914, registered January 15, 1916. $440 was paid on this last mortgage on March 13, 1915, by McIntyre by delivery of horses, which left the principal at $215.

McIntyre was about to enlist, and transferred the land on March 4, 1916, to Norman J. Campbell, a brother of the first mortgagees and one of the firm of Campbell Bros., in trust to sell the land and pay $100 to McIntyre when it was sold, and the balance, after payment of taxes and expenses, to be paid on the mortgages in order of priority. I find that Mackenzie and Bridgman agreed to this before the transfer was taken.

After some time a sale was made—on November 27, 1916—for $1,400, payable $400 cash; $100 December 1, 1917; $300 December 1, 1918; $300 December 1, 1919; $300 December 1, 1920; with interest at 8%. This sale was agreed to in writing by the three mortgagees. The mortgagee Bridgman signed the following agreement endorsed on the agreement for sale:—"I hereby agree to the terms and stipulations of this agreement, and agree to accept as payment in full of my mortgage the balance over after paying off prior incumbrances."

It was contended by Bridgman that he had no knowledge of the arrangement to pay McIntyre $100, and that he never agreed to it. In this respect he is in direct conflict with Milton N. Campbell. I believe the evidence of Campbell, that Bridgman knew about it, and agreed to it at the time the transfer was taken to Norman J. Campbell and at the time of the sale of the land. One very strong circumstance helping me to come to this conclusion is the agreement signed by Bridgman referred to above. If a computation is made of the amounts that had to be paid out of this $1,400 including taxes of $227.32, it will be found that $1,400 was enough to pay everything in full if the $100 did not have to be paid to McIntyre; but if $100 had to be paid to McIntyre, then $1,400 was not enough to pay Bridgman's mortgage in full. At the time Bridgman signed the memo. above-quoted, November 27, 1916, it seems to have been assumed that there was not enough to pay him in full, as he agreed to accept as payment in full the balance over after paying prior incumbrances. I, therefore, infer that Bridgman had knowledge of and agreed to the $100 payment to Mc-

Intyre, and accept Milton Campbell's evidence on this point.

According to the evidence, the plaintiff received on the agreement for sale the following amounts on the dates mentioned, namely:—

Nov. 27, 1916, $400; Dec. 1, 1917, $80.95; Feb. 26, 1918, $1100.70; Feb. 6, 1919, $200; Feb. 13, 1919, $70; Dec. 31, 1919, $500; Aug. 9, 1920, $263; Sept. 21, 1921, $20. Total, $1,634.65.

The $400 first received was probably used by the plaintiffs in the following way:—To pay taxes, $227.32; registration fee of transfer, $7.50; cheque to McIntyre, $100; pd. for discharge Bk. Toronto cavt., $4.25; Balance to apply on pltff's mtge., $60.93. Total, $400.

The plaintiffs applied the following amounts to their mortgage:—Nov. 27, 1916, $60.93; Nov. 1, 1917, $80.95; Feb. 26, 1918, $100.70; Feb. 6, 1919, $200; Feb. 13, 1919, $70; And, out of the $500 paid December 31, 1919, $202.10. Total $714.68.

The plaintiffs applied on the Mackenzie mortgage December 31, 1919, balance of the $500 payment $297.90, Aug. 9, 1920, out of the $263 payment, $80.00. Total, $377.90.

The plaintiffs have in hand for payment to defendants, according to their contention—The balance of the $263 payment, viz. $183, and the last payment, $20. Total, $203.

The plaintiffs are also entitled to charge the costs of registering the discharge of the Mackenzie mortgage as well as the Bridgman mortgage, which they have charged at $4.50.

On September 2, 1919, Bridgman transferred his mortgage to the defendants, which transfer was registered on September 5, 1919. The consideration for the transfer of the mortgage is expressed in the document as $250. The real consideration was $25 cash, one horse worth $100 to $125, and another horse of doubtful value. Bridgman said this second horse could not be sold at all for cash; he had fallen over a culvert and injured himself.

Before the action, plaintiffs tendered to the defendants a marked cheque for $194.77, and asked for a discharge of the Bridgman mortgage, which was refused, the defendants insisting on the full amount of the mortgage and interest, less the payment of $440 endorsed on the mortgage. The plaintiffs have always been and are now ready and willing to pay defendants the $194.77, and bring this action to obtain a discharge of the mortgage.

The defendants claim, first, that they are entitled to the full amount of their mortgage, that they are not bound by

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the equities of the preceding mortgagee, and rely on secs. 123 and 125 of the Land Titles Act, R.S.S. 1920, ch. 67. By sec. 123, mortgages may be transferred; and sec. 125 provides:—

"(1) Upon the registration of a transfer of a mortgage, incumbrance or lease, the interest of the transferor as set forth in such instrument with all rights, powers and privileges thereto appertaining shall pass to the transferee (etc.).

(2) By virtue of every such transfer, the right to sue upon the mortgage or other instrument and to recover the amount transferred or damages and all the interest of the transferor in such amount or damages shall vest in the transferee."

Reading that section as a whole, I cannot conclude that it was the intention to change the law, which has been that a transferee of a mortgage takes subject to the state of accounts between the mortgagor and mortgagee at the date of the transfer, unless some act of the mortgagor justifies him in believing otherwise. See *Dixon* v. *Winch* (1899), 68 L.J. (Ch.) 572, 47 W.R. 620, Cozens-Hardy L.J. says at p. 575:—"It is well settled that when a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer."

See also *Swan* v. *Wheeler* (1909), 2 S.L.R. 269, Lamont, J., at p. 273 says:—

"These authorities, it seems to me, establish that an assignee of a mortgage takes the mortgage subject to the state of accounts existing between the mortgagor and mortgagee at the time of the assignment. That, where the mortgagor shews the amount due to be less than the face value of the mortgage, the assignee can only recover the amount actually due, unless he can bring himself within the principle laid down in *Bickerton* v. *Walker* (1885), 31 Ch. D. 151. To do this he has to shew not only that he gave full value for the mortgage, without notice that a less amount only was due, but also that the mortgagor by some act has enabled the mortgagee to deceive him, (the assignee), or has given him reason for inferring that the mortgage was still a security for the larger amount. Here the assignee produces his mortgage, which on the face of it is a security for $1,008. The onus is then on the mortgagor, or those claiming under him, to shew that on a true statement of accounts there is not that amount due. When, however, that is shewn, I am of opinion that the onus is then on the assignee to shew that, notwithstanding the fact that the true state of accounts shews

a less sum than the amount claimed to be due, the mortgagor and those claiming under him are estopped from asserting that the larger amount is not due."

Then Lamont, J. goes into the accounts and finds that, instead of $1,008, the amount expressed in the mortgage, being due, there was only due $241.92. He then continues at p. 274:—

"This being the state of the accounts when Swan obtained an assignment of the mortgage, are the defendants estopped from claiming that only the sum of $241.92 and interest thereon is due upon the mortgage? I am of opinion that they are not, unless Swan shews that he took the mortgage without knowledge that the consideration therefor had not been advanced; that he in good faith had taken it over at the amount he claims to be entitled to; and that he was justified by some act of the mortgagor (which, in my opinion, would require to be something more than simply the execution of a mortgage with the usual receipt clause embodied therein) in inferring that the larger amount was then due on the mortgage. It is the duty of the assignee to inquire into the state of the accounts when taking over a mortgage, and he omits to do so at his peril unless he can justify that omission by some act of the mortgagor from which he is justified in inferring the state of accounts to be something different from what it actually is. On this point, however, there is not the slightest evidence. There is no evidence that Swan paid anything for the assignment, nor that he did not have full knowledge of the state of the accounts between the mortgagor and the mortgagee."

See also *Turner* v. *Smith*, [1901] 1 Ch. 213, 70 L.J. (Ch.) 144, 49 W.R. 186.

Fisher on Mortgages, 6th ed. (Can.) par. 184:

"A mortgagee is entitled to transfer his security either absolutely or by way of sub-mortgage, and with or without the concurrence of the mortgagor. (*Ex parte Sargent, re Tahiti Cotton Co.* (1874), L.R. 17 Eq. 273, at p. 279, 43 L.J. (Ch.) 425, 22 W.R. 815.) It is however always desirable that the latter should be a party, because in his absence the transferee is bound by the state of the accounts between the mortgagor and the transferor, whatever may have been the representations of the *latter* to the transferee, and though he has no notice of the discharge of any part of the debt."

Fisher on Mortgages, par. 1757:

"The assignee of a mortgage claiming under an assignment made without the privity of the mortgagor to the account will

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receive from the mortgagor so much only as is due on the security without reference to what was paid on the assignment. *Turner* v. *Smith* [1901] 1 Ch. 213. So the mortgagor, upon an assignment so made, loses none of his right to an account of past receipts from the mortgagee."

If defendant's contention is correct, he is entitled to $655, as that is "the interest of the transferor as set forth in such instrument," although he had knowledge that $440 had already been paid the mortgagee. The defendant's contention would also mean that if A mortgages land to B for $10,000, and A makes payments on the mortgage reducing it to $1,000, B could transfer the mortgage to C and by stating in the transfer of mortgage that his interest was $10,000, make A still liable to C for the $10,000. Such a contention is so repugnant to what is equitable that only the clearest language in a statute would lead me to such a conclusion. I am of the opinion that, reading sub-secs. 1 and 2 of sec. 125 together, only the interest of the mortgagor in the amount transferred vests in the transferee. The case of *Union Bank of Canada and Phillips* v. *Boulter-Waugh Ltd.* (1919), 46 D.L.R. 41, 58 Can. S.C.R. 385, I do not think applies. It is a decision under another section of the Act which does not include a transfer of a mortgage.

When defendants were about to take the transfer of this mortgage, they were informed that plaintiffs had sold the land and there were two mortgages and other payments to be met before this mortgage, and that only the balance coming from the sale of the land would be available for this mortgage. Keast interviewed Milton Campbell for the express purpose of finding out the state of affairs, and Milton Campbell explained the whole transaction and showed Keast the agreement signed by Bridgman endorsed on the agreement for sale. Milton Campbell also told Keast that there was about $202 principal and interest to be paid on the Bridgman mortgage, but that he was not sure of the exact figures, that it would take some time to figure it up accurately, and suggested that Keast wait for an exact accounting, but Keast said it was not necessary. Under these circumstances I do not think there was any estoppel.

Defendants' contention that plaintiff should not be allowed $100 paid McIntyre I have dealt with above.

There is another item of $50 which defendants object to. Mackenzie transferred his mortgage to one Humphries, who in turn transferred it to plaintiff Milton Campbell at a discount

of $50. There is only the evidence of Milton Campbell about this transaction, who says that it was his wife's money that bought this mortgage and that the payments on the mortgage were made to her. But it is also admitted by Milton Campbell that the transfer of the mortgage was made to him and that Humphries made the draft on him, and that the discharge of the mortgage was signed by him. Norman J. Campbell and his partners were trustees in this matter, and trustees cannot make a profit out of the trust without the knowledge and consent of the *cestui que trust*. Where the documents were all made in Milton Campbell's name, I am suspicious of the transaction, and I would require some corroboration of Milton Campbell's statement that it was his wife's money that went into the transaction. It surely would not have been difficult to produce the wife's bank-book showing the money for the transfer paid out of her account and the payments on the mortgage paid into her account. In the absence of this corroboration I find that the plaintiffs are not entitled to charge that $50.

Of the amount received August 9, 1920, the plaintiffs, then, would only be entitled to pay $50 on the Mackenzie mortgage, leaving $233 for the defendants' mortgage.

I do not think plaintiffs should be charged with interest on the amounts received.

The accounts are all referred to the Local Registrar, who will ascertain on the above basis:— (1) The amount received on the agreement for sale. (2) The amount required to pay plaintiffs' mortgage. (3) The amounts required to pay Mackenzie's mortgage. (4) Other amounts, taxes and expenses, and $100.00 paid McIntyre, which plaintiffs are entitled to. (5) The balance in plaintiffs' hands available for defendants' mortgage.

I do not think any further evidence is required; it is simply a matter of computation.

On payment of this amount, that is the balance in plaintiffs' hands available for defendants' mortgage, the plaintiffs will be entitled to a discharge, or if defendants refuse to sign a discharge on being tendered that amount, the amount will be paid into Court and an order issued discharging the mortgage.

As to costs, this has been very expensive litigation over a small difference. The plaintiffs did not tender enough, so I do not think they are entitled to costs. The defendants insisted on the full amount due on the mortgage less the $440

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paid, and disputed plaintiffs' right to the $100 paid MacIntyre, so I do not think they are entitled to costs. I think justice will be done by not allowing costs to either party.

Judgment accordingly.

REX v. DURNO

Ontario Supreme Court, Masten, J. December 20, 1921.

INTOXICATING LIQUORS (§ IIIA—50)—CONVICTION FOR HAVING—JURISDICTION OF MAGISTRATE—MOTION TO QUASH AMENDMENT TO ACT—RIGHT OF APPEAL—RIGHTS OF PARTY.

Should the magistrate try a case in which he has no jurisdiction, and record a conviction, an appeal will lie under the amendment to the Act, and this is the proper procedure, not a motion to quash.

[*Rex* v. *Denny* (1921), 61 D.L.R. 663, 36 Can. Cr. Cas. 77, followed; *Simpson* v. *Crowle*, [1921] 3 K.B. 243, referred to.]

MOTION for an order quashing a conviction of the defendant made by Walter J. Barr, a Police Magistrate in and for the town of Burlington, dated the 14th October, 1921, for an offence against the Ontario Temperance Act.

G. W. Morley, for the defendant.

F. P. Brennan, for the magistrate.

MASTEN, J.:—The applicant was convicted of a breach of the Ontario Temperance Act, "for that he, the said Ervine Durno, on the 15th day of October, A.D. 1921, at the town of Burlington, in the said county, unlawfully did have in his possession a quantity of liquor contrary to the Ontario Temperance Act."

A preliminary objection falls to be determined in this case, viz., that certiorari does not lie, because the conviction is appealable under the provisions of the Ontario Temperance Amendment Act of 1921, 11 Geo. V, ch. 73, sec. 6, which provides for an appeal from a conviction under the Act to the Judge of the County or District Court.

In support of the objection is cited the case of *Rex* v. *Denny* (1921), 61 D.L.R. 663, 36 Can. Cr. Cas. 77, decided by my brother Middleton on the 14th Ocotber last. I have been furnished with the judgment in that case, and it is founded upon the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 10, sub-sec. 3, which provides:—

"No such order or conviction shall be removed into the Supreme Court by writ of *certiorari* or otherwise except upon the ground that the appeal provided by any Act under which the conviction takes place or the order is made or by this Act would not afford an adequate remedy."

In the present case it is contended that the above section does not apply where the invalidity of the conviction (if it is

invalid) results from an alleged want of jurisdiction in the magistrate who convicts. It is said that the effect of sec. 5 of the Police Magistrates Extended Jurisdiction Act, 1921, 11 Geo. V, ch. 42, was, in the circumstances here shewn to exist, such as to rescind and cancel the commission as a Police Magistrate and any right or jurisdiction on the part of Walter J. Barr, the convicting police magistrate, to exercise any of his functions except those set forth in sub-sec. 2 of sec. 5 of that Act. The conviction in question, it is alleged, does not come within the exceptions of sub-sec. 2, and therefore it is contended by the applicant that the magistrate acted without jurisdiction. The magistrate affirmed his jurisdiction and recorded a conviction.

The question is whether an appeal lies from such an order, and, if appealed against, would the appeal afford an adequate remedy?

The applicant argues that if the magistrate had no jurisdiction no cause existed, there being no court, and where no cause existed no appeal can lie. The argument seems both plausible and logical, but, by well-established practice, common sense prevails, and an appeal lies on a question of jurisdiction in the same manner as on any other question. The latest illustration of this principle that I have found is afforded by the case of *Simpson* v. *Crowle*, [1921] 3 K.B. 243. In that case the County Court Judge erroneously held that he had jurisdiction, considered the merits, and dismissed the action. An appeal was entertained by a Divisional Court, and the County Court Judge was declared to have no jurisdiction, his findings on the merits were set aside, and in lieu thereof the judgment was directed to provide as follows:—

"The Judge, being of opinion that he has no jurisdiction to try the action, doth dismiss it."

This appeal was entertained notwithstanding the fact that in the County Court the parties proceeded to trial without the question of jurisdiction being raised. In our own Courts the cases of *Re Cosmopolitan Life Association* (1893), 15 P.R. 185, and *Sherk* v. *Evans* (1895), 22 A.R. (Ont.) 242, may be referred to.

I am therefore of opinion that an appeal lies, and further that the appeal affords an adequate remedy, and this brings the case within the decision of my brother Middleton in the case of *Rex* v. *Denny*, 61 D.L.R. 663, 36 Can. Cr. Cas. 77.

The result is that the motion must be refused with costs. The other questions which were argued before me on the hearing of the motion may hereafter arise in some other forum, and I refrain from discussing them. *Motion refused.*

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RE WESTERN TRUST Co. AND FEINSTEIN.

Saskatchewan King's Bench, Bigelow, J. January 30, 1922.

LANDLORD AND TENANT (§IID—30)—LEASE OF LAND FOR TERM—CLAUSE REQUIRING POSSESSION IF LAND SOLD AND PURCHASER REQUIRED POSSESSION—NOTICE TO GIVE UP POSSESSION AS LAND SOLD—NOTICE NOT STATING LAND REQUIRED BY PURCHASER—SUFFICIENCY OF NOTICE.

A lease of land contained the following clause "Further providing and agreed . . . . that should the lessor sell the within described premises and the purchaser require possession of same the lessee shall vacate upon receiving thirty days' notice . . . . The Court held that a notice stating that the land had been sold and requiring the tenant to give up possession in accordance with the terms of the lease, was insufficient in that it did not state that the purchaser required possession, and that the tenant was not an overholding tenant.

[*Pepper* v. *Butler* (1875), 37 U.C.Q.B. 253, and *Cadby* v. *Martinez* (1840), 11 Ad. & E. 720, 113 E.R. 587, referred to.]

APPEAL by tenant from an order of a District Court Judge in an action under the Landlord and Tenant Act (Sask.). Reversed.

F. F. MacDermid, for landlord.

G. A. Cruise, for tenant.

BIGELOW, J.:—This is an application under the Landlord and Tenant Act. The landlord demised and leased the land in question to the tenant on September 21, 1921, for 12 months from October 1, 1921. The lease contained the following clause:—"Further, providing and agreed between the lessor and lessee that should the lessor sell the within described premises and the purchaser require possession of same then the lessee shall vacate upon receiving thirty days' notice in writing, said notice to commence from date of service of same." On October 20, 1921, the landlord entered into a written agreement to sell to the Saskatchewan Investment & Trust Co. for $10,000, payable $5,000 cash and the balance on October 20, 1922. This agreement provided that the purchaser shall immediately after the execution of this agreement have the right to possession of the said premises. On October 24, 1921, the following notice was sent by the landlord to the tenant:—"The above premises having been sold you are, pursuant to the terms of our lease with you, dated 21st September, 1921, notified to quit, vacate and give up possession of the said premises within thirty days from date of service of this notice on you."

The tenant contends that that notice is not sufficient to put an end to the term as it does not appear that the purchaser requires possession of the premises. There is no doubt that the

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purchaser had a right to the possession but there is also no doubt that the purchaser had a right to take over the benefits of the lease. The lease was for $65 a month and extended till nearly a year from the date of the sale. I am of the opinion that the lease could not be determined until the tenant had some notice that the purchaser required possession.

There are two conditions in the lease to bring about a determination: first, sale of the property; second, that the purchaser requires possession of the premises. The notice of October 24 refers only to a sale, no notice was given that the purchaser required possession. In fact, on October 26 the agent of the purchaser gave the tenant notice that the purchaser would not require the premises for some time at least. It is true that this latter notice stated that: "if you wish to continue on, they will give you a lease not to exceed 12 months from December 1, 1921, at such rental as they may deem proper." But no new lease was ever entered into, and no notice whatever was given the tenant that the purchaser required possession.

As to the strictness of the notice required see *Pepper* v. *Butler* (1875), 37 U.C. Q.B. 253, and *Cadby* v. *Martinez* (1840), 11 Ad. & E. 720, 113 E.R. 587, 9 L.J. (Q.B.) 281.

I would, therefore, allow the appeal and decide that the tenant is not an overholding tenant. The tenant will have his costs of the original application and of this appeal.

Appeal allowed.

BROWN v. DOMINION EXPRESS Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 27, 1921.

CARRIERS (§ IIID—400)—SHIPMENT OF GOODS—ARRIVAL AT DESTINATION—ADVICE TO OWNER—DELAY IN TAKING DELIVERY—THEFT—LIABILITY. The carrier of goods who on arrival at their destination, stores them gratuitously, and who notifies the consignee of the arrival, is not liable to the consignee on theft of the goods in the absence of wilful misconduct or neglect.

[*Dixon* v. *Richelieu Navigation Co.* (1888), 15 A.R. (Ont.) 647, affirmed (1890), 18 Can. S.C.R. 704; *Swale* v. *C.P.R. Co.* (1913), 15 D.L.R. 816, 29 O.L.R. 634, 16 Can. Ry. Cas. 363, followed.]

APPEAL by defendant from the judgment of Lennox, J., in an action to recover $1,480, the value of 105 cases of bottles of intoxicating liquors purchased by the plaintiff in Montreal and shipped to him at Windsor. While in the possession of the defendants, the carriers, in their warehouse at Kingsville, the 105 cases were stolen, and the plaintiff alleged that the defendants were liable to him for the loss.

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The judgment appealed from is as follows:—Of four actions tried at the same Court at Sandwich concerning the carriage and loss of intoxicating liquor, this is the only one in which I can say that there is no ground upon which dishonesty, or an intention to evade the law, could be imputed. The plaintiff is a man of good financial standing, carrying on a lucrative business, and the liquor in question was not purchased with the intention of reselling it.

The plaintiff claims to recover $1,480. The first shipment was of 5 cases declared to be of the value of $75. This was received by the company on the 5th February, 1920. The other shipment contained 100 cases, valued at $1,400, and was received on the 15th March, 1920. Both were taken on at Walkerville, carried by the company to Kingsville—arriving a day later in each case—stored in the company's warehouse at that point; and the whole was stolen from the company's warehouse on the night of the 23rd March, 1920.

The defendant company rely upon the plaintiff's delay in taking delivery, and particularly upon a special contract, in the form of a receipt given therefor to the shippers, by which the plaintiff is bound, and some of the terms and conditions were as follows:—

"5 (b) For loss or damage occurring after 48 hours (exclusive of legal holidays) after notice of the arrival of the shipment at the destination or point of delivery had been mailed to the address of the consignee.

(c) The company shall not be liable for any loss caused by the default of the shipper or owner.

(d) For any loss or damage caused by delay or injury to or loss or destruction of the shipments or any part thereof from conditions beyond the control of the company, unless such loss or damage is caused by the negligence of the railway company upon whose trains or property the shipment is at the time such loss or damage occurred."

Clause (a) refers to "differences in weight or quantity by shrinking, leakages, etc.": to clause (b), this omitted condition, referring to (a) and (b), must be added, namely: "unless in either case such loss or damage was caused by the negligence of the company." This is a very important qualification of condition (b) set up by the defence.

The question for decision is: of two innocent parties which should bear the loss?

The defendants are common carriers, and, when the transit is at an end, their liability is to be determined by the law touching warehousemen or bailees. The company not having given

any written notice, there is room for debate as to whether their liability as carriers did not continue, that is, as insurers of the goods carried at common law, and still insurers, except in so far as the common law liability is modified by statute or the orders of the Railway Board; but I do not find it necessary to weigh this point carefully. Warehousing, more or less, is incidental to the defendants' business as common carriers, it is an inseparable factor of their calling, and the law attaches obligations, although not as burdensome, in some respects, as during transportation.

The building in which the company housed the plaintiff's goods is a stone structure, having the appearance, no doubt, to their customers, and persons not having to examine and keep it in repair, of strength and security. The company kept it locked up at all times when they were not taking in or delivering goods, I presume, and their agent notified the plaintiff that his goods would be under lock and key, although, as to the first shipment, and I am not sure as to the other, the agent added, "They will be at your risk." The direct cause of the theft was that, although the door used for ingress and egress was locked, there was another door, in the rear of the building, I think, the fastening of which was by hook and staple, and this had been so adjusted originally or had been allowed to fall into such a condition of nonrepair that by jerking upon the door on the outside the hook would spring out of the staple, and access could be gained in this way; and admittedly this is the way the thieves got in.

It was faintly suggested that the company are in the position of gratuitous bailees; that they are not in the habit of charging for storage and have no legal right to make a charge. The point was not developed, and I shall refer to it again later.

A warehouseman is one who, as his business or as part of his business, has the custody and care of another man's goods. Unless there is some law or regulation preventing him, he has, in the absence of a special agreement or regulation or rule, an implied right to demand and obtain reasonable compensation for space and care. He is not an insurer, but he is bound to take all reasonable care of the goods, and is liable for loss and injury occasioned by his negligence. A railway company ceases to be a common carrier and becomes a warehouser when the transit is at an end, and it is the same as to other common carriers if the business they are engaged in involves the housing and care of the goods they profess to carry. I can find no ground for specialising in the case of this company. Their business is subject to the provisions of the Railway Act and the orders of the Board of Railway Commissioners for Canada. Amongst other

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things, the Board may determine "(*a*) the extent to which the liability of the company . . . . may be . . . . impaired, restricted or limited; and (*b*) prescribe the terms and conditions under which goods may be collected, received, *cared for* or handled," etc.: The Railway Act, R.S.C. 1906, ch. 37, sec. 353, subsec. 3.*

The contracts in this case are stated to be in pursuance of orders and approvals of the Board of Railway Commissioners, but it is not shewn that the common law liability of the company as warehousemen has been "impaired or restricted" by any schedule, classification, or order of the Board in the way suggested, or that they are not entitled to collect tolls for goods remaining in their warehouses if and when they comply with the orders of the Board by notice in writing. If it is a fact that they are prevented from collecting warehouse charges, the order should have been filed, and it would then no doubt appear that the right was surrendered in consideration of some other advantage, and if so there would be indirect compensation.

Chapman v. *Great Western R.W. Co.* (1880), 5 Q.B.D. 278, is an illustration of absence of negligence upon the part of the company and non-liability.

As to one of the consignments sued for in this action there was a slight error in the name of the consignee, but it occasioned no difficulty. The company's agent knew for whom it was intended, so informed the law officers, and, in all that he did or says he did, treated the plaintiff as owner, as he in fact was.

I am of opinion that the plaintiff is entitled to recover; but I think it right that I should add that I have not come to this conclusion without a good deal of hesitation. There is no "poor man" in this case on either side, and so my judgment is not liable to be warped by unconscious sympathy. There is no getting away from the fact that Mr. Brown had made use of the company's premises for the first shipment, and proposed to use them, for some little time further at least, for the second, for his own convenience, because his house was vacant and supposedly unsafe. It is argued by counsel for the defence, upon the authority of *Pleet* v. *Canadian Northern Quebec R.W. Co.* (1921), 56 D.L.R. 404, 48 O.L.R. 351, and in appeal (1921), 64 D.L.R. 316; 50 O.L.R. 223, that the plaintiff was guilty of "gross negligence" and so not entitled to recover. However vigilant the plaintiff might have been, he must rely upon the contract of the company, express or implied, to care for the goods; and, assuming without deciding that their duty as carriers was ended, the relevant question is the negligence of the company. If there is a difference in the grades of negligence,

*See the Railway Act, 1919, 9 and 10 Geo. V., ch. 68, rec. 365 (2).

they were guilty of the grossest kind of "gross negligence" in leaving the warehouse in that condition described. Jewels or rubies or diamonds were not as liable to be stolen in the county of Essex in March, 1920, as the plaintiff's 105 cases of "necessaries," as the company's agent must have known, and he must have known that the existence of this previous store was sure to be noised abroad, for the officers of the law had visited him; and to talk of the things they have done, the things they are doing, and the things they are going to do, is of the essence and being of "the moral uplifters" everywhere. To turn the key in the front door was not enough—a burglar never enters by the front door—it became the duty of the company, constantly handling this coveted commodity, to test the safety appliances of their warehouses; it became the immediate and imperative duty of their agent, in the circumstances I have referred to, to be alert and vigilant.

I think the principle of *Mitchell* v. *Lancashire and Yorkshire R.W. Co.* (1875), L.R. 10 Q.B. 256, applies to the decision of this action. It is true that in that case the company described themselves as warehousemen and referred to warehouse charges. They requested the plaintiff to remove the flax at once, and part of it remained for over two months. They tried to protect it, but had no adequate means. Blackburn, J., said (p. 260): "After this notice, and the consignee does not fetch the goods away, and becomes in morâ, then I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee. . . . I think, ... the railway company in holding these goods could have charged warehouse rent, and that being so, I think there can be no doubt that *primâ facie* there was a liability in them as bailees for reward. The liability of an ordinary bailee is to take ordinary and reasonable care. And if the defendants in this case are under that liability, there is ample evidence that they did not do that." The learned Judge held that "at owner's sole risk" did not relieve them. I have said all I need say as to the right of the company to charge for storage in this case.

The declared value of the goods was $1,475, not $1,480. The plaintiff claims interest by way of damages. I do not think I should allow it—he is not damaged by the delay, the money is worth more *now* than the unconsumed residue of the liquor would be if he had got it a year ago. The company is entitled to the express charges; these will be deducted, and there will be judgment for the balance with costs.

J. D. Spence, for appellants.

J. H. Rodd, K.C., for respondent.

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Maclaren, J.A.

The judgment of the Court was read by

MACLAREN, J.A.:—This is an appeal by the defendants from a judgment of Lennox, J., of the 2nd May, 1921, condemning the defendants to pay to the plaintiff the sum of $1,440,58, the value (less express charges) of two consignments of liquor shipped by Hiram Walker & Sons at Walkerville to the plaintiff at the village of Kingsville in the same county.

The first consignment, of 5 cases, was shipped on the 5th February, 1920, and was valued at $75; the second, of 100 cases, was shipped on the 15th March, and valued at $1,400. Each consignment reached Kingsville the day after shipment.

The facts relating to the first shipment are not really in dispute and depend upon a question of law, but the parties differ widely as to the circumstances relating to the second shipment.

The plaintiff is a fisherman, carrying on business at Kingsville, and has a residence there in which he spends the summer months or the fishing season, and has also a winter residence in Windsor.

When the first consignment arrived at Kingsville on the 6th February, the express agent, Hall, says that he endeavoured to make delivery, and called up the plaintiff's house but could get no response. He then placed the 5 cases in a room in the station building, called the old bonded room, which was kept locked and which was considered a place of safety. A few days later he met the plaintiff in the street and informed him of the shipment being there. The plaintiff said he would not be in Kingsville for a while, and asked if he could not leave it there for a few days. Hall replied that it was under lock and key; but it was there at his own risk. The plaintiff admits that Hall told him that it would be there at his own risk if he left it, and he acquiesced.

The second shipment, of 100 cases, was made on the 15th March, 1920, and arrived at Kingsville on the 16th. The agent says that he saw one Westcott, a special friend of the plaintiff's, that day, and asked him where the plaintiff was, and was told that he was in Windsor. He told Westcott that a consignment had come for Brown and asked Westcott to notify him.

The agent says that he was called up the next forenoon by the plaintiff by long distance telephone from Windsor and asked about the consignment. The plaintiff said he would be down in a day or two and look after it, and he asked if it would be all right to leave it there. It had been placed in the old bonded room where the 5 cases were, on the evening of the day on which it arrived. The plaintiff asserts that his conversation with Hall

was not on the 17th, as alleged, but was on the 20th, and he denies that he was then told that it would be at his risk.

On Wednesday morning of the following week, the 24th March, it was discovered that the plaintiff's 105 cases, with 3 cases for another person, had been stolen during the night.

The usual entrance to the bonded room was from the main room of the station and the express office, through a slatted door, which was kept locked. There was also a heavy sliding door in the rear wall of the bonded room, which was not used, not having been opened for the last 2 or 3 years. It was fastened by two hooks and staples, an upper and a lower one, made of iron, of about ⅜ of an inch in diameter. The hooks were found to be considerably straightened out, so that, when replaced in the staples, they could by great pressure be sprung out. It was manifest that the burglars had reached the liquor in this way. They had closed the sliding door after them, leaving the hooks hanging down loose.

The learned trial Judge said that he had not come to the conclusion to hold the defendants liable without a good deal of hesitation. He did so, he said, on the principle laid down in the case of *Mitchell* v. *Lancashire and Yorkshire R. W. Co.*, L.R. 10 Q.B. 256. With great respect, I am unable to see the analogy between the two cases. There the railway company gave the consignees notice to remove the goods "as soon as possible, as they remain here to your order, and are now held by the company, not as carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges, in addition to the charges now advised." See the remarks of Blackburn, J., on p. 262, and of Field, J., on p. 263, as to how the words "at owner's sole risk" were modified and qualified by the words "warehousemen" and "warehouse charges" in the notice.

In the present case the defendants did not hold themselves out as being "warehousemen;" and, as a matter of fact, they never made any "warehouse charges;" so that the sole ground on which the company were held liable in the Mitchell case is lacking in the present case. It also appears from the Government certificates furnished that the defendant company in this case were not authorised to make any warehouse charges at Kingsville.

The trial Judge made no findings and did not pass upon the evidence, but I think it may be fairly inferred from the hesitation he speaks of, and in basing his decision upon the *Mitchell* case, by which he considered himself bound, that, upon the merits and the evidence, his opinion was not unfavorable to the defence

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except as to the law upon the question of "owner's risk," upon which I think he was mistaken.

I have no hesitation in coming to the conclusion that, where the plaintiff and Hall differ as to matters upon which they both speak, the evidence of Hall is to be preferred. For instance, as to the conversation over the long distance telephone, which Hall says took place on the 17th March, relating to the shipment of the 100 cases, the plaintiff in his examination for discovery admitted that it may have taken place, and he did not give any satisfactory reason for changing his testimony at the trial. He corroborates Hall by saying that it was Westcott who informed him of the arrival of the second consignment of 100 cases, and speaks of his having had a conversation with Westcott the morning of the trial, but he did not call him as a witness to contradict the testimony of Hall. On this very important point he is contradicted not only by Hall but by his own examination for discovery, upon which he was cross-examined at the trial.

The plaintiff is also contradicted by the witness Sharpe, who says he had a conversation with him in his own house on the Monday following the robbery. Sharpe, the route agent or inspector of the defendant company, who was investigating the robbery, says that he asked the plaintiff when he was first notified of the shipment of the 100 cases being there. Brown told him that he had a talk with Mr. Hall over the telephone on the 17th March at Windsor, and that he told Hall he could not get down for a few days, and asked him if he could hold the shipment until he opened his house in Kingsville, all of which Brown denies at the trial.

Upon the whole, I am clearly of opinion that we should accept the testimony of Hall that it was agreed that the second consignment was left on the same terms as the first, at the plaintiff's risk, as Hall's truthfulness was not impeached and he was simply carrying out his policy as to the first consignment, and he had a much stronger reason for requiring it in the second case than in the first, on account of its size.

The next question that arises is as to the meaning of the words "owner's risk," which, in my opinion, the evidence clearly shews were made applicable to both of these consignments. This question has been settled for us by decisions which are binding upon us. The first of these I refer to is *Dixon* v. *Richelieu Navigation Co.* (1888), 15 A.R. (Ont.) 647, at 649, where Hagarty, C.J.O., says that "the words 'owner's risk' alone would protect the carriers against all but wilful neglect or misconduct or unreasonable delay." In the same case, Burton, J.A., said at 654 that "the cases fully establish that the words

'owner's risk' protect the defendants from all liabilities, except wilful misconduct." This case was taken to the Supreme Court of Canada and there affirmed: (1890), 18 Can. S.C.R. 704.

The principle of this case has been adopted and followed both in the English Courts and our own. See *Bullen* v. *Swan Electric Engraving Co.* (1907), 23 Times L.R. 258; *Reynolds* v. *Boston Deep Sea Fishing Co.* (1921), 38 Times L.R. 22; *Swale* v. *Canadian Pacific R.W. Co.* (1913), 15 D.L.R. 816, 16 Can. Ry. Cas. 363, 29 O.L.R. 634; and *British Columbia Canning Co.* v. *McGregor* (1913), 14 D.L.R. 555, 18 B.C.R. 663.

The last matter to be considered is, whether the defendant company were guilty of such wilful neglect or misconduct with respect to these consignments as would make them liable to the plaintiff under the foregoing authorities. Hall, the agent of the express company, was also the Kingsville station agent of the Pere Marquette Railway Company, positions which he had filled for 12 years. He considered it a safe place, as it had been used for storing valuable goods during his time and before then. It was called the old bonded room because, before its being used for storing express goods, it had been used by the Customs authorities for goods remaining in bond. It had two doors: one a slatted door, which gave an entrance from the main station room and the express room, which was kept closed and under lock and key, and the other a heavy wooden sliding door in the rear wall leading to the outside, in the upper part of which there was a glass window with strong wooden slats. This door was secured on the inside by two iron hooks and staples, one about 18 inches from the bottom of the door and the other an equal distance from the top. These hooks and staples were made from iron rods about three-eighths of an inch in diameter. This door was not used either for bringing in or taking out anything from the bonded room. The last time it was opened previous to the burglary in question was two or three years before, when the room was being cleaned out. Hall, the railway and express company agent, was of opinion that it was a safe and suitable place for the storing of valuable goods.

Allan Sharpe, the route agent or inspector of the express company, says that he is familiar with the stations and express offices of his own and other companies, and considered this an exceptionally good one. He was advised of the burglary at once, and came to Kingsville to make an investigation. He found that both iron hooks in the sliding door had been tampered with, and, notwithstanding their great strength, had been partly straight-

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ened out, so that their bulging out was largely removed, and they no longer properly served their purpose as hooks.

James O. Brown, the town constable of Kingsville, a brother of the plaintiff, says he went to examine the door, the day after the burglary. He swears that the stem of the hook was about 6 or 7 inches long, made of three-eighths iron, and straightened out, so that there was not any bulge to it and it had not any clinching effect. The agent took hold of the big handle in his presence and gave it three jerks, and the hooks slid out. He tried it a second time but did not succeed.

It is worthy of remark that not a single witness favourable to the claim of the plaintiff speaks of his having ever seen the premises or their equipment before the mutilation of the hooks, and their whole testimony is based upon that being the normal condition.

It was argued before us that the statement of the company's agent to the plaintiff that the goods were under lock and key was not correct, on account of the sliding door having no lock, but only the hooks and staples. I think it may fairly be answered that two hooks and staples made up from iron rods three-eighths of an inch in diameter, with stems 6 or 7 inches in length, as testified by the plaintiff's brother, would be a great deal stronger than any lock that would in the ordinary course be placed on such a door. No doubt the agent had in mind the lock upon the slatted door between the main room of the station and the bonded room.

In my opinion, there is no evidence to sustain the charge of "wilful neglect" or "wilful misconduct" required by the authorities above cited, and the judgment appealed from should be reversed and the action dismissed.

Appeal allowed.

PREMIER LUMBER COMPANY v. G.T.P.R. Co.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. April 12, 1922.

CARRIERS (§IIID—410)—OF GOODS—BILL OF LADING—CLAUSE LIMITING LIABILITY UNLESS NOTICE GIVEN—MISDELIVERY OF GOODS—FAILURE TO GIVE NOTICE—RIGHTS OF PARTIES.

One of the conditions of a bill of lading was as follows, "Notice of loss, damage, or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given, the carrier shall not be liable." The Court held failure to give notice within the time prescribed disentitled the

plaintiffs to recover the value of the goods, which on arrival at their destination were delivered to the wrong person.

[*Neilson* v. *London and North Western R. Co.*, [1922] 1 K.B. 192, applied.]

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Martin, J.A.

APPEAL by plaintiff from the trial judgment in an action for the value of certain goods, delivered by the carrier to the wrong person upon arrival at destination. Affirmed.

E. C. Mayers, for appellant.

A. Alexander, for respondent.

MARTIN, J.A.:—This is an action for the value of five cars of lumber which the statement of claim (3) alleges were lost in transit and so never delivered under the contract for carriage set up.

It is admitted that the said five cars did reach their destination but upon arrival were delivered to the wrong person, and it is not alleged that in the course of the carriage (which was found to be without delay) there was any deviation from the route specified in the bills of lading. This constitutes misdelivery—*Neilson* v. *London and North Western R. Co.*, [1922] 1 K.B. 192, (affirmed [1922] W.N. 162)—and whatever the wrongful possessors did with the cars after such arrival, either by disposing of them there or forwarding them to customers at other places, is immaterial, as I view the matter. One of the conditions of the bills of lading was the following:—

"Notice of loss, damage, or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable."

No notice was given of the loss, and the action was dismissed on that ground. It was urged before us that this condition or exception relates only to things done under the contract in its due performance and not in violation thereof, and so it cannot be invoked to assist the defendant. The question is a nice one and it has occasioned me much consideration, but fortunately the recent decision in *Neilson's* case, *supra*, has elucidated it.

That was a case of certain packages of theatrical properties which were billed in a van "through to Bolton" but had in the course of the journey been by mistake diverted at Manchester to other points and consequently were delayed for two days in arriving at Bolton thereby causing damage to the plaintiff.

At p. 197 Bankes, L.J., says:—

"The defendants contracted to convey these goods from

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Llandudno to Bolton by a specified route, and they endeavored to protect themselves in certain events. I think the law is quite plain that if a carrier desires to exempt himself from his common law liability he must do so in clear language, and that in my opinion the defendants did not do here. And secondly as the contract had reference to the conveyance by the prescribed route and by that route alone, when once the goods were diverted by the defendants from the prescribed route and taken on another journey, even though that diversion was the result of a pure mistake on the part of their inspector, they ceased to be covered by the contract and by the exceptions which it contained."

And he goes on to say that such an act was not misdelivery,—nor "any delivery at all."

Scrutton, L.J., at 202 says: "Misdelivery means a delivery to a wrong person and if you keep the goods yourself you do not deliver them at all."

But in the case at Bar the goods did "by the prescribed route" reach their destination, and there were misdelivered. I can only regard this as something, however unfortunate, that "happened in the course of carrying out the contract," as Scrutton, L.J., puts it p. 201, and as the language of the "exception" is quite clear it must be given effect to, because what happened is I think covered by the expression—"failure to make delivery"—i.e.—to the proper party under the contract. I am unable to take the view that the exception is displaced by the references to negligence in the other clauses, cited: this notice of loss clause is comprehensive and appropriate to the misdelivery which occurred, the failure to make a proper delivery causing the "loss" of the goods to the plaintiff. In coming to this conclusion I have assumed all the other questions in favor of the plaintiff. I need only add that the case of *Wilson* v. *Canadian Development Co.* (1903), 33 Can. S.C.R. 432, was one where the carrier "wrongfully sold or converted the goods" to its own use, p. 442. It follows that the appeal should be dismissed.

GALLIHER, J.A.:—I agree with the trial Judge, that the failure to give notice within the time prescribed disentitles the plaintiffs to recover and would dismiss the appeal.

MCPHILLIPS, J.A. (dissenting):—This is an action for the loss of five cars of lumber not forthcoming to answer to the issued bills of lading therefor—the appellant being the indorsee of the bills of lading. The lumber it would appear was shipped away from the point of destination by the railway company

quite unauthorizedly and it has failed to account for the lumber—in effect the railway company has been guilty of conversion of the lumber. The contract was one for through carriage and the railway company was liable throughout for the due carriage and delivery of the lumber to the holders of the bills of lading. Further, the shipment was under—as it was necessarily required to be—the joint tariff regulation—viz.: Order of the Board of Railway Commissioners, No. 7562—15th July, 1909—and no provision in the bills of lading will admit of the railway company excusing itself from liability upon the ground that the loss or damage arose from the action of any intervening carrier, that is, the carrier issuing the bills of lading is liable to the holder of the bills of lading. Unquestionably, there was a contractual obligation to carry and deliver the lumber to the holders of the bills of lading but that was not done. In *Crawford & Law* v. *Allan Line Steamship Co.*, [1912] A.C. 130 at p. 147, 81 L.J. (P.C.) 113, Lord Shaw quoted from an opinion of Lord Salvesen, these words:—

"If there had been a bill of lading signed on behalf of the ship . . . . this would have been a contractual obligation which it would lie on the ship to excuse itself from discharging."

And Lord Shaw then said at p. 147: "I entirely agree in that view. As accordingly I am along with your Lordships of opinion that there was such a bill of lading on behalf of the ship, in this case I think the contractual obligation referred to rests upon the respondents."

Here it rests upon the railway company (the respondent) and the evidence is wanting in the present case to establish any excuse. There has been in this case a complete frustration of the contract of carriage and no provision excusing liability such as we have in the present case, can avail or absolve the railway company from liability upon the special facts of this case—(*Wilson* v. *Canadian Development Co.* (1903), 33 Can. S.C.R. 432, at pp. 441, 442, Davies, J.). The condition relied upon in the present case for excusing liability does not in its terms nor by reasonable implication, cover the negligence of the carrier—the *ratio* of the judgment of Lord Alverstone, C.J., in *Price & Co.* v. *Union Lighterage Co.*, [1904] 1 K.B. 412 at p. 416, 73 L.J. (K.B.) 222, 52 W.R. 325, is applicable to the present case; he there said:

"It is of course quite possible to construe the words, 'any loss of or damage to goods which can be covered by insurance' as including everything, because practically everything can be so

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covered, and, as pointed out by Walton, J., a great many policies of insurance would include such a loss as that which arose in this case. The question, however, is not whether these words could be made to cover such a loss, but whether in a contract for carriage they include, on a reasonable construction, an exemption from negligence on the part of the carrier. We have only to look at the case to which I have referred, and in particular to *Sutton* v. *Ciceri*, (15 App. Cas. 144) to see that the words of this contract can receive a contractual and business-like construction and have effect without including in the exemption the consequences of the negligence of the carrier. That being so, the principle that to exempt the carrier from liability for the consequences of his negligence there must be words that make it clear that the parties intended that there should be such an exemption is applicable to this case, and the learned judge was right in holding that the contract does not exempt the defendants from liability for their own negligence. I think, therefore, that the appeal should be dismissed."

We have here the palpable case of the non-performance of the contract of carriage and the production of the lumber to answer to the holders of the bills of lading, and in this connection what Atkin, L.J., said at pp. 470, 471, in the *Cap Palos*, [1921] P. 458, is much in point in the present case.

"The question that arises is whether under the above circumstances the defendant can rely upon the exceptions. In my opinion they have no application in the facts of this case. It is immaterial to discuss whether the true view is that the wide words of the exceptions 'default', 'omission', 'breach of duty', properly construed do not extend to cases where the contracting party ceases altogether to perform the contract; or that the exceptions construed in their widest sense do not apply where the contract is not being performed at all. The principle appears to me to be common to all classes of contract, and is to be found applied in cases of marine insurance (Marine Insurance Act, 1906, ss. 45-48); carriage by sea and river (*Morrison & Co.* v. *Shaw, Savill & Albion Co.*, [1916] 2 K.B. 783; *Davis* v. *Garrett* (1830), 6 Bing. 716); by land (*Mallet* v. *Great Eastern R. Co.*, [1899] 1 Q.B. 309; *Lilley* v. *Doubleday*, 7 Q.B.D. 510); and contracts of bailment. 'The principle is well-known, and perhaps *Lilley* v. *Doubleday*, (7 Q.B.D. 510) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted

for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it'; (per Scrutton, L.J., in *Gibaud* v. *Great Eastern R. Co.*, [1921] 2 K.B. 426, 435;) If the tugs on the orders of the defendant had cast off the tow in a storm, on a lee shore, for the purpose of engaging in a more profitable salvage operation, and the tow were in consequence damaged, could it be suggested that the intention of the contract was that the defendant should be protected? It is not, as was contended, a question of a repudiation of contract which has to be accepted by the other party in order to give rise to a claim for breach. The tow might go to the bottom protesting to the last moment and claiming fulfilment of the contract and yet the defendant would, in my judgment, in such a case fail to be protected by his exceptions. I am far from saying that a contractor may not make a valid contract, that he is not to be liable for any failure to perform his contract, including even wilful default; but he must use very clear words to express that purpose, which I do not find here.

For the above reasons I come to the conclusion that the exceptions in this case afford no defence to the claim and that effect must be given to the learned judge's findings of fact, and judgment entered for the plaintiffs for damages to be assessed by the registrar and merchants." (Also see *Mallet* v. *G.E.R. Co.*)

It would appear to me that the conditions for exemption from liability, amount to this—that they are of no avail save where the carrier has proved (which he has not in the present case) that he has not been guilty of negligence. Now, the carrier in the present case admits at this bar that there was conversion of the lumber but attempts to escape liability by saying that the conversion was not their act but the acts of persons for whom they are not liable, and further, the conversion was after the contract was performed. Upon the facts, I cannot accede to the contention that there was performance of the contract, as I have already said, it is the case of complete frustration of contract. The lumber was accepted for carriage subject to bills of lading and the lumber has never been produced in answer to the bills of lading. Could there be any state of circumstances more complete to evidence non-performance of contract? It is a clear case of failure of performance of carriage and negligence throughout. The onus in any case, was on the railway company,

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having issued the bills of lading, to excuse itself from discharging its contractual obligation and that was not done. The appellant was entitled, being the holder of the bills of lading, to have delivered to it the lumber covered by the bills of lading, but that contract was never performed by the railway company; in such a case it is idle to cite conditions of exemption; the language of Lord Alverstone, C.J., in the *Price* case,—*supra* meets the point "to exempt the carrier from liability for the consequences of his negligence, there must be words that make it clear that the parties intended that there should be such an exemption," and I fail to see that in the present case the conditions of exemption at all excuse the railway company in its frustration of the contract of carriage and failure to produce the lumber. Admittedly the present case is one of conversion and the railway company has not discharged the onus which rested upon it. It is futile to say that the conversion was by others, it is to the appellant that the respondent must account, its contractual obligation is not capable of being transferred to others; the railway company as a common carrier was under the obligation to produce the lumber to the holders of the bills of lading. In the *Prinz Adalbert*, [1917] A.C. 586, 86 L.J. (P.C.) 165, Lord Sumner, at p. 589, said: "The bill of lading is the symbol of the goods . . . . Possession of the indorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival."

The appellant was entitled to have the lumber delivered in accordance with the terms of the bills of lading held by it; but the railway company did not do this, nor has it legally excused itself from the contractual obligation.

In *Neilson* v. *L. & N.W.R. Co.*, [1922] 1 K.B. 192—Scrutton L.J., at pp. 201, 202,—said: "If a carrier wishes to protect himself from liability for the negligence of his servants, he must do it in clear and unambiguous language."

Insofar as there is evidence in the present case—the railway company re-routed the cars carrying the lumber and made deliveries to other than the holders of the bills of lading, a complete frustration of the contract; and it is to be noted that the railway company is only able to account for one car out of the five as to its final disposition, but that disposition was not on the order of the appellant, and as to the other four cars, no account whatever.

Upon this view of the matter, the language of Greer, J., [1921] 3 K.B. 213, quoted by Bankes, L.J., in the *Neilson* case,

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supra, seems much in point in the present case—that the goods arrived at their destination, but were re-routed again unauthorizedly, (and before any notice to the holders of the bills of lading) does not seem to me to be at all helpful to the railway company; it was a negligent act—Greer, J., said, at pp. 197, 198:—

"For myself where goods have been intentionally sent upon a journey not covered by the contract I have a difficulty in seeing it can make any difference as regards the liability of the railway company whether they were started on a wrong journey immediately after they were delivered to the company, or were diverted on to a wrong route after they had arrived at an intermediate station. It seems to me that in both cases the company have equally failed to perform the service in respect of which the limitation of liability was agreed to by the consignor."

Bankes, L.J., at p. 198, said immediately following what is above quoted, "with every word of that statement, I entirely agree."

In the *Neilson* case, *supra*—the Court of Appeal affirmed the Divisional Court, which held that as the defendants' servant intentionally sent the goods to places which were in fact not upon the contract route, the defendants were not relieved from liability by the terms of the contract. In the present case there must follow liability as there is no compliance with the contractual obligation to merely bring the lumber to the point of destination, then re-route it and make deliveries to other than the holders of the bills of lading—such conduct amounts to wrongful conversion of the lumber and frustration of the contract of carriage and it is impossible upon such a state of facts to admit of exemption provisions from liability being invoked and it must follow that the railway company cannot be relieved from liability by the terms of the contract. I would allow the appeal; and a new trial must be had to assess the damages unless the amount of damages can be agreed upon.

EBERTS, J.A., agreed that the appeal should be dismissed.

Appeal dismissed.

MAJOR v. C.P.R. Co.
DROUILLARD v. DOMINION EXPRESS Co.
ROCHELEAU v. DOMINION EXPRESS Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. December 27, 1921.

CARRIERS (§ III K—510)—IMPORTATION OF LIQUOR INTO ONTARIO ILLEGALLY—1916, CH. 19 (DOM.)—WRECK—LOSS OF LIQUOR—RIGHTS OF CONSIGNEES.

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MAJOR v. CANADIAN PACIFIC R.W. Co.

The consignees of liquor imported into Ontario illegally have no remedy against the carriers for loss owing to railway wreck or theft.

[*Taylor* v. *Bowers* (1876), 1 Q.B.D. 291; *Kearley* v. *Thomson* (1890), 24 Q.B.D. 742; *Scheuerman* v. *Scheuerman* (1916), 28 D.L.R. 223, 52 Can. S.C.R. 625, referred to.]

APPEAL from the judgment of Lennox, J., in three actions brought against the defendants as carriers to recover the value of certain cases of intoxicating liquors shipped to the respective plaintiffs at Windsor from Montreal and stolen or destroyed while in the custody of the defendants. Affirmed.

The judgments appealed from are as follows:—(MAJOR'S CASE). On the 23rd March, 1920, Law Young & Co., liquor dealers in Montreal, acting for and as agents of the plaintiff, delivered to the defendant company in that city 50 cases of London Dry gin and 50 cases of Kilmarnock red label whisky, of the value of $3,700, for transportation by the company's railway and delivery to the plaintiff at Windsor. The plaintiff's agents having become responsible for the payment of the freightage charges and signed a guarantee endorsed upon the bill of lading in these terms, namely, "We hereby undertake and declare that this shipment is of a class and shipped under conditions permitted by law," the company accepted the delivery of the said goods and agreed to carry them upon this condition and according to the terms of a bill of lading in a form approved by the Board of Railway Commissioners of Canada.

The goods arrived at Windsor, and the plaintiff was prepared to take delivery in due time, and he paid the freight upon the whole shipment, but the defendant company were only able to deliver 44 cases: 19 cases of gin and 37 cases of whisky having been stolen while the goods were in the custody of the company. The plaintiff claims to recover $2,186.61 from the company and interest on this sum.

There is only one question of fact to be considered, and upon the decision of this the liability or non-liability of the company, I think, must turn. Mr. Davis, however, argues that the plaintiff is entitled to recover in any event, because the right of action, as he contends, is founded on tort. If Mr. Davis had framed the statement of claim, and if the solicitor upon the record had not been so intimately connected with the preliminary stages of this and the Rocheleau and Drouillard actions, which followed the trial of this action, the argument would be more plausible, but it would still not be convincing. In the statement of claim it is said: "The plaintiff is a gentleman . . . . and the defendant is a common carrier." This is all right as to both as far as it goes,

but it is relevant to add to the plaintiff's description "and ex hotel keeper," for the plaintiff's contention is a bonâ fide importation, for home consumption, in conformity with the written undertaking and declaration of the plaintiff's agents; and the single issue presented by the defence is, whether or not the plaintiff had at the date in question really severed his connection with the liquor traffic, and only imported for his own personal needs, seeing—and there are many other cogent circumstances as well—that the plaintiff, being charged with illicit total sales, in close succession, of about 180 cases of liquor, including the 100 cases in question, and, summoned to attend the police court on the 14th May, informed the inspector that he had sold out his entire stock, and repeated this in court, and on his own confession was fined $1,000 with costs. There is no evidence as to whether the plaintiff voluntarily retired or was forced out by the Ontario Temperance Act, 1916, ch. 50. At the trial the plaintiff claimed to be "a bottle a day man," or a little better some days. Having already provided for his own comfort by an investment of $3,700, he immediately, and without waiting to know whether the company would recoup him for the loss of 56 cases, ordered in 60 cases more, a total outlay of say $6,000 with about 20 cases still unaccounted for. It is a lot of money to apply personally, and the plaintiff looked anything but a wreck or debauchee—he appeared to be a shrewd, alert, healthy, well-preserved, well-dressed and well groomed business man—a typical landlord of the class who, ministering to the demands of all and sundry his patrons, leaves them to do the drinking. With the evidence of mere novices all about him making money in large sums and with little exertion, I am afraiad that the lure of the old habit of ministering to the wants of others rather than his own became too strong for the plaintiff to resist, and, with modifications necessitated by legislation, he reverted to the most lucrative branch of his old calling, under the name in the pleadings mentioned, and that the stolen liquor was purchased and imported for the purpose and with the intention of re-selling it. Mr. Davis asks me to conclude that he "lied like a gentleman" on the occasion of the police court investigation, but there is only one combination of circumstances that furnishes quasi-recognition of this character of excuse—immunity from financial sacrifice is not within the purview of "the code of honour"—and, even if I altogether ignore the police court incident, it does not go far in clearing away the imputation of a deliberate intention to evade the law. I cannot accept the plaintiff's evidence as given at the trial. I find that the 100 cases of liquor in question were purchased outside and imported into this Province for

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the purpose of sale and with the intention of disposing of it contrary to law. I find that the signed declaration of the plaintiff's agents was untrue to the knowledge of the plaintiff, and that the company accepted and acted upon it as a condition of the contract and in the belief of its truth. Assuming, but seriously doubting, and certainly without deciding, that the plaintiff might have framed his action and closed his case without resorting to the special contract entered into between the parties, the argument is to no purpose, for the plaintiff declared upon the special contract and put it in as proof of his case. The transaction was clearly contrary to public policy—the policy of both the Province and Dominion—as declared by statute, and the Court cannot assist the plaintiff in such case.

There will be judgment dismissing the action with costs.

(DROUILLARD CASE). This is the second action, in the order of trial, in the liquor series which I tried at Sandwich. Each case is, of course, to be determined upon its own facts, however strong the family resemblance may be. It happened that Mr. Lafferty, the solicitor in three of them, was induced to lend his assistance in all of them, I think, in the initial stages of the trouble, although his identity was not disclosed by the correspondence until the claims were about ripe for action, and it is unfortunate, I think, that he dabbled in these matters in a way to necessitate his becoming a witness, and occasioning the need of a good deal of evidence by way of explanation. It happened that this plaintiff, the plaintiff in number three (and possibly Mr. Major, I do not know), resided in the neighbourhood of the river, a locality adapted to carrying on an allicit traffic, that in both instances sickness in the family was the cause of the changed purpose leading to the sudden disposal of the household stores, and that in both an anxious purchaser accidentally arrived immediately the decision to sell was arrived at. It happened that these two plaintiffs, old friends and neighbours, were upon the same mission in Montreal at the same time, and it happened that, for alleged reasons to be referred to, neither would allow the company to make good the loss by a subsequent delivery.

The plaintiff has a family and makes a precarious living as a butcher and farmer. I say precarious because, taking his own statements, his gains ranged from $400 to $4,000 a year. He did not say that the $4,000 a year came more than once, and I am satisfied that his verbal account of profits, of which he produced no record, was greatly exaggerated. He says 1920 was a bad year, but nevertheless he purchased 80 cases, principally gin, for his own use. He repudiated the idea of a heavy daily

consumption, but friends would frequently come in of an evening, and the social gathering would consume 5 or 6 bottles upon each occasion. I think he intimated that this would occur about once a week.

He did not say that they paid for what they got or contributed ratably, but no man in the position of the plaintiff, and with a family to provide for and with a conscience, would dream of furnishing this weekly revel without some equivalent. I do not think the meetings occurred, but it is the reason put forward by a light drinker for his large requirements. His outlay was $2,650 exclusive of express charges and the expense of his journey to Montreal, practically the accumulations of his lifetime, if, in fact, it was his own money. There is no object in reviewing the evidence. I cannot believe that any head of a family would be so insensible to the claims of his wife and children as to squander his and their resources in this reckless way. He admits the sale, but says this was not his intention at the time he bought it. The story is very simple: part of the shipment was lost or destroyed in a wreck caused by a collision. I quite agree that, if the purchase was an honest one and within the law, the railway company were the servants of the defendant company, and the latter are responsible for the manifest negligence of their agents and servants. *F. T. James Co.* v. *Dominion Express Co.* (1907), 13 O.L.R. 211.

The residue was delivered to the plaintiff in May, 1920, and the vigilance of the police and their frequent inspection of the premises prevented the possibility of a sale until October. Having found everything all right in the meantime, and some of the officials having left Windsor, the police supervision relaxed in the month of October. Just then, as the plaintiff's story is, he became ill, the doctor warned his wife of the risk incurred by the plaintiff if he drank at all, a family consultation followed, it was decided to sell out, an inquiring bootlegger happened along almost at once, and the stock was sold at a large net profit even after the payment of the usual fine. The wife was not called, the doctor was not called, the banker was not called, and the absence of none of them was accounted for. The plaintiff's story throughout was one peculiarly calling for corroboration, and, if true, corroboration was easy.

I find that the liquor in question was purchased and imported into Ontario in violation of the laws of the Province and the Dominion and for the purpose and with the intention of selling it.

The frame of the action and character of proof was the same as in the Major case and I need not repeat what I said there. In

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such case the Court leaves the wrongdoer where it finds him.

The action will be dismissed with costs.

(ROCHELEAU CASE). There is a difference in detail of course, but in general outline the character of the purchase and importation is substantially the same as in the Major and Drouillard actions, tried at the same court and just decided. To Mr. Davis's contention that, although the plaintiff might fail in an action ex contractu and still have a right to damages as for a tort committed by the company as common carriers, the answer is, as in the action just referred to, the action is brought for breach of contract, a special written contract entered into between the parties in a form duly approved by the Board of Railway Commissioners for Canada; the plaintiff rested his case upon proof of this contract, and could not have made a prima facie case without it; and, if it turns out to be a fact that the transaction on the plaintiff's side was illegal, he cannot recover.

The plaintiff is a market gardener, owning and cultivating 35 acres of land, which, by reason of a speculative increase of value, or holding prices, in the neighbourhood, he says is worth $30,000. He called no evidence of value, and, being in the subdivision area or locality somewhere round about Sandwich, it would not be surprising if, put upon the market, he could not realise 30 per cent. of the value he deposed to. He spoke of also having two mortgages of a total face value of $5,000, but gave no particulars. If they represent balance of consideration money upon sales of subdivision lands, made during a boom period, and they may be for anything that appears, I would not like to hazard an opinion as to what they are actually worth. In addition to all this, he says that in the spring of 1920 he had $4,500 in cash, the proceeds of years of accumulation, *never banked*, and of those years of earnings he says he appropriated $4,065 to the purchase of 135 cases of liquor in Montreal for his own use.

Part of it was destroyed in a collision for which the company is responsible in damages, if not relieved by reason of illegality. Seventy cases were saved from the wreck and delivered to the plaintiff. Of these he did in fact sell 65, for which he was fined, and, after paying everything, he came out with a profit and 5 cases for his own use. In this case the alleged illness of the wife and her objection to the smell is said to be the reason for the plaintiff's change of mind.

The question for decision is, was this liquor purchased and brought into Ontario with the intention of selling it, or the most of it, as the plaintiff in fact did? I am satisfied that that was the plaintiff's purpose and intention.

The action will be dismissed with costs.

F. D. Davis, K.C., for appellants.

John D. Spence, for respondents.

FERGUSON, J.A.:—In each of these actions the plaintiff appeals from a judgment of Lennox, J., dismissing the action.

The three actions were tried together, and the three appeals were argued together. The claims arise out of shipments of liquor by the plaintiffs into Ontario and the loss of part of the liquor by the defendants. Each plaintiff purchased liquor in Montreal from dealers there, paid for it, and instructed the liquor dealers to ship the liquor each had purchased to their several places of residence in Ontario; the liquor dealers delivered the liquor to the carriers for transportation. In the Major case the liquor was delivered to the railway company, and they issued their usual bill of lading, which consists of a receipt for the liquor and a contract to carry it.

In the other two cases the liquor was delivered to the Dominion Express Company, and express receipts were given therefor. Embodied in each receipt is a contract to carry to destination named.

The defences to the action are:—

(1) That the goods were lost or destroyed without negligence.

(2) Illegality in the making and purpose of the contracts, in that each of the plaintiffs sent and imported the liquor into Ontario for the purpose of sale, contrary to the laws of Ontario; that sending and importation for such purpose is prohibited by Act of the Parliament of Canada, intituled "An Act in Aid of Provincial Legislation prohibiting or restricting the Sale or Use of Intoxicating Liquors," 1916, being ch. 19 of 6 & 7 Geo. V. That Act makes (sec. 1) it an offence for "any person . . . . by himself, his clerk, servant or agent . . . . (to) send, ship, take, bring or carry or cause to be sent," etc., "into any Province . . . . intoxicating liquor, knowing or intending that such intoxicating liquor will or shall be thereafter dealt with in violation of the laws of the Province into which such intoxicating liquor is sent," etc.

(3) That at the time the liquor was stolen or destroyed, it was liable to confiscation, and therefore the plaintiffs suffered no loss.

Part of the liquor shipped under the railway contract was stolen from the railway yards in Windsor, and part of the liquor that was shipped by Dominion express was destroyed in a head-on railway collision. Counsel for the defendants did not urge that the defendants had in any of the cases given sufficien evidence to relieve them from liability under legal and valid

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contracts of bailment and carriage, but in each case contended that the liquor was shipped into Ontario contrary to the law, and for that reason the contracts were illegal and void, or that the plaintiffs could not rely on the acknowledgment of receipts or contracts to carry contrary to law, as foundation for their respective claims.

The learned trial Judge found as a fact that each of the plaintiffs sent and imported his liquors into Ontario for the purpose of sale, contrary to the Ontario Temperance Act, and I am unable to say that these findings are not justified by the evidence.

It appears well established that, "if money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done:" Mellish, L.J., in *Taylor* v. *Bowers* (1876), 1 Q.B.D. 291, 300.

The first part of the foregoing proposition has been questioned: see *Kearley* v. *Thomson* (1890), 24 Q.B.D. 742; but the latter part of it has never been questioned: see *Scheuerman* v. *Scheuerman* (1916), 28 D.L.R. 223, 52 Can. S.C.R. 625.

The principle is: "No court will lend its aid to a man who bounds his cause of action upon an immoral or an illegal act:" Lord Mansfield in *Holman* v. *Johnson* (1775), 1 Cowp. 341, 98 E.R. 1120; see also *Armstrong* v. *Toler* (1826), 11 Wheat. (U.S.S.C.) 258. In *Holman* v. *Johnson*, Lord Mansfield stated the law as follows (p. 343):—

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justitce, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

The law does not deprive the owner of his title to the goods

or moneys because he has parted with the possession thereof for an illegal purpose, but the Courts will neither enforce a contract made for an illegal purpose, nor aid him who has parted with the possession of his goods for an illegal purpose if that purpose has been accomplished, and, to establish his title or right to possession, he requires any aid from the illegal transaction. See *Taylor* v. *Bowers, supra; Farmers' Mart Limited* v. *Milne*, [1915] A.C. 106; and Leake on Contracts, 5th ed. pp. 552-4; Smith's Leading Cases, 12th ed., vol. 1, p. 454.

The appeals appear to turn on whether or not the facts of these cases bring them within these well-established rules of law or practice.

The production of the bills of lading and receipts cast on the defendants the onus of proving or excusing delivery: they, to the satisfaction of the trial Judge, established that these goods were imported into Ontario for sale, contrary to the laws of Ontario, and that the contracts of carriage were each made for the purpose and with the intent of sending the goods into Ontario contrary to the prohibitions contained in the Act of the Parliament of Canada 6 & 7 Geo. V., 1916, ch. 19 from which it seems to follow that the contract to carry, if not void, is, at least, unenforceable.

Counsel for the appellants argued that, even if the contracts to carry are void or are not enforceable, yet that the bill of lading and the express receipts are instruments two-fold in their character, that is, they are firstly acknowledgments of the receipt of the goods, and secondly they are contracts to transport and deliver; that causes of action arose out of the acknowledgments of receipt, separate, distinct, and different from the causes of action that arose out of or were imposed by the contract to carry; that the receipt of the goods was legal, and it was only the contract to carry into Ontario that was prohibited or illegal; that proof of the delivery of the goods was in itself sufficient to call upon the defendants to account for the goods as bailees; that, as bailees seeking to account for goods destroyed or lost while in their possession, the defendants must shew circumstances negativing negligence; *Phipps* v. *New Claridge Hotel Limited* (1905), 22 Times L.R. 49; *Williams* v. *Curzon Syndicate Limited* (1919), 35 Times L.R. 475; and that the defendants do not contend that they have established loss without negligence.

These contentions bring me to a consideration of the following questions: Is it the law or the policy of the law that, if the shipper, at the time of depositing the goods and making the contract of shipment, deposits and contracts with the intent and purpose of importing the liquor into another Province for a

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purpose prohibited by law, the whole contract is rendered void, and that none of the duties and obligations which the law imposes on a carrier in respect of the care and redelivery of the goods are enforceable, or is the policy and effect of the law such as to make void or unenforceable only that term or obligation of the contract which provides for illegal carriage into a Province to which importation is prohibited?

The statutes relied upon by the defendants do not declare that such contracts shall be void: the defendants' bills of lading have been made evidence of title and negotiable instruments the transfer of which carries the title to the goods; in the hands of the plaintiffs at Montreal, or while the goods were in Montreal; these documents might have been used to transfer the goods to innocent purchasers, who might have shipped the goods into Ontario for legal purposes; and I do not think it is the policy of the law to render these negotiable commercial documents absolutely void if it be shewn that one party to them entered into the contract and received them for an illegal purpose, but in the hands of an innocent transferee, a bill of lading obtained under such circumstances might be the foundation of an enforceable claim; in other words, I think the law only avoids the contract in so far as it is necessary to prevent being done that which the law prohibits.

That illegality in the making of a contract is not always enough to void the whole contract or to require the Court to refuse its aid for the enforcement of any provision of the contract; and that the Court will look at and consider the policy of the law in granting or refusing aid to a plaintiff suing on such a contract, and will only refuse its aid to enforce a part of the contract, which is contrary to the express provisions and policy of the law, was, I think, the view taken by the Supreme Court of the United States in *Merchants' Cotton Press and Storage Co.* v. *Insurance Co. of North America* (1894), 151 U.S. 368. There the shipper and the railway company entered into a contract for the shipment of goods at a rate which, the Court assumed for the purpose of decision, the plaintiff knew contravened the provisions of the statutes of the United States prohibiting carriage at a rate other than that established by the Inter-State Commerce Board. The goods were destroyed, and in the action the defendants sought to set up the illegality of the transaction as a defence to their liability under the contract; but the Court was of opinion that the contract of carriage was not prohibited, but only that part of the contract which provided for an illegal rate; so in the cases at bar it may be argued that the undertaking in

the bill of lading to carry into Ontario does not render void and unenforceable the implied agreement to care for and redeliver.

It may be further argued that sec. 1 of the Dominion Act, providing for confiscation, and sec. 70 of the Ontario Temperance Act, providing for seizure and confiscation of the goods and prosecution of the owner for keeping for sale, recognise that the illegal shipper is the owner and the custodian of the goods; and that, as, under the Dominion Act relied upon by the defendants, confiscation can only follow a third offence, and under the Ontario Act confiscation can only follow seizure and legal inquisition, it cannot be the intent and purpose of the law to relieve the defendants from the great and onerous obligation which the common law imposes upon carriers or bailees of goods, but only from the obligation to carry them contrary to law: *Kerrison* v. *Cole* (1807), 8 East 231, 103 E.R. 330.

These arguments make in the plaintiffs' favour, but I do not think they go far enough, for it seems that, even if we limit the rule so as to make void or unenforceable only that part of the contract which the law prohibits, yet that the obligations which arise out of the receipt must, in the circumstances of these cases, be found to arise out of an illegal or prohibited delivery and receipt.

The Dominion Act provides that he who "sends" contrary to the Act shall be guilty; and, in my view, the delivery to be sent was part of the sending that was subsequently carried into effect in direct violation of the law—the delivery was made with the intent and purpose that the law should be violated, and, even if the receipt and contract to carry were not absolutely void, and might be made the foundation of a claim by an innocent transferee of the bills, yet the plaintiffs cannot make receipts obtained and contracts entered into by them with the intent and purpose that the law should be violated, the foundation of their claims, at least not where the illegal purpose has been accomplished.

The defendants did not set up this defence for the purpose of protecting the public, and, in my view, they are not entitled to much credit for setting it up. If I could find a way to deprive the defendants of any advantage from such a plea I would do so, but I am unable to find that the plaaintiffs have proven contracts or causes of action other than such as are contained in or arise out of the transactions evidenced by the bill of lading and receipts, and the defendants have established that the deposits and contracts evidenced by these bills were made and entered into with the intent and purpose that the law should be violated, and that such illegal intent and purpose was in each case ac-

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complished, and therefore that the claim of each of the plaintiffs is based upon an illegal and prohibited act or transaction and cannot be supported without reference thereto or aid therefrom, and the authorities I have cited, as well as those collected, reviewed, and considered in Broom's Common Law, 9th ed., pp. 346 to 352, and Smith's Leading Cases, 12th ed., vol. 1, pp. 417 and 449, make it clear that it is the duty of the Court to refuse to aid these plaintiffs.

I am, for these reasons, of the opinion that the appeal must be dismissed with costs.

The result I have arrived at renders it unnecessary for me to consider the question of damage, but I incline to the view that up to seizure under sec. 70 of the Ontario Temperance Act the plaintiffs might have changed their intent to sell contrary to the Act, and in these cases we could not say that at the time the losses occurred the time for repentance and change of intent had arrived, been passed, and lost.

MEREDITH, C.J.O., and MACLAREN, J.A., agreed with FERGUSON, J.A.

MAGEE, J.A., dissented.

Appeals dismissed with costs.

LEHN & FINK INC. v. BEIERSDORF & CO.

(Annotated)

Exchequer Court of Canada, Audette, J. July 12, 1922.

TRADEMARK (§III—12)—ASSIGNMENT — LICENSE — SALE BY AMERICAN ALIEN PROPERTY CUSTODIAN—EFFECT OF SALE ON CANADIAN TRADE MARK.

Petitioners claimed the ownership of the trademark "Pebeco" under certain agreements with the German firm P. Beiersdorf & Co. (the predecessor in title of the objecting party) made, respectively, in July and September, 1909, and February, 1919, and having relation to the business of selling tooth paste bearing the name or mark of "Pebeco" in the United States and Canada. Subsequently to the execution of the said agreements, namely, in 1909, the general trade mark "Pebeco" was registered in Canada by the said P. Beiersdorf & Co. In 1911, P. Beiersdorf & Co. obtained a specific trade mark in Canada for the word "Pebeco" as applied to tooth paste. In their applications for both the general and specific marks P. Beiersdorf & Co. swore that the trade mark "Pebeco" belonged to them. After the United States had entered into the war with Germany in 1917, the alien property custodian in the United States, under the provisions of the Act of Congress known as the Trading with the Enemy Act, seized the American trade mark and sold it to the petitioners in the United States, together with the rights of P. Beiersdorf & Co. under the said agreements.

Held, that inasmuch as the said agreements amounted to nothing more than licenses to sell the goods bearing the trade mark of P.B. & Co. in the United States and Canada that the petition should be dismissed.

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2. That the American alien property custodian could not sell or dispose of the property of German and Canadian citizens in Canada, or any rights subsisting between them there. All he could sell or dispose of was the American trade mark and property of German and American citizens in the United States or any rights subsisting between such citizens in that country.

[*Rey* v. *Lecouturier* 27 R.P.C. 268, in the House of Lords *Lecouturier* v. *Rey*, [1910] A.C. 262, followed. See Annotations 55 D.L.R. 85, 56 D.L.R. 9.]

ACTION to expunge from the Register of Trade marks in Canada the word "Pebeco" as registered in the name of P.B. & Co. and to have same registered in petitioner's own name as a specific trade mark to be used in connection with the manufacture and sale of tooth paste. Trade mark registered in Canada May 18, 1920, by Lehn & Fink Inc. ordered to be expunged.

The facts of the case are fully set out in the reasons for judgment.

Wallace Nesbitt, K.C., and *A. W. Langmuir*, for petitioner.

R. S. Smart, for objecting party.

AUDETTE, J.:—The petitioners seek, by the present action, to expunge, from the register of trade mark of the Dominion of Canada, the word "Pebeco", as registered in the name of P. Beiersdorf & Co. and to have the same registered in their own name as a specific trade mark to be used in connection with the manufacture and sale of tooth paste.

For the proper understanding of the controversy between the parties, it becomes necessary to set out here in full the admissions made by both parties at the opening of the case. These admissions read as follows, namely:

"The following admissions are made by the parties solely for the purposes of the trial of this action and without prejudice to the right of either party to contradict the same in any other action or proceeding whatsoever:

1. The allegations contained in paras. 1 and 2 of the petition.

2. The allegations contained in paras. 1, 2 and 3 of the statement of objection and counterclaim filed by P. Beiersdorf & Co., G.m.b.H.

3. That the trade mark "Pebeco" in question in this action was one registered in Canada in the year 1907, as a trade mark in the name of P. Beiersdorf & Co., the predecessor in title of the objecting party, and was used in Canada by P. Beiersdorf & Co. in connection with the sale of tooth paste prior to the dates of the execution of the contracts of 1909 hereinafter referred to.

4. That in the year 1903 an agreement was entered into be-

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tween the petitioner's predecessors, Lehn & Fink, Inc., and P. Beiersdorf & Co., and such contract may be proved by the production of a copy thereof as agreed upon by the parties.

5. That Lehn & Fink, Inc., and P. Beiersdorf & Co. forthwith entered upon performance of and carried out the terms of the said agreement of 1903, and continued in performance of the terms thereof until such time as said agreement of 1903 was rendered inoperative and supplanted by the agreements of 1909 hereinafter referred to.

6. That in the year 1909 further contracts were entered into between the petitioner's predecessors, Lehn & Fink, Inc., and P. Beiersdorf & Co. in regard to the manufacture and sale of "Pebeco" tooth paste and the use of the trade mark "Pebeco" as follows, and such contracts may be proved by production of copies thereof as agreed upon between the parties:

(a) Contract executed by Beiersdorf at Hamburg, June 28, 1909, and by Lehn & Fink, Inc. in New York, July 12, 1909.

(b) Contract executed by Beiersdorf in Hamburg, September 9, 1909, and by Lehn & Fink, Inc. in New York, October 1, 1909.

7. That following execution of the said contract of 1909, performance of the same was thereafter carried out by the parties thereto without breach. In the year 1917, the United States of America entered the Great War and, consequently, enacted the trading with the Enemy Act and Lehn & Fink, Inc., under the provisions of that Act, applied for and received a license from the Federal Trade Commission of the United States of America and used the said trade mark "Pebeco." Subsequently to such licence, the alien property custodian purported to seize certain property and transfer the same as set out in para. 8 hereof.

8. The alien property custodian of the United States purported to seize and transfer certain property of P. Beiersdorf & Co. as set out in an assignment from the said alien property custodian to Lehn & Fink, Inc., the petitioners, dated May 13, 1919, and such assignment may be proved by the production of the instruments purported to be signed by the said alien property custodian, without proof of seizure, it being open to the objecting party to contend that such seizure and assignment did not in fact or law cover the Canadian trade mark and business.

9. The petitioner paid the sum of $1,000,000 for the assignment from the alien property custodian referred to in para. 8 hereto, which said sum is held by such alien property custodian or the Government of the United States of America.

10. That a Treaty of Peace has been entered into between the United States of America and Germany, and for the text thereof both sides may refer to printed copies thereof as commonly available without any necessity for proving the same.

11. That the Treaty of Peace between Germany and the United States referred to now forms part of the law of Hamburg.

12. That certain labels to be agreed upon between the parties, including labels and literature already filed in Court, are labels used by the petitioner in connection with the marketing of the 'Pebeco' tooth paste in Canada and the United States under the terms of the said contracts of 1903 and 1909.

13. That part of the 'Pebeco' tooth paste supplied to the Canadian market after the year 1909 was made by P. Beiersdorf & Co. of Hamburg, and shipped by them to Canada upon the order and request of Lehn & Fink, Inc., the petitioner. The orders for such tooth paste being taken by Lehn & Fink, Inc., and the tooth paste shipped by P. Beiersdorf & Co. to the Canadian purchasers or the sub-agents of the petitioner, Lehn & Fink, Inc.

14. That an armistice came into effect between Germany, Great Britain, Canada and the United States and other powers at war with Germany on November 11, 1918.

15. That subject to the general application of any general law or enactment or treaty, the Government of the Dominion of Canada has not at any time or in any way interfered with the respective rights as the case may be of the parties hereto in and to the Canadian trade mark 'Pebeco' and the goodwill in connection therewith; nor has the Canadian Government at any time made any seizures of such trade mark and goodwill.

All of the foregoing admissions are made subject to the right of either party to object to the facts admitted being offered in evidence in this case on the ground of irrelevance.

The parties agree that either party may with the permission of the Court make such amendments in the pleadings herein as delivered as may be necessary and agreed upon to set forth the contentions of the parties."

The petitioners' claim rests upon the contract of July 12, 1909, the contract with respect to the Canadian Territory of September 19, 1909, and the amending or "altering" contract of February 9, 1919, which changes the July 12, contract. All these contracts are filed as ex. 3. Furthermore the petitioners also rest their claim upon the seizure made in the United States

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by the alien property custodian and the assignment made by him to the petitioners and which is filed as ex. 4.

I have read over the agreements contained in ex. 3 and find in them nothing but an agreement in the nature of a licence. In fact it is a license whereby the German owners of the trade mark 'Pebeco' impose the obligation upon the American licensees to pay royalties and to comply with a number of terms and conditions for the preservation and maintenance of their estimated high grade of the goods protected by their trade mark and in consideration thereof they, correspondingly, assume the obligation to extend or give the American people the right to sell in the United States and in Canada, the goods bearing the objecting party's trade mark. Both parties have the right to terminate this agreement on January 1, of any year by giving 3 months' notice. A service of such notice, however, shall not be admissible earlier than from January 1, 1935. The agreement further provides that should one of the parties violate one of its essential conditions, the other party may withdraw from the agreement.

The agreements in no way can be termed a sale of the trade mark. There is not a single clause or enactment in the agreements whereby the ownership of either the trade mark in the United States or in Canada is dealt with or mentioned. The ownership of these trade marks did not change or pass under these agreements.

The only mention of Canada and the only part of these agreements dealing with Canada is limited to the few words of the agreement of September 19, 1909, which states that the previous agreement "between Chemische Fabrik P. Beiersdorf & Co., in Hamburg and the firm Lehn & Fink in New York, dated the 12|22 1909, is supplemented by the undersigned as follows:—

"The territory covered by this agreement is being extended to include Canada. All provisions in force with regard to the United States of America shall also apply to Canada."

This *habendum* and last clause contained in this short agreement means nothing more than that Lehn & Fink can sell as well in the United States as in Canada, but in no wise can it be contended that it carries with it the transfer of the ownership of the trade mark "Pebeco" in Canada.

Paragraph 3 of the *admissions* wrongly states "that the trade mark 'Pebeco' was registered in Canada in the year 1907," as it appears by exs. 7 and 7a that the *general* trade mark "Pebeco" was registered in Canada on November 11, 1909, and the *specific*

trade mark "Pebeco" to be applied to the sale of tooth paste, and which "consists of a panel upon which appears the word 'Pebeco' accompanied by the words 'tooth paste' and No. 650, with an ornamental border line at the right and an ornamental border line and the words 'the registered trade mark Pebeco protects against imitations', at the left"—was registered in Canada on August 8, 1911.

It, therefore, appears that the agreements relied upon by the petitioners for claiming the ownership of the trade mark bear respectively date of July, 1909, and September, 1909, whereas the word "Pebeco" was registered in Canada only subsequently to these dates, before the war, by the German firm P. Beiersdorf & Co. of Hamburg, Germany, who were the owners thereof, an indispensable condition to the right for such registration. The specific trade mark was registered even as late as 1911. On both occasions,—being after the date of these two agreements,—P. Beiersdorf & Co. swore that the trade marks belonged to them and it was as owners alone that they had the right to register. This idea of ownership on behalf of the petitioners seems to have originated only recently perhaps only since the war, following the rights they acquired in the United States under the American law which avoided the German trade marks during the war,—a state of law which did not, however, obtain in Canada.

I, therefore, find that the ownership of the two Canadian trade marks,—or any one of them—in no way passed under these agreements, which amount to nothing more than a licence with its usual terms and conditions, the most cogent proof for this finding.

Coming now to the consideration of the sale made, in the United States, by the alien property custodian acting under the provisions of the Act of Congress known as the Trading with the Enemy Act approved of on October 6, 1917, it will be seen, by reference to ex. 4, that he seized the American trade mark and sold the same to the petitioners.

By the *habendum* clause of such sale the alien property custodian sold to the petitioners the following property, to wit:

"That certain trade mark registered in the United States Patent Office and identified as follows:—

'Trade Mark No. Date of Registration Title
61678 April 2, 1907, Pebeco for tooth paste'

and also, the business of the firm of P. Beiersdorf & Co. in the United States appurtenant to the said trade mark, and all the

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rights, interests, and benefits created in favor of or conferred upon said enemy, the firm of P. Beiersdorf & Co., by a certain agreement dated June 28, 1909, and July 12, 1909, between said enemy and Lehn & Fink, of New York, and by any and all agreements between said enemy and Lehn & Fink, modifying said agreement; and also, all the rights created and existing in favor of or conferred upon said enemy in and to any royalty or sum or sums of money accrued or accruing under the terms of any of said agreements; and also, all claims and demands conferred upon said enemy against said Lehn & Fink, and every right, title and interest with respect thereto, etc."

From the seizure and sale, it will obviously appear that no one, at that time, conceived the idea that the above mentioned agreements had conveyed the ownership even of the American trade mark, since after seizure, it was sold to the very people who now claim that such trade marks had passed to them under such agreements. The matter is too clear. And if the American trade mark did not pass under these agreements, it cannot be reasonably contended that the Canadian trade marks passed thereunder.

That sale was furthermore made "subject to the rights of Lehn & Fink under the agreements or licenses." How can the petitioners now contend that these agreements or licenses conveyed the ownership of the trade mark, when they willingly paid for this American trade mark a very large sum of money? Mentioning it is answering it.

I must, therefore, further find that in the sale made by the American alien property custodian the Canadian trade marks did not pass.

Indeed, inasmuch as within each State nothing is recognized as law except that which the supreme authority in that State has enacted and is able to enforce, it follows that the American Court could not *proprio vigore* cancel or dispose of the Canadian trade marks.

Lord Macnaghten, in *Rey* v. *Lecouturier* 27 R.P.C. 268 at 276, [1910] A.C. 262, the famous *Chartreuse* case, said: "To me it seems perfectly plain that by the very nature of things a law of a foreign country, and a sale by a foreign Court under that law, cannot affect property not within the reach of the foreign law, or the jurisdiction of the foreign Court charged with its administration." And in the same case, at p. 280 per Lord Loreburn, L.C.; "but this property—for property it is—which has come in question in this appeal is property situated in Eng-

land, and must, therefore, be regulated and disposed of in accordance with the law of England." ANNOTATION

The alien property custodian in the United States could not sell rights existing between German and Canadian citizens. All he could sell was the American trade mark and the rights conveyed to American citizens and existing in the United States under the above mentioned working agreements or licences—which obviously admit the ownership of the trade mark to be in Beiersdorf & Co.—as licensee under these agreements. The petitioners, as licensees, are estopped from attacking the ownership of the trade marks. Trade marks in Canada belonging to alien enemies during the war remained *in statu quo* and no law was enacted depriving them of such property.

I, therefore, find that the Canadian trade marks did not pass under the sale by the alien property custodian and that the same remain in the ownership of those who first registered them in Canada.

Having said so much, I may add there were a number of incidental questions raised at Bar upon which, in the view I take of the case, it becomes unnecessary to pass. If they were not wholly based upon a hypothetical view of the facts of the case, they were certainly extraneous to the real issue between the parties, namely, whether the petitioners are the true owners of the Canadian marks. That is the salient fact to which the Court has directed its consideration and made its finding adverse to the claim of the petitioners.

Therefore, there will be judgment ordering the rectification of the Canadian register, by expunging the trade mark "Pebeco," registered on May 18, 1920, by Lehn & Fink, Inc, in register No. 113, folio 26506 and to restore and register on said Canadian register the general trade mark "Pebeco" registered on November 11, 1909, by P. Beiersdorf & Co., in reg. 58, folio 14181, and also the specific trade mark "Pebeco" to be applied to tooth paste, registered on August 8, 1911, by P. Beiersdorf & Co. in register No. 56, folio 16135. The action is dismissed with costs to the objecting party.

Action dismissed.

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TRADEMARK—OWNERSHIP OF BY DIFFERENT PARTIES IN DIFFERENT MARKETS.

BY RUSSEL S. SMART, B.A., M.E., OF THE OTTAWA BAR.

A trade mark being used to distinguish the goods of one trader from another in the market, it may reasonably be supposed that

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there is a necessary relation between the trade mark rights and the market, and that, in different markets, ownership of the trade mark may belong to different parties.

In 28 Am. & Eng. Encyclopædia of Law p. 390, para. 4, it is said: "A particular word or mark may at the same time be a valid trade mark in one country and not in others, or it may be the trade mark of one person in one country and of a different person in another country."

The *Chartreuse* case, *Rey* v. *Lecouturier, supra,* referred to in the judgment, is possibly the most instructive of the cases in this line.

The Order of Carthusian Monks situated at La Grande Chartreuse, had for years made and sold liqueurs under marks or labels the most important feature of which was the phrase "Fabriquée a La Grande Chartreuse," the liqueur being that commonly known as "Chartreuse." In 1901 the property of the congregation of the Grande Chartreuse, including trade marks, became by judgments of the French Courts vested in the defendant. The question whether the foreign, including the British, trade marks were so vested was expressly left undecided in France. The comptroller, on application, transferred the British marks from Father Rey, a trustee of the Carthusian Order, to the defendants, who manufactured liqueurs as successors to the monks at their distillery and introduced and sold them in England under the old labels and in the old bottles. The monks manufactured the liqueur in Spain and a Spanish company sold it on their behalf.

The monks and the Spanish company brought an action against the liquidator and his assigns, to restrain them from using the word "Chartreuse" so as to pass off their liqueurs as being those manufactured by the plaintiffs. It was held by Joyce, J., at the trial (see judgment of Joyce, J., 25 R.P.C. 274) that there was no passing off by the defendants. The plaintiffs appealed, and the judgment was reversed by the Court of Appeal (1907), 25 R.P.C. 265, and its judgment was concurred in by the House of Lords, [1910] A.C. 262, 27 R.P.C. 268, the holding being that the word had acquired a secondary meaning, so that the use of it by others than the monks would necessarily deceive, and also that the monks were entitled to the English trade marks.

A motion by the personal representative of C. M. Rey, in whose name the British trade marks of the business carried on by the monks had stood, asking that the comptroller might be

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directed to expunge the entries of the name of the French liquidator from the register in respect of these marks, was ordered to come on together with the action. This motion was dismissed with costs by Joyce, J., but on appeal, the register was ordered to be rectified as asked.

Lord Alverstone, L.C.J., said in delivering his opinion in the Court of Appeal, 25 R.P.C. 265, at 284-285:

"I now come to the substantial question in the case, and I think it may be stated in this way: Had 'Chartreuse' in the year 1903, acquired in England in the liqueur market a secondary meaning? And if it had acquired a secondary meaning, who was entitled to the benefit of the liqueur protected by that secondary meaning? And then, have the proceedings in France deprived the people, who would be entitled to that benefit, of the right still to possess it?

Everyone would not state the questions in exactly the same way, but that is how they occur to my mind. After listening most carefully to Sir Robert Finlay's most just and proper criticism of the evidence, I have not the slightest doubt that for a great many years before 1901 the word 'Chartreuse' or 'Grande Chartreuse' had acquired in the English liqueur market the secondary meaning that it was a liqueur manufactured by the monks of the monastery .... It seems to me that what anybody would have understood it to mean would have been the liqueur manufactured by the monks of the monastery of La Grande Chartreuse."

Buckley, L.J., said at p. 291:

"It seems to me that the monks have a business in connection with which they can enjoy, if they are entitled to it, the trade marks, and these various labels which are on the register, and in respect of which *Lecouturier* has put his name on the register. They are carrying on a business in connection with which they are entitled to enjoy those trade marks, if those trade marks are theirs. Now are they theirs? In my opinion, they are ..."

Kennedy, L.J., said at p. 292:

"In fact, the product of their industry had acquired a commercial character by the designation of 'Chartreuse,' and that designation meant to the public an article manufactured by the monks according to the process which they used, and there it is, it seems to me, with great respect to the learned Judge below, that he has taken a view which, upon the evidence, appears untenable."

Continuing, the Lord Justice said at p. 293:

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"I again cannot follow the learned Judge below on the evidence before us when he said: 'There was nothing further from the contemplation of either party than that their 'Chartreuse' should be passed off as the product of the other, or be purchased as or for the other.' If by that is meant that *M. Lecouturier* was not seeking to say that what he was selling in this country had been manufactured at Tarragona, no doubt that is perfectly true, but if it means that he did not mean that he was not contemplating, or rather those who represent him were not contemplating, that what was going on the English market should be bought as being the product which had acquired the commercial designation of 'Chartreuse,' that is a thing which was manufactured by Carthusian monks, and manufactured according to their process, I am at variance entirely upon the question of fact. It seems to me plain that what the defendants desired to impress upon the public was—'You are getting the thing which the Carthusian monks manufactured by their process'; and it would have been perfectly useless to state the fact, 'We are not using the process, we are not using that which is manufactured by Carthusian monks, but we have bought the locality in which the articles were produced before; we have bought the buildings, and, so far as we could, the plant and the business in France, whatever that may mean, which we must admit does not include the process, and does not include those who manufactured it before and whose hands produced the article.' If that be so, it seems to me that we have to deal with a case in which it is shutting one's eyes to the facts not to see that what is being done is a representation that the thing which is being put upon the market is something which it is not, and that there is an injury of which the plaintiffs have a right to complain, as they have continued to make, though in a different place of business in which they manufacture, the article which they manufactured before, and which is represented by the defendants untruly to be manufactured by them."

The defendants appealed to the House of Lords, where the case is reported under the name "*Lecouturier* v. *Rey*, in [1910] A.C. 262 and under the name of *Rey* v. *Lecouturier*, 27 R.P.C. 268.

The House of Lords held that the decision of the Court of Appeal was right and that the appeal must be dismissed with costs.

In Canada, while some cases have been decided upon the assumption that trade mark rights must be based upon use in

Canada, there are few, if any, cases directly laying this down as a proposition of law. ANNOTATION

Spilling v. *Ryall* (1903), 8 Can. Ex. 195, concerned the registration of a trade mark consisting of a vignette of King Edward VII. with the British Coat of Arms and the words "Our King" and "Edward Seventh," which was held to be a good trade mark in Canada, although it appeared that Moebs & Co., cigar manufacturers of Detroit, had adopted a similar trade mark in the United States. The Court held that Moebs & Co. were not before the Court, and their rights were not involved in the case. It also appeared that the mark could not have been registered in England.

In *Imperial Tobacco Co.* v. *Duffy*, [1918] A.C. 181, 35 R.P.C. 12, there was a registration by plaintiff of a trade mark in Newfoundland which mark had been previously registered by the defendants in the United States. The defendants sought to extend their business to Newfoundland, but were restrained; the Privy Council holding the Newfoundland registration valid, notwithstanding the prior registration in the United States.

So also in *Kaiserbrauerei Beck & Co.* v. *Baltz Brewing Co.* (1895), 71 Fed. 695; and *Baltz Brewing Co.* v. *Kaiserbrauerei Beck & Co.* (1896), 74 Fed. 222. The word "Kaiser" as applied to beer was held to be a good trade mark in the United States, although the complainant, a German corporation, had no right in the word "Kaiser" as a trade mark, and could acquire none in Germany.

In *Avenarius* v. *Kornely* (1909), 139 Wis. 247, one of the questions was whether a German citizen had the right to protect the word "Carbolineum" applied to paint as a trade mark in the United States, it being found as a fact by the Court, (see p. 251):—

"That the word 'Carbolineum' was first used in Germany, and under the then existing laws of that country, it was not and could not become a trade mark, and the plaintiff could not prevent competitors from using said word as a designation for their similar products."

And Kerwin, J., said, at p. 269:—

"Whether he could have registered it in foreign countries under their laws as a trade name is not material. Our Courts are not bound by any foreign rule, judicial or otherwise, as to the precise essentials of a trade mark. The question is whether plaintiff's claim is in harmony with the law, written and unwritten, of this country. Nor do our Courts decide what trade

ANNOTATION marks exist or do not exist in foreign countries. The question is whether the plaintiff was entitled to have his trade name recorded here. *Vacuum Oil Co.* v. *Eagle Oil Co.* (1903), 122 Fed. 105; *Hohner* v. *Gratz* (1892), 50 Fed. 369; *The Appolon* (1824), 9 Wheat. 362; *De Brimont* v. *Penniman* (1873), 10 Blatchf. 436; *Browne, Trade Marks*, ss. 50, 51."

And the Court held that the name was properly registered and could be protected in the United States.

The rule stated in the "*Carbolineum*" case just cited, 139 Wis. 247, that the question of the right to a trade mark is to be determined by the law of the place of registration, was likewise laid down in *Pinto* v. *Badman* (1891), 8 R.P.C. 181, at 193, Fry, L.J., said:—

"But then we come to this last point, which is the question, whether or no the plaintiffs have shewn that at the time of the registration they had a right to the exclusive use of the trade mark in this country? Now, I observe in the first place that that is a question of English law, because this is a registration of a trade mark in England, and the exclusive right asserted is the exclusive right to use in England. Therefore, it is obviously a question of English law."

On the same point in *Cellular Clothing* v. *Maxton*, [1899] A.C. 326 at 342, Lord Shand said:—

"On the facts of this case I entirely agree with the Lord Ordinary: I think his Lordship is sound in the view he takes that this has to be tried as a question affecting the trade in Scotland, and even if it had been proved that in England the word 'cellular' had acquired the secondary signification claimed, still, if it were not proved that in Scotland the same signification was attached to it by the trade and the public, I should say the decision ought to be different from what it might perhaps be in England."

In a recent case from the Exchequer Court of Canada, *Jones* v. *Horton* (Annotated) (1922), 65 D.L.R. 33, Audette, J., said, at p. 40:—

"It is unnecessary to give any opinion upon what as yet is a moot question as to whether—taking into consideration that Canada and the United States are adjoining and neighbouring countries—a Canadian citizen would have the right, with impunity, to appropriate an American registered trade mark extensively used in the United States for many years and register it as his own in Canada; and, furthermore, whether the American owner having for a long period neglected to register in

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Canada, did not lose, by such laches, his right to so register."

There are certain decisions of the late Mr. Lowe, Deputy Minister of Agriculture, to the effect that the applicant for a trade mark in Canada must be the proprietor the world over. *Bush Manufacturing Co.* v. *Hanson* (1888), 2 Can. Ex. 557; *Groff* v. *Snow Drift Baking Powder Co.* (1889), 2 Can. Ex. 568. These cases have not been followed in any subsequent cases in Canada, but, on the other hand, they have not been overruled.

In an early case, *Smith* v. *Fair* (1887), 14 O.R. 729, Proudfoot, J., took the opposite view, and supported it by citation of the English authority *Berliner, Gesellschaff Tivoli,* v. *Knight,* [1883] W.N. 70.

Cassels, J., in *Re Vulcan Trade-Mark* (1914), 22 D.L.R. 214, 15 Can. Ex. 265, affirmed (1915), 24 D.L.R. 621, 51 Can. S.C.R. 411, referred to the preceding cases on the point without expressing any definite opinion thereon.

PULLAN v. SPEIZMAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. December 27, 1921.

SALE (§ IB—5)—OF GOODS—CONTRACT TO PURCHASE GOODS—INSTRUCTIONS FOR SHIPMENT—DELAY OWING TO EMBARGO—FIRE—PROPERTY IN GOODS—RETURN OF DEPOSIT.

Goods sold under a contract by description are not appropriated to the contract unless with the consent of the buyer and according to his instructions, and the property in them does not pass.

[*Schmidt* v. *Wilson & Canham* (1920), 47 O.L.R. 194, affirmed (1920, 55 D.L.R. 516, 48 O.L.R. 257; *Colley* v. *Overseas Exporters,* [1921] 3 K.B. 302, referred to.]

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.O.—

This is an appeal by the defendant from the judgment of the County Court of the County of York, DENTON, Co.C.J., dated the 7th March, 1921, which was directed to be entered after the trial before him sitting without a jury on that day.

The action is brought to recover $300 paid by the respondent (the plaintiff) to the appellant on account of the price of 21,000 pounds of sisal ropes sold to him by the appellant, and the claim to recover is based upon the contention that the contract for sale was cancelled in the exercise of the right which the respondent was given by the contract to cancel it in the event which happened; and the appellant counterclaims for the balance of the price of the sisal and some other articles: $13.30 for 38 pounds of merchant tailor clips at 35 cents per pound, and $81.50 for 2,330 pounds of sisal string at 3½ cents per pound. The respondent admits that he owes for the clips, but says that

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the price was 32 cents per pound, and he also admits his indebtedness for the sisal string as claimed.

The learned trial Judge gave effect to the claim of the respondent, and allowed him, in addition to the $300, $43.72, which he said the appellant admitted he owed to the respondent, and from these two sums he deducted $76.23, which he said the respondent admitted, leaving a balance in favour of the respondent of $267.49, for which he gave him judgment with costs.

In passing it may be pointed out that the amount admitted by the respondent was not $76.23, but $93.66, made up of the 38 pounds of clips at 32 cents per pound—$12.16—and $81.50 for the sisal string.

The facts are not seriously in dispute. The contract is evidenced by an order signed by the respondent dated the 25th March, 1920. It is on a printed form, and the subject of the order is "approximately 2,100 lbs. new sisal rope, similar to sample submitted," and the price is $3.70 per "hhd." It provides that "E Pullan will furnish A. Speizman with shipping instructions next week;" and that payment is to be made "30 days dft. from day of shipment. Mr. Speizman will be responsible for quantity and quality of goods."

There is a further provision in these words: "We reserve the right to cancel all or part of this order if the material is not shipped within the time specified."

This order was accepted in writing by the appellant.

On the following day, the respondent wrote to the appellant the following letter:—

"Confirming our conversation to-day, regarding shipping instructions for the sisal rope we purchased from you, please ship same to

"E. Pullan, Willow Avenue Station, Hoboken, New Jersey.

"This is to be shipped viâ C.P.R. and West Shore Railroad delivery. Kindly ship this stock as a car-load, providing that there is more than 20,000 lbs. If there is less than 20,000 lbs., ship it as a less car-load shipment. It is understood of course that you will attend to the necessary export entries and consular invoice.

"Kindly follow the above instructions exactly as given to you, and if there is anything you do not understand, please let us know immediately. Please send us the signed bill of lading and invoice as soon as you make the shipment.

"Yours very truly, E. PULLAN."

The sisal which the appellant agreed to sell was purchased by him from John Julius Block, in whose possession it was in Kingston, and it was arranged between them that Block should

attend to the shipment of it. There was at the time the contract was made a railway embargo which prevented the shipment being made to Hoboken, or, as I understand it, to any point in the Eastern United States. Block applied to the agent of the Canadian Pacific Railway Company at Kingston for a car for Hoboken, and the agent, by mistake, not knowing of the embargo or forgetting that it existed, placed a car at the disposal of Block, who loaded into it the sisal. In a very short time the mistake was discovered, and Block was told that the car could not go to Hoboken, and it was then unloaded, and the sisal was taken back to Block's premises, where it was subsequently destroyed by an accidental fire. It appeared in evidence that the embargo was "lifted" on the 4th May following, and was not put on again until the 14th of that month.

Christopher C. Robinson, for appellant.

J. Singer, for respondent.

The judgment of the Court was read by

MEREDITH, C.J.O. (after setting out the facts as above):—The evidence establishes clearly, I think, that Block was anxious to carry out the respondent's shipping instructions, and made reasonable endeavours to do so; and there is, I think, much force in his statement that, although the embargo was off during the period mentioned, it was difficult, if not practically impossible, owing to the mass of commodities required to be shipped that had accumulated while the embargo was on, to get a car for the shipment of the sisal to Hoboken.

It is equally clear, I think, that the appellant was anxious to get delivery, and the whole difficulty as to the shipment to Hoboken arose from conditions over which neither the appellant nor the respondent had control; and the case, therefore, falls to be determined according to the strict rights of the parties.

The learned trial Judge seems to have thought that the duty of providing a car to receive the shipment of the sisal rested upon the appellant. I do not so think, but am of opinion that, the contract being for a sale free on board, that duty rested on the respondent—that is, under such a contract the duty rested on the respondent to provide an effective means of conveyance to the point to which he desired that the sisal should be shipped; that is settled law: *H. O. Brandt & Co.* v. *H. N. Morris & Co., Limited*, [1917] 2 K.B. 784, 795, 798.

In that case the contract was for the sale and purchase of aniline oil, f.o.b. Manchester. When the contract was made, there was no prohibition against the export of such oil, but the prohibition was subsequently imposed unless a license was obtained, and what was held was that it was the duty of the buyers

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to provide an effective ship, i.e., a ship which could legally carry the goods, and that it was then that the seller's duty to put the goods on the ship arose.

In the case at bar, the respondent did not provide an "effective" car, and the duty of the appellant to load the goods did not arise; but, as I have said, under a mistake as to the possibility of that car being "routed" to Hoboken, the sisal was loaded into a Canadian Pacific Railway car, and, when it was found that it could not go to Hoboken, as I have said, the sisal was unloaded and placed in Block's warehouse.

It was argued by counsel for the appellant that the putting of the goods into the car, notwithstanding the mistake, was an appropriation of them to the contract sufficient to pass the property in them to the respondent.

It is undoubtedly the law that where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract by the seller with the assent of the buyer, the property in the goods then passes to the buyer, and that the assent may be express or implied and may be given either before or after the appropriation is made.

It is a proper conclusion from the conduct of the parties that, if the sisal had been loaded upon a car routed for Hoboken, that would have been an appropriation by the appellant with the assent of the respondent sufficient to effect the passing of the property in the sisal to the respondent, for his assent would properly be implied. But can the assent be implied where the sisal was not loaded upon a car routed for Hoboken but upon a car that was not destined for that point? I think not. My view is that it was only when the sisal was loaded upon a car routed for Hoboken that the assent to the appropriation would be implied. I am inclined to think also that the shipment was not complete until the bill of lading of the railway company had been obtained and it was available to the respondent.

It follows from this that the appellant is not entitled to recover the purchase-price, but his remedy is for the recovery of damages for the breach of the contract owing to the respondent's failure to provide a car in which the sisal could be shipped, if the failure to do that constituted a breach of the contract, and the measure of his damages would be the difference between the contract price and the market value of the sisal at the time the breach occurred. The case is further complicated by the fact that the sisal has been destroyed by fire. If at the time the fire occurred there had not been the breach by the respondent of the contract, I do not see how the respondent can be made

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liable for any damages or why he should not recover the amount of the payment he had made on account of the purchase-price. The fire occurred on the 20th June, and from the time the contract was made until that day at least the embargo was on except for the few days in May during which, as I have mentioned, it was off. This embargo affected shipments to Hoboken viâ the West Shore Railroad, but there was no embargo on shipments viâ the New York Central Railway, except between the 2nd and 20th April and the 12th June and 2nd July. I think that the respondent was entitled to have the sisal shipped to Hoboken viâ the Canadian Pacific and West Shore Railways, and that he was not bound to accept shipment by any other route.

It is manifest from the testimony of Block that in his view, up to the time of the fire, there was no reasonable opportunity for the respondent to provide a car that would be billed to Hoboken viâ the two railways over which it was to be carried to its destination. In that view Block was, I think, right, and it can hardly lie in the mouth of the appellant to assert the contrary, in the face of the testimony of Block, who was put forward by him to shew that that was the case.

It follows that, there having been no default by the respondent in providing the car up to the time of the fire, and, as I have said, the property not having passed to the respondent, he was not liable to pay for the sisal and is entitled to the return of the money he had paid on account of the purchase-price. See also *Colley* v. *Overseas Exporters*, [1921] 3 K.B. 302; *Schmidt* v. *Wilson* (1920), 47 O.L.R. 194, per Logie, J., at p. 200, affirmed (1920), 55 D.L.R. 516, 48 O.L.R. 257.

For these reasons, I would affirm the judgment, with the variations I have suggested, viz., that the amount awarded to the respondent be reduced by $27.43, and I would direct that the costs of the appeal be paid by the appellant.

Appeal dismissed.

BREWERS & BOTTLERS SUPPLY Co. v. YORKTON DISTRIBUTING Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

APPEAL (§VIIL—470)—SALE OF GOODS—FINDINGS OF FACT BY TRIAL JUDGE—INTERFERENCE WITH BY APPELLATE COURT—MISAPPREHENSION OF FACTS BY TRIAL JUDGE—VARIATION OF JUDGMENT.

In so far as the findings of a trial Judge are based upon conclusions of fact, drawn from contradictory evidence, they will not be interfered with by an Appellate Court, but where the Court is convinced that the trial Judge has given judgment upon a misapprehension of the facts, the Court will vary the judgment in regard to these particulars.

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BREWERS & BOTTLERS SUPPLY CO. v. YORKTON DISTRIBUTING CO.

Turgeon, J.A.

APPEAL by defendants from the trial judgment in an action to recover the purchase price of certain goods sold by the plaintiff to the defendants. Judgment varied.

P. M. Anderson, K.C., and *W. B. O'Regan*, for appellants.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—The matters to be disposed of in this case are entirely questions of fact. On or about April 15, 1920, the defendant purchased the goods in question from the plaintiffs. These goods consist of 10 wooden tanks, one filler, 2 filters, one pump, one labeler and one corking machine; all these goods being intended for use in the preparing and bottling of liquor. The two filters were supplied, it is admitted, on the understanding that the defendants might keep one of them, only, unless they required both in their business. One of the members of the defendant company notified one Daly, a representative of the company, at Yorkton, on or about May 10, 1920, that the defendants did not intend to keep any of the goods on account of their dissatisfaction with the goods supplied. The defendants contended at the trial that the transaction between the parties constituted an entire contract for the purchase and installation of a bottling plant. The trial Judge has found, upon conflicting evidence, that such was not the case, but that each of these articles was sold separately and specifically under conditions which bound the plaintiffs in each case to supply an article reasonably fit for the purposes intended, within the meaning of the Sale of Goods Act (R.S.S. 1920, ch. 197, sec. 16 (1)). He found that the filler did not comply with the condition imposed by the Act, and allowed the defendants the full amount of its purchase price, on condition that they deliver it up to the plaintiffs at Yorkton. He found that the filters, pump, corking machine and tanks complied with the contract, and gave judgment in favour of the plaintiffs for their purchase-price. Insofar as his findings in these matters are based upon conclusions of fact drawn from contradictory evidence, they ought not to be interfered with. But, in regard to the filters, I am convinced, from a consideration of the evidence, that the trial Judge has pronounced himself upon a misapprehension of the facts. I think the evidence to be found on pp. 178 and 179 of the appeal book makes it clear that only one of these filters was used by the defendants or intended to be kept by them.

Then as to the filter which was used by the defendants, there seems to be no dispute at all that it was delivered in an in-

complete state, and that the defendants had to expend upon it the sum of $101.65 in order to put it in proper condition.

I think that the judgment should be varied in these particulars, and that, in addition to the filler which the trial Judge has ordered to be delivered to the plaintiffs at Yorkton in reduction of the plaintiffs' claim, the defendants should be entitled to return the filter which they state was never used, and, upon their returning this filter at Yorkton unused and in the same condition as it was delivered to them, its purchase price ($375.) should be deducted from the judgment. A further deduction should be made of the amount of $101.65 above referred to.

I have had some hesitation in arriving at a conclusion on the subject of the tanks. I think the evidence on this point is unsatisfactory and that some more definite cause might have been found for the discoloration of the liquor, which no doubt took place. The defendants merely shew, on the one hand, that they poured the liquor into the tanks and allowed it to stand there for some time and that it came out greatly discoloured. The plaintiffs, on the other hand, prove that the tanks were made of red-wood, and that alcohol does not become discoloured when allowed to lie in a container with chips of red-wood. It has been suggested, I think on the argument, that this discolouration may have been due to the quality of the water which was used to soak into the tanks and to distend them before the liquor was poured in, but there is no evidence on the point. I do not think, however, under the circumstances that the mere fact of the discolouration of the liquor, without more, is evidence of the unfitness of the tanks. If the tanks were found to be leaky or of the wrong capacity, these facts would speak for themselves and the defendants would not have to shew anything more. But, the soundness and capacity of the tanks not being in dispute, I think, in view of the evidence of the witness Bonz, that it was incumbent upon the defendants to go further than they did to satisfy their allegation of unfitness.

This action was brought for the recovery of $3,370, the full purchase price of all the articles. The trial Judge found in favour of the appellants on the issue concerning the filler and allowed them $650 on account of this item, ordering judgment to be entered against them for the balance, $2,720, with the costs of the action. They appealed from this judgment, and upon the argument the respondents applied for and obtained leave to cross-appeal against the trial Judge's finding regarding the filler. On the evidence, this cross-appeal should, I think, be disallowed.

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In the result, the respondents fail on the cross-appeal, and while the appellants do not succeed generally on the appeal, they do succeed, according to my finding, in having the judgment against them reduced by the sum of $476.65. In these circumstances, I think that the appellants should have their costs of appeal, but that the costs in the Court below should stand as ordered by the trial Judge.

HAULTAIN, C.J.S.:—As each party has been successful on a substantial point in this appeal I do not think that the appellants should have any costs of appeal. Otherwise, I concur in the judgment of my brother Turgeon.

Judgment varied.

REX v. TAYLOR.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 27, 1921.

CRIMINAL LAW (§ IIG—70)—ASSAULT BY TWO MEN ON A THIRD—DEATH RESULTING—CHARGE OF MURDER AGAINST ONE—ASSAULT AGAINST THE OTHER—CASE RESERVED IN LATTER INSTANCE—JUDGMENT OF APPELLATE DIVISION.

A conviction for assault is no bar to a prosecution for murder or manslaughter subsequently, and the Crown officers may in their discretion prosecute for the lesser offence.

[*Regina* v. *Morris* (1867), L.R. 1 C.C.R. 90; *Regina* v. *Friel* (1891), 17 Cox C.C. 325; *Regina* v. *Miles* (1890), 24 Q.B.D. 423, referred to.]

THE following statement of the facts is taken from the judgment of HODGINS, J.A.:—Reserved case submitted by SNIDER, County Court Judge, sitting as Chairman of the General Sessions of the Peace in and for the County of Wentworth.

The question reserved is stated as follows:—

"I held that where an assault has been committed resulting in death no charge other than murder or manslaughter will lie against the accused, and I accordingly withdrew the case from the jury and traversed the same to the next Sessions in order to submit this case to the Court, accepting bail for the prisoner in the meantime."

"Was I right in so holding?"

The accused was being tried before the learned Chairman and a jury on a bill of indictment charging him with having unlawfully assaulted Harry Byrnes, thereby causing him actual bodily harm, contrary to the provisions of sec. 295 of the Criminal Code.

The facts as stated in the case by the learned trial Judge are as follows:—

"The evidence disclosed that at the Hamilton Winter Assizes, 1921, an indictment was preferred before the grand jury charg-

ing the prisoner and one Louis La Chappelle with the murder of the said Harry Byrnes, and the grand jury were instructed that they might return a true bill either for murder or manslaughter; the grand jury brought in 'no bill' against the prisoner Edward Taylor and a 'true bill' against the prisoner Louis La Chappelle. The Crown counsel, with the consent of the presiding Judge, then preferred the indictment against this prisoner which came before me in this case, upon which the grand jury brought in a 'true bill,' which was traversed to this Court.

"The evidence disclosed that the deceased Harry Byrnes and the prisoner and Louis La Chappelle had an altercation in the street; there was evidence on the part of the Crown that the prisoner struck the deceased on his head with some instrument, the blow bringing the deceased to his knees; almost immediately, and before the deceased had regained his feet, La Chappelle struck the deceased several blows on his head with another instrument; the skull was crushed by blows from the effects of which he died within a few hours thereafter, but the medical witness who performed an autopsy on the body of the deceased was unable to distinguish the injury caused by the blow struck by the prisoner from the injuries caused by the blows struck by La Chapelle, or to say what effect the blow struck by the prisoner had."

Edward Bayly, K.C., for the Attorney-General for Ontario, *C. W. Bell*, K.C., for the prisoner.

HODGINS, J.A. (after stating the facts as above):—It is quite open on the evidence, as stated in the case, to assume that the grand jury, when the indictment for murder was before them, arrived at the conclusion that the blow struck by the accused did not cause or contribute to the death, but that it was La Chappelle's assault which really killed Byrnes, and that in consequence they could, and did, ignore the bill.

The present indictment is for the assault committed on Byrnes before La Chappelle struck him, which undoubtedly did cause actual bodily harm.

I think the procedure adopted by the learned County Court Judge, sitting in the General Sessions, was not that which he was entitled to take.

The provisions of the Criminal Code regarding a reserved case (secs. 1014 to 1018) clearly indicate that the trial is not to be retarded or interfered with by the granting or the refusing of a stated case; indeed, they provide in imperative terms that after a question is reserved "the trial shall proceed as in other cases" (sec. 1014 (4)). To stop the trial, discharge the jury, and traverse the case to the next Sessions, and at the same time

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to reserve a case to this Court, was, in my judgment, to adopt a practice wholly at variance with the Code. It would open the door for stating cases upon the admission or rejection of evidence, etc., during a criminal trial and also for adjourning the trial till the reserved case had been decided. This, after the accused has been given in charge, is improper. The jury must either be discharged or the trial must go on. If the former course is adopted, it puts an end to the trial, and so there is no proceeding during which a case can be reserved. Besides this, if we should answer upon the question before us that the indictment was proper, how can this Court exercise the powers given by sec. 1018 and what power has the Judge to admit to bail under sec. 1014 (5) pending the hearing of the case?

If the evidence upon an indictment for a crime indicates that the accused is guilty of a greater crime, then I conceive that it is the right of the trial Judge to discharge the jury and direct a new indictment to be preferred, or, if that is beyond his jurisdiction, to remand the accused into custody until the Crown has decided what course shall be taken. The trial Judge can, however, proceed with the trial, leaving it to the accused to plead autrefois convict or autrefois acquit to any new indictment, or he may reserve a case while the accused is still on trial. Any of these courses is dictated by justice—both to the Crown and the accused. The last-mentioned one is that preferred by Denman, J., in *Regina* v. *Tancock* (1876), 13 Cox C.C. 217. The prisoner was tried for the manslaughter of A., found guilty and sentenced. Shortly after his trial, the coroner's jury returned an inquisition for wilful murder upon the same facts. At the next assizes the prisoner was arraigned upon such inquisition, when he pleaded autrefois convict. The facts of identity of the prisoner and deceased were given in evidence, and Denman, J., said, at p. 219:—

"If I thought, on the depositions, that this was a case in which there had been an act committed which was probably murder, and which the jury would probably so think, I should reserve the point for the Court for Crown Cases Reserved and try the prisoner for murder; but, after carefully reading the depositions and consulting with the Lord Chief Baron, my opinion is very strong indeed that to expect a verdict of murder would be idle; and if there were one, I should have to report against the conviction. That being so, the prisoner would then practically be tried again on the same facts for the same offence, which is abhorrent to the law of England. I shall therefore rule to the jury that I think this plea proved, and that they ought to find the issue in favour of the prisoner."

The difficulty of allowing the course taken by the learned trial Judge to be followed instead of that of disposing of the case before him, leaving it to the accused, if subsequently indicted, to plead autrefois convict or acquit, is well put by Lord Denman, C.J., in *Regina* v. *Button* (1848), 3 Cox C.C. 229: it was there decided that "upon an indictment for misdemeanour it is no ground for an acquittal that the evidence necessary to prove the misdemeanour also shews that it is part of a felony, and that the felony has been completed. Thus upon an indictment for a conspiracy to commit larceny, and charging that in pursuance of that conspiracy the larceny had been committed, the defendant is not entitled to an acquittal, though the evidence proves that he was guilty of felony, the conspiracy proved making him an accessory before the fact to the crime of larceny."

In discussing the case during the argument, Lord Denman asks (p. 232):—

"If indicted for a conspiracy, is the defendant to purge himself by committing a felony?" Counsel answers: "That must be contended if the conspiracy in this instance is to be held to be merged." Lord Denman asks: "What would be the form of application to prevent the conviction? Is it a matter for the jury who are empanelled to decide aye or no whether a particular offence has been committed, that another offence of a higher nature has been committed?"

In giving judgment, he said, after discussing the cases upon the subject (p. 240):—

"It was further urged for the defendants, that, unless this defence was sustained, they might be twice punished for the same offence. But this is not so; the two offences being different in the eye of the law. If, however, a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the Court to apportion the sentence for the felony with reference to such former conviction. If the position contended for by the defendants was true, its application would be subject to much uncertainty; for it is not within the province of the Judge, in general, to decide on the credibility of the witnesses, or the weight of the facts tending to prove a felony; but according to the present contention, the duty of acquitting, on his own opinion, is cast upon him; and this conclusion of fact, in which probably the jury would not have concurred, is to be subject to no review. Also, if he should be satisfied that a felony is proved, and should direct an acquittal of the misdemeanour, it is obviously uncertain whether the same evidence would be given upon a prosecution for felony, or would be satisfactory to the jury, or would be left without answer. The

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felony may be pretended to extinguish the misdemeanour, and then may be shewn to be but a false pretence; and entire impunity has sometimes been obtained, by varying the description of the offence according to the prisoner's interest; and he has been liberated on both charges solely because he was guilty upon both. Upon this review, we are of opinion that this conviction for a misdemeanour ought to be sustained, although the evidence proving it proved also that it was part of a felony, and that such felony had been completed."

The same view has been taken in this Province. In *Regina* v. *Doty* (1894), 25 O.R. 362, a prisoner indicted and tried for the offence of having seduced a girl under 16 was held to have been properly convicted of such offence, although the evidence given, if believed in whole, would have supported a conviction for rape, an indictment for which he had been previously ignored by the grand jury. Boyd, C., considered that the jury, while giving credit to the girl's evidence in the main, did not accept her statement so far as related to violence—a course perfectly competent for them to take. Meredith, J., said that, "had there been evidence of the other, and entirely different, offence only, the trial Judge would doubtless have directed an acquittal upon this indictment, and have made an order under which another indictment for the offence proved, would have been prepared." He agreed that the jury might believe only part of the evidence if they so chose.

The *Doty* case follows *Regina* v. *Neale* (1884), 1 Car. & Kir. 591, the decision in which is also stated in *Regina* v. *Button*, 3 Cox C.C. 229, to be a direct adjudication that a misdemeanour which is part of a felony may be prosecuted as a misdemeanour though the felony has been completed. I refer also to the remarks of Osler, J.A., in *Miller* v. *Lea* (1898), 25 A.R. (Ont.) 428.

There is, too, in the statement of the learned trial Judge here an assumption which rather usurps the function of the jury. The point is whether this particular assault caused death to result. This question has never been tried: the grand jury has taken the view that the accused was not guilty of murder, and no one but a petit jury can determine the point to be settled in regard to the present indictment, at a regular trial. The relation of an assault to the death in the case of murder following violence sometimes raises a question of considerable difficulty. This is illustrated by the case of *Regina* v. *Bird* (1851), 5 Cox C.C. 20, where the crime of murder was charged as having been caused by several assaults committed by the prisoners, the evidence shewing the commission of these assaults,

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but failing to connect them with death as its cause. The point debated was whether, under the statute 1 Vict. ch. 85, sec. 11, which enabled the jury on an indictment for murder or manslaughter to acquit for the felony and to convict for an assault, a conviction was proper where the assault was not shewn to have conduced to the death. The case was very fully argued and was considered by fourteen Judges, who, by a majority, decided that the prisoners could not have been lawfully convicted of an assault on that indictment under the circumstances above named, inasmuch as the assault contemplated by the statute must be such that it was a part of the very act and transaction prosecuted and also conduced to the death. They also held that the prisoners were liable to punishment upon a subsequent indictment for those assaults.

This case was considered and followed several times in this Province. In *Regina* v. *Dingman* (1863), 22 U.C.R. 283, it was held that under C.S.C. ch. 99, sec. 66 (similar to the English statute), there could be no conviction for an assault unless the indictment charged an assault in terms, or a felony necessarily including it, which manslaughter was not.

In *Regina* v. *Ganes* (1872), 22 U.C.C.P. 185, the Court decided, following *Regina* v. *Bird*, that on an indictment for murder the prisoner could not be convicted of an assault under 32 & 33 Vict. ch. 29, sec. 5, which was similar in terms to the English statute. Hagarty, C.J.: "I have arrived at the conclusion that we must decide this case on the authority of *Regina* v. *Bird*, and that the prisoners here could not have been convicted, on this indictment, of any assault not conducing to the death. . . . The question in *Bird's* case was whether, assuming that there could be a verdict for assault on an indictment for murder, the assault must have been conducive to the death . . . therefore the jury should have been directed that they could only convict of some assault conducing to the death." Gwynne, J.: "The true rule, as it appears to me, to be deduced from *Regina* v. *Bird*, and the one best calculated to ensure an efficient administration of justice in such cases, is, that inasmuch as the only assaults which are included in the crime charged, in an indictment for murder or manslaughter, are those which conduce to the death, these are the only ones which are material to the issue and involved in it; and if the accused be found guilty of such assaults, or of any one conducing to the death, then he is guilty of homicide either in the degree of murder or manslaughter . . . The logical conclusion to be deduced from the decision appears to me to be shortly this, that if the prisoner is guilty of an assault which has conduced to the death, he is guilty of felony,

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and cannot in respect of that assault be convicted of assault merely; and if the assault proved does not conduce to the death, it is distinct from and independent thereof, and is therefore not included in the crime charged, and is dehors the indictment; and therefore no verdict of assault can be rendered upon an indictment for homicide, in respect of such an assault."

Regina v. *Smith* (1874), 34 U.C.R. 552: "On an indictment for murder in the statutory form, not charging an assault, the prisoner, under 32 & 33 Vict. ch. 29, sec. 51, cannot be convicted of an assault; and his acquittal of the felony is therefore no bar to a subsequent indictment for the assault." Richards, C.J., (p. 554): "I think all the Judges there" (referring to *Regina* v. *Bird*) "concur that to convict of an assault, when the indictment is for felony, the indictment must be for a felony which necessarily includes an assault. It is not necessary that it should be expressly charged on the face of the indictment. It will be sufficient if the felony charged must of necessity include an assault."

In view of the above considerations, I am of opinion that what the learned Judge has assumed must be tested by the facts actually proved in regard to the assault. It is not a matter that can be decided in advance on a point of law. It depends wholly upon whether the assault did or did not conduce to the death, and that a jury must try. For this reason, as well as that already considered, I am of opinion that the reserved case is not properly before us.

It is consequently unnecessary to determine the larger point argued, as to the right generally to indict for a lesser instead of a greater offence, yet, as it was argued before us, and the Crown has invited us to express an opinion as to it, I have no objection to state my views for what they are worth.

Ample provision is made in the Criminal Code for the laying of informations and the presentation of indictments. Any one can put the law in motion: Russell on Crimes, 7th ed., p. 1923; *Rex* v. *St. Louis* (1897), 1 Can. Cr. Cas. 141; and see secs. 654, 668, 871, 872 of the Code. When that is done, the conduct of the prosecution is practically in the hands of the Crown, which in this Province assumes the responsibility for the punishment of criminal offenders. There is no provision restricting the power of the Crown to lay information for any description of crime which the facts warrant, nor is there anything circumscribing the discretion of the Crown as to the degree of crime for which it shall determine to prosecute. Public opinion and a sense of duty can be counted on, and is in practice relied on, to correct any tendency not to enforce the law to the fullest

extent. There is, no doubt, at present, a desire to prosecute owners and drivers of automobiles where death has been caused for a lesser offence than manslaughter so as to secure conviction and punishment. This tendency may be dangerous from a public point of view, but the Crown must fairly weigh the moral and practical effect of such a course. Miscarriage of justice is, however, rare, and in the words of Hawkins, J., in *Regina* v. *Miles* (1890), 17 Cox C.C. 9, 20, "no system of judicature can be suggested in which occasionally failure to ensure complete justice may not rise." (See also 24 Q.B.D. 423).

Conditions have previously arisen, due to treason, riot, disorder, or the persistent occurrence of a particular offence, which have caused the laying of informations appropriate to the time as well as the offence. There are only a few instances in which the Code or the common law interferes with the practice of the Crown or prescribes the course to be pursued even to the extent of empowering the jury to convict for a crime not actually charged in the indictment. Section 732, sub-sec. 2, for example, requires a Justice to refrain from convicting for an assault if the assault was accompanied by an attempt to commit some other indictable offence, or, if the case was one for indictment, to limit himself to inquiry and committal. See also secs. 950, 951, 952, 953, 954. There are other provisions which deal with another aspect, namely, the effect of a conviction or acquittal for a greater or lesser offence in determining whether or not the offence has been substantially dealt with in the prior proceedings (secs. 907, 908, 909, 950 (2)). It is the maxim which lies at the base of the plea of autrefois convict or acquit that securely safeguards those accused and the public from overzeal on the one hand or laxity on the other. It requires the firm ground of actual facts and of transactions in open court, in place of opinion, and in no way ties the hands of the Crown, while affording full protection to any one who finds himself in peril for a second time for the same offence.

Discussing the cases cited in the argument, the *Ganes* case has already been mentioned. In *Rex* v. *Shea* (1909), 14 Can. Crim. Cas. 319, a decision by Wallace, County Court Judge (Nova Scotia), there had been an acquittal on a charge of manslaughter, while here the grand jury have returned "no bill." This is of course no bar to a subsequent indictment for the same offence (see *Regina* v. *Simmonite* (1843), 1 Cox C.C. 30). In the *Shea* case, Wallace, Co.C.J., says at p. 321:—

"The real question is whether on the sole charge of manslaughter, in the form which was used in the case pleaded"

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("did kill and slay") "a defendant can be convicted of a lesser offence" (i.e., of inflicting bodily harm, based on the same circumstances, occurring on the same day), "as, if so, the defendant having been once in legal peril in respect to the lesser offence cannot again be placed in peril.

At common law a defendant when charged with manslaughter could not, on that charge, have been convicted of a lesser offence: *Regina* v. *McGrath* (1867), 26 U.C.R. 385. Subsequently a statute was passed in England empowering the Court on a trial for manslaughter to convict for the lesser offence of an assault. There is no similar provision in the Canadian Code.

It is contended that sec. 951 of the Code has the same effect as the English statute. Such a construction, however, cannot be given to that section, where manslaughter has been charged, and I therefore hold that the plea of *autrefois acquit*, set up on behalf of the accused, has not been established, and that the accused must stand his trial on the lesser charge."

This case is opposed to the decision of the Saskatchewan Court of Appeal in the later case of *Rex* v. *Forseille* (1920), 55 D.L.R. 262, 35 Can. Cr. Cas. 171, 13 S.L.R. 474. The accused was tried on a charge containing two counts, one for manslaughter and the other for causing grievous bodily harm by an unlawful act. Held, that the second count should not have been allowed to go to the jury. The jury having found him not guilty of manslaughter he could not be convicted on the second count. Haultain, C.J.S., says: "If he was guilty of doing grievous bodily harm which resulted in immediate death, he was guilty of manslaughter. The jury found him not guilty of manslaughter, and that finding takes away all possible ground upon which a verdict of guilty on the second count could be based."

This is because grievous bodily harm may result in death or may not. If it does cause death, then clearly the offence becomes identical with manslaughter.

The question involved in these two cases and in the present case is one of some nicety.

The rule laid down by Cockburn, C.J., in *Regina* v. *Elrington* (1861), 1 B. & S. 688, (121 E.R. 870), is thus stated (p. 696): "We must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

This is said by Pollock, B., in *Regina* v. *Miles*, 17 Cox C.C. 9, 22, (24 Q.B.D. 423, 436), to be "not only the law, but it is consonant with sound sense and the just treatment of defendants."

Explanations of this rule are pointed out in various cases. In the *Miles* case, Hawkins, J., says (17 Cox C.C., at p. 20) that a previous conviction for common assault could not be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. "For the offence of murder consists in felonious killing." He explains the difficulties which have arisen in the application of the rule (autrefois convict) as having most frequently occurred in cases where conviction or acquittal for a simple offence has been set up as a bar to a subsequent charge against the same person in a more aggravated form, and gives the rule, as deducible from the numerous cases to be found on the subject, to be this: "that where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with malicious or wicked intent, or by reason that *the committal of the offence was followed by serious consequences*" (pp. 18, 19). The Court was composed of Lord Coleridge, C.J., Pollock, B., Hawkins, J., Charles, J., and Grantham, J.

In *Reg* v. *Salvi* (1857), as reported in 10 Cox C.C. 481 (note (b)) at p. 482, Pollock, C.B., on a charge of murder, where the prisoner had been previously acquitted on a charge of wounding with intent to murder, said: "A party may be convicted upon an indictment for murder by evidence that would have no tendency to prove that there was any intent to kill, nay, by evidence that might clearly shew he meant to stop short of death, and even took some means to prevent death, but if that illegal act of his produces death, that is murder." Martin, B., said: "The offence for which the prisoner has been tried was one of intent, and was therefore complete the moment the stab was given, whereas the offence for which he was now indicted could only be consummated by the death of the party." The Court held that the plea was no bar to the charge of murder, and the prisoner was found by the jury guilty of manslaughter.

The case of *Regina* v. *Gilmore* (1882), 15 Cox C.C. 85, deals with a like distinction.

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So a new offence arises when death occurs after an assault: *Regina* v. *Morris* (1867), 10 Cox C.C. 480; *Regina* v. *Friel* (1891), 17 Cox C.C. 325; *Rex* v. *Tonks*, [1916] 1 K.B. 443.

In *Union Colliery Co.* v. *The Queen* (1900), 31 Can. S.C.R. 81, the offence charged was punishable under the Criminal Code, sec. 213. Sedgewick, J., in giving judgment, pointed out the difference between what was charged and the crime of manslaughter, in these words (p. 90): "It is possible that the facts alleged in the indictment" ("the company unlawfully neglected . . . to take reasonable precautions," etc., "in maintaining the . . . bridge . . . thereby causing the death of," etc.) "would be sufficient to sustain an indictment for manslaughter against an individual, but the offence alleged in the indictment here is not the manslaughter; it is criminal negligence in the discharge of duty. The killing is not alleged as the offence, but merely the consequence of the offence."

This case may be compared with *Regina* v. *Friel*, 17 Cox C.C. 325, where Williams, J., pointed out that in cases of manslaughter, where the charge is based on death resulting from culpable negligence, there is no criminal offence unless death ensues and gives rise to a charge of manslaughter.

The conclusion I have come to, from considering the foregoing cases and others, is that there is no legal restriction upon the power of the Crown in determining as to the particular offence which shall either be preferred or prosecuted against an offender; that changed circumstances may dictate the propriety of exercising a discretion which at another time would be inexpedient; that the real safeguards in criminal procedure lie in the honour and responsibility of the Crown and upon the right of a person not to be twice vexed for the same offence; and that it is often an extremely difficult matter to determine, in advance and finally, for what crime a person should properly be placed on trial. It is, I think, generally expedient to proceed with a trial upon an indictment before the Court, leaving it to be ascertained afterwards whether the accused is put in peril twice in the same matter if a subsequent charge is preferred.

In the result, I think the Court has no power to deal with the question submitted, and that the reserve case should be quashed.

There should be no costs.

MEREDITH, C.J.O.:—I have had the opportunity of reading the opinion of my brother Hodgins, in which the material facts are set out.

I have doubts as to the correctness of my learned brother's view as to the power of the Judge of the Court below to ask the opinion of this Court on the case he has stated. It is not, however, necessary to determine that question.

It is clear that it was not for the learned Judge to determine whether the assault which the accused is alleged to have committed resulted in the death of the person assaulted: that was, if a material question, one for the jury; and, therefore, if the question asked were properly asked, our answer to it would be in the negative. The proper course to have been taken would have been to have let the case go to the jury with a direction as to the law, which, holding the view which the learned Judge held, would have been that if the finding were that death resulted from the assault the accused should be acquitted. Such an expression from this Court would, though it were not proper, for the reasons given by my brother Hodgins, to give a formal answer to the question asked, doubtless be a guide in dealing with the case hereafter if the adjourned trial should take place.

I am inclined to think that the question asked is properly the subject of a stated case. It involves really two questions: (1) whether if it be proved that death resulted from the assault the prisoner should be acquitted; and (2) was the course taken by the learned Judge in deciding that question of fact right?

While the learned Judge erred in the course he took at the trial, and in not adopting what, I have said, would have been the proper course, it does not follow that he had no authority to state the case.

Section 1014 of the Criminal Code contains the provisions as to reserving questions of law for the opinion of the Court. Subsection 2 provides that any question of law arising on the trial . . . may be reserved either during or after the trial. And subsection 4 provides that after a question is reserved the trial shall proceed as in other cases.

I do not think that the fact that the provision of subsec. 4 was not followed affects the right to reserve questions of law which, as in this case, were reserved before the trial was adjourned. There was, when the decision to reserve was made, as it were a vested right to the reservation, which was not, I think, affected by the failure to observe the direction of subsec. 4.

Mr. Bayly pressed upon us the desirability of our deciding whether the view of the learned Judge of the Court below was right, and I see no reason why we should not express our opinion as to it.

It has been held that a summary conviction for assault is not a bar to a subsequent indictment for manslaughter upon the

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death of the person assaulted consequent upon the same assault, and that decision was reached notwithstanding the statutory provision that if any person against whom a complaint of assault shall have been made by or on behalf of the party aggrieved, having been convicted, shall have suffered the imprisonment awarded, "he shall be released from all further or other proceedings civil or criminal for the same cause."

The cases to which I refer are *Regina* v. *Morris* (1867), L.R. 1 C.C.R. 90; *Regina* v. *Friel*, 17 Cox C.C. 325; *Regina* v. *Miles*, 17 Cox C.C. 9, 24 Q.B.D. 423.

It is an â fortiori case that where, as in the case at bar, no such statutory provision applies, a conviction for the assault would form no bar to a prosecution for manslaughter or murder. The reasons for that are clearly stated in the cases referred to.

If, then, a conviction for the assault charged in the case at bar would not bar the right to try the prisoner for murder or manslaughter, it follows, I think, that the Crown officers may in their discretion prosecute for the lesser offence.

In the *Miles* case the conviction was quashed, but only on the ground that the prisoner had been previously convicted for the same assault with which he was then charged, and it was pointed out that a conviction for assault would not be a bar to an indictment for murder, because that was a different offence consisting of feloniously killing, nor would a conviction for assault bar a subsequent prosecution for rape. See the observations of Hawkins, J., 24 Q.B.D., at pp. 434, 435.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., agreed that the question should be answered in the negative.

FERGUSON, J.A.:—I agree in the result, but express no opinion on the proposition of law stated by the learned trial Judge.

I am of opinion that in this case it is not yet necessary to pass upon the correctness of the legal proposition stated.

The Crown has not charged that the assault set forth in the indictment was either the cause of death or a cause of death.

Therefore, unless or until it is admitted or found by the jury that the assault was at least a contributing cause of death, it was, in my opinion, improper for the trial Judge to withdraw the case from the jury—for it seems to me that until the jury found or the Crown admitted that the assault charged was a cause of the death it was unnecessary to consider the question raised by the trial Judge.

The question may never arise in the case, for the jury may find that the prisoner is not guilty of any assault, or that he

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committed an assault which did not cause death or contribute thereto.

These were questions for the jury, which the learned trial Judge should have permitted them to pass upon.

The opinion of the learned trial Judge is based upon an assumption of fact which should have been left to the jury.

Though the opinion of the trial Judge is in accord with what appears to me to have been the general practice and the opinion of the Appellate Division of the Supreme Court of Saskatchewan in *Rex* v. *Forseille*, 55 D.L.R. 262, 35 Can. Cr. Cas. 171, 13 S.L.R. 474, the time to apply it had not arrived when he did so—and consequently the time has not arrived for us to determine the correctness of his proposition, from which it follows that any opinion we now express could not be taken as determining the question. In these circumstances I think it is better to express no opinion.

Question answered in the negative.

COMPAGNIE DU BOULEVARD PIE IX v. DAMPHOUSSE.

Quebec King's Bench, Lamothe, C.J., Martin, Guerin, Allard and Rivard, JJ.

BANKRUPTCY (§I—6)—ASSIGNMENT — SUSPENSION OF PROCEEDINGS BY CREDITORS—SECURED CREDITORS—RIGHTS OF—POWER OF COURT TO RESTRAIN PROCEEDINGS—BANKRUPTCY ACT, SECS. 6 AND 7—CONSTRUCTION.

An assignment or receiving order under the Bankruptcy Act, sec. 6, suspends of itself without any need for an order of the Court all proceedings taken by the creditors, with the exception of secured creditors, but the Judge has power under sec. 7 (1) to issue a formal order restraining a secured creditor from continuing his proceedings.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPEAL from a judgment of the Superior Court, sitting in Bankruptcy, which ordered, at the request of the trustee, that a seizure of immovables made by the sheriff of Montreal be suspended on payment of the costs of the said sheriff. The seizure was made in satisfaction of a judgment for taxes rendered in favour of the town of Montreal North, one of the appellants. The Court applied arts. 7 and 8 of the Bankruptcy Act 1920, (Can.) ch. 36 which are very broad.

Létourneau, Beaulieu, Marin and *Mercier*, for appellant.

Dorais and *Dorais*, for respondent.

LAMOTHE, C.J.:—The judgment is attacked on the ground that, notwithstanding these two articles, the Superior Court had no power to order a sale to be suspended in such a manner, in view of the fact that a privileged claim was involved and that

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the same Bankruptcy Act, arts. 6 and 7, reserves to the secured creditor the right to continue the proceedings.

The following, in my opinion, is the meaning of the Bankruptcy Act on this point: an assignment or receiving order suspends of itself, without any need for an order of the Court, all proceedings taken by the creditors, with the exception of secured creditors; but the Judge has always the power under art. 7, first paragraph, to issue a formal order restraining a secured creditor from continuing his proceedings, if he thinks it advisable to do so. In other words, art. 6 and art. 11, sec. 1, of the Bankruptcy Act anticipate the effect of the receiving order as such, while art. 7, sec. 1 gives the Court power to intervene in any case. If no formal order is made to suspend the proceedings, taken by a secured creditor, such creditor may continue to exercise his rights; but if such an order has been given, the creditor must obey.

I shall not examine in the present case the meaning of the words "secured creditor." Does this mean a creditor possessing things of value pledged in his favour? Can the phrase "secured creditor" be applied to one who has a simple right to be collocated by preference in case of a judicial sale? I shall reserve for another occasion my opinion on this point. I would confirm the judgment.

MARTIN, J.:—The Town of Montreal North appeals and urges that, under the provisions of the Bankruptcy Act, its proceedings by way of realisation of its judgment by the seizure and sale of its debtor's real property cannot be suspended by reason of an assignment in bankruptcy in as much as it is a secured creditor. It invokes and relies upon the concluding paragraph of sec. 6 of the Act, the reserve in sec. 7 and the terms of sec. 10.

The general rule laid down in the Act is that the assignment or receiving order takes precedence over all attachments of debt by way of garnishment and these words are added:—"But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

Does this proviso apply to the case of a municipal corporation having a privileged claim upon immoveable property for taxes? In my opinion it does not. I should say that it applied only to cases where the creditor had acquired a right in the thing, as in the case of banks making advances under the pro-

visions of the Bank Act, 1913 (Can.) ch. 9, or in the case of a trustee for bondholders where the company had defaulted in payment and the trustee had entered into possession; or in other words the reserve applies to secured creditors who may have their security in hand or which may be in the nature of a claim against some third person, like a promissory note or property of a third person held as collateral security or other property in which the title is vested in the creditor subject to an equity of redemption by or on behalf of the debtor. In all such cases the assignment in bankruptcy does not entitle the trustee to claim such property but gives the creditor the right to realise or otherwise deal with the same as if there had been no assignment, but surely this proviso does not apply to a case where the property is the property of the debtor; in such case it becomes vested in the trustee and the latter is entitled to deal with and dispose of same subject to the preferential right of any creditor claiming a privilege thereon, which rights, if they exist, must be recognised by the trustee in distribution of the sale of the property of the insolvent.

That is what this Court held in *La Manufacture de Seaux et de Boites de Trois-Riviers* v. *Beliveau and Bisson* (1920), 30 Que. K.B. 389, but I do not interpret this provision of the Act as giving to a secured creditor the power to seize and sell immoveable property upon which the creditor has security. If one secured creditor can exercise this right, all of them can, and the property of the debtor thus frittered away in useless costs and the whole purpose of the Bankruptcy Act defeated.

Where the security has been completed before the making of a receiving order secured creditors have a right, as against the trustee, to deal with the security. (1) They may rely on their security and not prove; (2) they may realise on their security and prove for the balance; (3) they may surrender their security and prove for the whole debt; but where the creditor only has a privelege to be paid by preference out of the proceeds of the sale, the reserve in the concluding paragraph of sec. 6 of the Bankruptcy Act does not give such creditor the right to have the property seized and sold notwithstanding the assignment in bankruptcy. In any event, I should say that the order appealed from is one which it was competent for the Superior Court to give under sub-sec. 1 of sec. 7 of the Act, as well as under sec. 11.

It is stated that Surveyer, J. in a judgment involving the same point, held views diametrically opposed to those expressed

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by Maclennan, J. in the present case, and he relied upon certain English cases cited in his judgment.

I have examined those cases and they all relate to the position of a creditor under an English mortgage being that of owner where the debtor merely has an equity of redemption in the property. This rule, of course, does not apply in the case of our hypothec where the debtor remains owner of the property until dispossessed. Much less would it apply in the case of a municipal corporation having a priveleged claim for taxes.

My colleague Allard, J. called my attention to the case of *Birks* v. *Lewis* (1891), 8 Que. K.B. 517. I do not think that case applies or governs. It was there held that under the former provisions of our Code of Procedure respecting abandonment of property that any creditor secured or not could proceed with an execution against immoveable property.

I would dismiss the present appeal with costs and confirm the judgment appealed from for the reasons herein expressed and therein set forth.

GUERIN, J.:—I would confirm the judgment *a quo* with costs.

ALLARD, J:—The first question raised by the parties is as to whether or not the appellant is a secured creditor in the sense of the Bankruptcy Act. I think so. As such secured creditor, has it the right to continue the proceedings in execution of the judgment it obtained against the said insolvent after the latter has been declared bankrupt? I answer this question as follows:

According to the interpretation I give to arts. 7 and 11 of the Bankruptcy Act of 1920, bankruptcy suspends all the proceedings taken by any but secured creditors. Proceedings taken by secured creditors—such as the seizure in the present case—are not suspended without a formal order from a Judge of the bankruptcy Court; and I think that the Judge may grant such request under art. 7 of the Act when it appears to be made in the interests of the parties. It is to be presumed that in the present case the Court considered, in the exercise of its discretionary power, that it was for the advantage of the insolvent and its creditors that the sale of the property of the former be suspended. For these reasons I would confirm the judgment.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 27, 1921.

EVIDENCE (§ IIE—182)—SHIPMENT OF LIQUOR TO ONTARIO—CONSIGNED AS LATHS—FICTITIOUS NAME OF CONSIGNEE—ONTARIO TEMPERANCE ACT, 1916, CH. 50, SEC. 70, SUB-SEC. 9—EVIDENCE—CONFISCATION.

When liquor is shipped into Ontario consigned to a fictitious person or concealed or hidden so as to make discovery difficult, it is *prima facie* evidence that it is to be sold or held for sale contrary to the Act.

[*Rex* v. *James and Johnson*, [1902] 1 K.B. 540; *Rex* v. *Audley*, [1907] 1 K.B. 383; *Rex* v. *Waller* (1921), 60 D.L.R. 557, 34 Can. Cr. Cas. 312, 14 S.L.R. 237, referred to.]

AN appeal by the Attorney-General for Ontario from an order of KELLY, J., (1921), 64 D.L.R. 629, quashing an order of one of the Police Magistrates for the City of Toronto directing the confiscation of intoxicating liquors.

Edward Bayly, K.C., and *F. P. Brennan*, for the appellant.

James Haverson, K.C., and *R. H. Greer*, K.C., for the defendant, respondent.

MEREDITH, C.J.O.:—This is an appeal by the Attorney-General for Ontario from an order of Kelly, J., dated the 13th July, 1921, setting aside an order of the Police Magistrate for the City of Toronto (Denison) made on the 8th February, 1921, for the confiscation of liquor.

As the law stood when the transaction in question took place, it was provided by sec. 70 of the Ontario Temperance Act (6 Geo. V, ch. 50) that (sec. 70, subsec. 1): "Where an inspector, policeman, constable or officer finds liquor in transit or in course of delivery upon the premises of any railway company, or at any wharf, railway station, express office, warehouse or other place, and believes that such liquor is to be sold or kept for sale or otherwise in contravention of this Act, he may forthwith seize and remove the same together with the package or packages in which such liquor is contained;" and provision is made by the following subsections for the procedure leading up to an order for the forfeiture of the liquor to His Majesty "to be destroyed or otherwise dealt with in such manner as the Minister may direct;" this order is to be made "if the Justice . . . finds that it was intended that such liquor was to be sold or kept for sale or otherwise in contravention of this Act" (subsec. 7).

Subsection 9 provides that, "If it appears to the Justice that such liquor or any part of it was consigned to some person in a fictitious name or was shipped as other goods, or was covered or concealed in such manner as would probably render discovery of the nature of the contents of the vessel, cask or package in which the same was contained more difficult, it shall be *prima*

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facie evidence that the liquor was intended to be sold or kept for sale in contravention of this Act."

The Act also contains provisions as to the prohibitory sections of it not being applicable to shipments through Ontario from and to points out of the Province.

The first of these is sec. 43, which provides that nothing in sec. 40—the main prohibitory section—"shall prevent common carriers or other persons from carrying or conveying liquor . . . through Ontario from a place outside of it to another place outside of it."

The other provision is sec. 139, which is as follows:—

"While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Ontario, except under license or as otherwise specially provided by this Act, and to restrict the consumption of liquor within the limits of the Province of Ontario, it shall not affect and is not intended to affect bonâ fide transactions in liquor between a person in the Province of Ontario and a person in another Province or in a foreign country, and the provisions of the Act shall be construed accordingly."

That the conditions mentioned in subsec. 9 of sec. 70 existed is beyond question: the liquor was shipped as lath, and was consigned under a fictitious name at Montreal to a fictitious name in Toronto, and it was covered or concealed in such a manner as would probably render discovery of the nature of the contents of the vessel in which it was contained more difficult.

There was, therefore, "primâ facie evidence that the liquor was intended to be sold or kept for sale in contravention of this Act."

It was argued by counsel for the respondent that the liquor was purchased by him in Montreal, and was intended to be transported through Ontario to Cleveland, Ohio, where he resided, and that his reason for shipping to Toronto was that he thought that the authorities in Cleveland would be less likely to suspect that the car in which the liquor was being transported contained liquor if it had come from Ontario than if it came from Montreal, and that it was always his intention, when the car reached Toronto, to re-bill the car in which the liquor was, at once, to Cleveland, and that he had in fact so re-billed it before the seizure was made.

It was, in my opinion, a question of fact to be decided by the Police Magistrate whether the liquor was being transported in the manner mentioned in sec. 43 or sec. 139.

The adjudication of the Police Magistrate was, according to the order for the confiscation of the liquor, "that a quantity of

liquor in transit, to wit, 397 cases of Green River whisky seized in pursuance of section 70 of the Ontario Temperance Act on the 25th day of December, 1920, at Parkdale station, in the said city of Toronto, of which Rideau Lumber Company appeared to be the consignee or owner, was intended to be sold or kept for sale in contravention of the provisions of the said Act."

That is a finding of fact, and the only question for us is, was there any evidence to support it? There undoubtedly was such evidence, for subsec. 9 of sec. 70 makes the existence of such conditions as existed in this case primâ facie evidence that the liquor was intended to be sold or kept for sale in contravention of the Act. That primâ facie case could, of course, be met by the respondent proving that it was not so intended or that it came within the exceptions mentioned in sec. 43 or sec. 139. This he attempted to do, but must have failed to satisfy the Police Magistrate of that, else the adjudication that was made could not have been made. In addition to this primâ facie case, there was also the fact that the liquor was not shipped from Montreal to a place outside of the Province, but to Toronto, and that fact alone, in my opinion, cast upon the respondent the onus of proving that the intention was what he alleges it to have been.

It has been settled by a long line of decisions that upon a motion to quash the Court cannot look behind the conviction except to see whether there was any evidence to support it, and cannot, therefore, weigh the evidence or pass upon it.

There are some observations of the Chief Justice of the Common Pleas in *Rex* v. *Lemaire* (1920), 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 475, which seem to indicate that the quashing of a conviction and the setting aside of a verdict stand upon the same footing. I am unable to agree with that view, and it is, in my judgment, opposed to the well-settled rule established by a long line of decisions. I am also unable, for the same reason, to agree with what was said by Middleton, J., in *Rex* v. *Mooney* (1921), 58 D.L.R. 524, 36 Can. Cr. Cas. 165, 49 O.L.R. 274, if indeed he intended to do more than follow *Rex* v. *Lemaire*.

I do not mean to say that where there is but a scintilla of evidence to support it the conviction may not be quashed, but as to that it is unnecessary to express an opinion. There was in this case ample evidence of a breach of the Act, and, therefore, to justify the making of the order, which could have been met by the respondent proving that the case came within the exceptions in sec. 43 or sec. 139, and of that, as I have said, he failed to satisfy the Police Magistrate.

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Such cases as *Ex p. Cunningham* (1884), 13 Q.B.D. 418, and *Ex p. Barne* (1886), 16 Q.B.D. 522, are distinguishable.

In the former case the question arose under the Bankruptcy Act, 1883, sec. 6 (1) of which provided that "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England;" and it was held that the onus was on the petitioning creditor to shew that the debtor was "domiciled" in England. Stating his opinion Baggallay, L.J., said (p. 421): "I can quite conceive that there may be cases in which there is such an amount of primâ facie evidence of an English domicile as to shift the burden on to the respondent." Cotton, L.J., uses language to the same effect (p. 423).

In the case at bar, assuming that the onus was in the first place on the Crown, there was, in my opinion, such evidence as shifted the burden on to the respondent. I refer to the fact that the shipment was to Toronto, and that the conditions mentioned in sec. 70 (9) existed.

In *Ex p. Barne* it was held that the Court was bound by the decision in the *Cunningham* case, of which it also approved, but the rule enunciated by Lord Justice Baggallay as to the shifting of the burden of proof was also recognised and acted upon.

I am not satisfied that such cases as *Ex p. Cunningham* and *Ex p. Barne* have any application to a case such as this. There the question was one as to the jurisdiction of the Court, here the question is as to whether or not there had been a contravention of the Act. I am inclined to think that the provisions of secs. 43 and 139 are in the nature of exceptions, and that the onus of proving that the case came within them rests upon the person charged. See *Rex* v. *James*, [1902] 1 K.B. 540; *Rex* v. *Audley*, [1907] 1 K.B. 383; and *London and North Western R.W. Co.* v. *J. P. Ashton and Co.*, [1920] A.C. 84. See also the Summary Convictions Act, sec. 5 (R.S.O. 1914, ch. 90).

In *Rex* v. *Waller* (1921), 60 D.L.R. 557, 34 Can. Cr. Cas. 312, 14 S.L.R. 237, a decision of the Saskatchewan Court of Appeal, in a case arising on somewhat similar provisions to those contained in the Ontario Act, the analogous provision was treated as an exception, and, as I understand the report of the case, the defendant was held to have brought himself within the exception.

If there had not been the provisions of secs. 43 and 139, a bonâ fide transaction such as mentioned in sec. 139, and a ship-

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ment such as is mentioned in sec. 43, would not have been affected by the Act. If there had been no such provisions, I cannot doubt that if liquor were shipped into the Province the onus would rest upon the person charged with a breach of the Act to prove that the liquor was only in transit through this Province from one place outside the Province to another outside of it, and I see no reason why the result should be different because these provisions were inserted in the Act to guard against its being intended to interfere with matters as to which the Legislature had no jurisdiction to legislate.

I have grave doubts whether a shipment such as was made, that is, from Montreal to Toronto, with the intention of re-shipping from that point to Cleveland, is within the exceptions, but it is unnecessary to determine that question.

I would, for the reasons I have given, allow the appeal with costs, and reverse the order of my brother Kelly.

If, as was argued by counsel for the respondent, the Police Magistrate's view was that, on the assumption that it was always intended to re-ship it to Cleveland, inasmuch as the intention was to smuggle the liquor into the United States, the shipment could not be brought within the exception, his view was, I think, erroneous, but there is nothing to shew that the magistrate so thought or acted upon that view in making his adjudication. The case is one, however, in which it would be well for the provincial authorities to consider whether the respondent should not be afforded an opportunity of satisfying them that there was never any intention of doing otherwise than sending the liquor through this Province to Cleveland, though it is difficult to see what use it can be put to, now that, owing to the publicity the shipment has obtained through the proceedings that have been taken, its entry into the United States has been in all probability rendered impossible.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—I agree with the reasons and conclusions of my Lord the Chief Justice, and only desire to say that, although the Police Magistrate appears to have acted upon the declaration in the provincial statute as to what would be primâ facie evidence, yet he fully recognised that it was only primâ facie evidence and was rebuttable; and, seeing and hearing the witnesses called to rebut it, he declined to give sufficient credence to their evidence to hold that a primâ facie case was displaced. It may be questioned whether in a transaction over which the Province has no jurisdiction the Legislature could declare any state of facts to be primâ facie evidence or alter the rules of evidence. But, quite apart from the statute, there was in the circumstances

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themselves sufficient primâ facie evidence that the shipment was intended only as an import into Ontario for an illegal purpose—and the Police Magistrate was not satisfied with the answer to it.

HODGINS, J.A.:—Owing to the way in which the learned magistrate expressed his decision, it is not possible to point to any actual finding that the case did not come within sec. 139 of the Ontario Temperance Act, 6 Geo. V, ch. 50.

But it must, of necessity, as it seems to me, have been included in his decision.

That section expresses the constitutional situation when it says that it is not intended by the Ontario Temperance Act "to affect bonâ fide transactions in liquor between a person in the Province of Ontario and a person in . . . a foreign country."

The proof that this transaction was a bonâ fide one between two persons, one in this Province and one in the United States of America, depends upon the testimony of the accused, the sole evidence outside of his statements being that of McKeown, chief biller of the Canadian Pacific Railway. He says that the accused, about 9.30 a.m. on the 28th December, came in and wanted the car to go to Cleveland, and that he made out a blank bill of lading for Cleveland, U.S.A., and gave it to the accused, who went away, and when he returned and paid the charges the car had been seized. The evidence of the accused that he was the owner of the liquor, that he was the Rideau Lumber Company, the consignee, a fictitious name, and that the honest or real part of the transaction was "getting this from Montreal to Cleveland," was disbelieved by the magistrate, in view of the admissions of the accused's counsel and the fraud in the manner of loading and describing the car and its contents, and his deceit in obtaining the United States import papers.

In face of the discrediting of the accused's evidence, upon which alone the bonâ fides of the transaction depends, coupled with the fact that the transaction, upon his testimony, was confined to himself acting under different names, I am unable to see how sec. 139 can be called in to assist him.

The undisputed and admitted facts bring the case exactly within the provisions of sec. 70, subsec. 9, in every particular, and in themselves completely negative the idea that the transaction in question was a bonâ fide one such as sec. 139 contemplates.

I think the appeal must succeed.

FERGUSON, J.A.:—Appeal by the Attorney-General from an order of Kelly, J., dated the 13th July, whereby he set aside an order of G. T. Denison, Esquire, Police Magistrate for the City of Toronto, dated the 8th February, declaring 397 cases

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of Green River whisky seized under sec. 70 of the Ontario Temperance Act forfeited to His Majesty.

When called upon to shew cause why the liquor seized should not be forfeited, the defendant set up that at the time of seizure the liquor was in the hands of a common carrier in course of transit from a point outside of Ontario to a destination outside of Ontario, that is, from Montreal, Quebec, to Cleveland, Ohio, and was not being kept for sale in Ontario, contrary to the Ontario Temperance Act, 6 Geo. V, ch. 50.

All the oral and written evidence goes to support the contentions of the defendant; but, because the railway car containing the liquor was in the bills of lading described as a car of laths and was billed to Toronto, addressed to a fictitious company, and at Toronto re-billed to Cleveland, again described as containing laths, the magistrate was of opinion that he could and he did call into play and rely upon the provisions of subsec. 9 of sec. 70 of the Ontario Temperance Act for the purpose of enabling him to make a finding that the liquor seized was, at the time of its seizure, being kept for sale in Ontario, contrary to the Act.

On a motion to quash the Magistrate's order, the learned Judge, whose order is appealed from, reviewed the evidence, and was of opinion that "upon the whole evidence reasonable men could not come to the conclusion to which the magistrate had given effect," and quashed the order of confiscation.

The Attorney-General appeals, and on his behalf it was urged:—

(a) That the learned Judge whose order is appealed from erred in undertaking to review and weigh the evidence.

(b) That, if there was any evidence to support the finding, the learned Judge was bound to dismiss the application to quash, for this proposition relying on *Rex* v. *Rankin* (1919), 31 Can. Cr. Cas. 275, 45 O.L.R. 96; *Regina* v. *St. Clair* (1900), 27 A.R. (Ont.) 308; *Rex* v. *Carter* (1916), 28 D.L.R. 606, 26 Can. Cr. Cas. 51, 9 Alta. L.R. 481.

(c) That the magistrate had determined that, at the time the liquor was seized, it was not in course of transit through Ontario, and that the magistrate in coming to this conclusion was entitled to call to his aid the provisions of subsec. 9 of sec. 70.

(d) That, even if, in determining that question, he was not entitled to rely on subsec. 9, there was evidence sufficient to support the conclusion arrived at.

For the defendant it was contended:—

(a) That the learned Judge was entitled to weigh the evid-

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ence, and if of opinion that no reasonable man considering it could properly come to the conclusion arrived at by the magistrate, he was right in quashing the order: *Rex* v. *Lemaire*, 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 475; *Rex* v. *Mooney*, 58 D.L.R. 524, 49 O.L.R. 274, 36 Can. Cr. Cas. 165.

(b) That the magistrate did not purport to determine the issue as to transit, but refused and neglected to determine that as a preliminary issue.

(c) That, unless and until that question was determined, he could not call into play nor make applicable the Ontario Temperance Act, or any of its provisions.

(d) That without the aid of the statute, there was no evidence to support a finding that the liquor, at the time of seizure, was not in transit from Montreal to Cleveland.

I do not think it is in this case necessary to determine the limits or powers of a Judge, on a motion to quash a conviction or a magistrate's order to review, consider, and weigh the evidence, but I take this opportunity to point out that the right or power to review and supervise the proceedings of an inferior tribunal is not limited by statute or rule of law, but is founded on the inherent jurisdiction of the Court to see that justice is done.

I am of opinion that the Ontario Temperance Act is not intended to be, and is not, an Act of such general application as enables the Court to say that it applies to all liquor found in the Province of Ontario, or to all handling of liquor in Ontario, or to every transaction or dealing with or in respect of liquor in Ontario. Sections 139 and 43 of the Act were, I think, enacted to declare and make it clear that the Act was intended to be one of limited application, i.e., one limited to matters, dealings, and transactions in liquor, provincial in their nature, and in particular that it was not an Act intended to affect the transit of liquor through Ontario from a point outside of Ontario to a destination outside of Ontario. See also the Liquor Transportation Act, 1920, ch. 80, sec. 6. It seems to me that such a transaction could not be described as a matter "merely local in its nature," or one taking place "wholly within Ontario." See *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73, at p. 78; *Attorney-General for Ontario* v. *Att'y-Gen'l for Canada*, [1896] A.C. 348, at p. 363; *Rex* v. *Waller*, 60 D.L.R. 557, 34 Can. Cr. Cas. 312, 14 S.L.R. 237. And therefore, where the question is raised as to the Act being applicable, it is not, as was contended by the Attorney-General, right to cast upon the defendant the onus of establishing and obtaining a finding that it is not applicable: *Rex* v. *Diamond*

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(1921), 59 D.L.R. 109, 35 Can. Cr. Cas. 250, 16 Alta. L.R. 302.

Under the English Bankruptcy Act, which is limited in its application to persons domiciled in England, the Court in *In re Cunningham*, 13 Q.B.D. 418, and in *In re Barne*, 16 Q.B.D. 522, was of opinion that, the question of domicile being raised, it was for the petitioner to establish jurisdiction by proving English domicile. The question of shipment and transit from Montreal to Cleveland being raised, I am of opinion that it was necessary for the Crown to prove that the liquor was within the purview and ambit of the Act—the legislative jurisdiction of the Province—by establishing that the liquor was not being transported through Ontario from a point outside of the Province to a destination outside of the Province, and that, unless and until that question was determined adversely to the defendant, the magistrate had no right or power to rely upon or call to his assistance subsec. 9 of sec. 70.

It is conceded that the liquor was shipped from Montreal to Toronto, in a car described in the bill of lading as containing laths, and was addressed to a fictitious company. The magistrate accepted as truthful the evidence of the railway clerk to the effect that, while the liquor was yet at Toronto in the possession of the carrier, and before its seizure, the defendant had instructed the railway company to re-ship the car to Cleveland.

To me it appears that the magistrate refused to consider or determine what, to my mind, was a necessary preliminary to his relying on subsec. 9—that is, was the liquor within the ambit of the Act? Was it, at the time of its seizure, in course of transit from Montreal to Cleveland? On my reading of the transcript of the proceedings at the hearing, the magistrate ignored or refused to consider and determine that question before calling to his assistance subsec. 9, but, applying subsec. 9 to the admitted facts that the liquor was improperly addressed, described, and concealed, found that it was being kept within Ontario contrary to the Act.

It was argued that the pronouncement of the magistrate necessarily involved a determination of the question I have been discussing. I am of the opinion that, if it does that, the magistrate in determining the preliminary question improperly relied on subsec. 9 of sec. 70, and in doing so misdirected himself, and particularly in respect of the preliminary question to be tried and determined, and the evidence applicable thereto, and the onus and burden of proof in respect thereof; and that it cannot be said that the order of the magistrate is the result of a proper judicial inquiry and determination of the issues to be tried that should not be quashed if any of the evidence relied upon by the magistrate is sufficient to support his conclusion. If I am right, and the magistrate so misdirected himself, I think it is clear that in such circumstances the learned Judge whose

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order is appealed from was, and we are, entitled to review the evidence, not merely to satisfy ourselves that there was or was not evidence on which the magistrate might have made the necessary finding had he directed himself properly, but to satisfy ourselves that he acted on such evidence, and the course of justice was not in any way impeded by bias, prejudice, fraud, or erroneous view of the law: *Rex* v. *Nat. Bell Liquors* (1921), 56 D.L.R. 523, 35 Can. Cr. Cas. 44, 16 Alta. L.R. 149. (See also 65 D.L.R. 1.)

Having carefully read and considered all the evidence, I am of the opinion that the learned Judge whose order is appealed from was right in his opinion as to the effect of the evidence and the conduct of the magistrate, and I would dismiss the appeal.

Appeal allowed (FERGUSON, J.A., *dissenting*).

Re ARTHUR RACINE.

Quebec Superior Court in Bankruptcy, Pannoton, J. June 30, 1922.

FRAUDULENT CONVEYANCES (§II—5)—INSOLVENT—DEED OF OBLIGATION—CONSIDERATION—FRAUD—SETTING ASIDE—BANKRUPTCY ACT, SEC. 2 (t).

A deed of obligation given at a time when the person giving it is insolvent within the meaning of sec. 2 (t) of the Bankruptcy Act, and which is given as security for the amount owed by the insolvent at the time it is given, although declared in the contract to be for a loan, is fraudulent and will be set aside.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

PETITION by an authorised trustee under the Bankruptcy Act to set aside a deed of obligation given by the insolvent. Petition granted.

Monty & Duranleau, for petitioner.

Brown, Montgomery & McMichael, for respondent.

PANNETON, J.:—The trustee's petition alleges as follows:—

"1. The assignor Arthur Racine made an authorized assignment in the hands of your petitioner for the benefit of his creditors on March 10, 1922;

2. By deed of obligation made and passed before Joseph Lemieux, N.P., on December 15, 1921, the authorised assignor acknowledged to owe respondent the sum of $5,000 which he promised to pay within 1 year from that date or before with interest at 7% per annum, as appears by an authentic copy of the said deed produced as ex. 1;

3. By the said deed of obligation the authorised assignor, as security for the payment of the said sum to the respondent with interest and accessories, hypothecated in respondent's favour for the same sum the hereinafter described immovable belonging to him, namely: 'A certain emplacement situated on the south side of the principal street in the city of Granby, known and designated on the cadastral plan of the city of Granby as lot number (461) four hundred and sixty-one, with the build-

ings thereon erected, saving and excepting however the western part of the said lot and the southern part of the same heretofore sold to the School Commissioners of the Village of Granby, and the right of passage in common existing in favour of the said School Commissioners.'

4. The said deed of obligation was registered in the registry office of the county of Shefford under number 79,214, as appears by the certificate of registration dated March 18, 1922, produced as ex. 2;

5. The assignor had a current account with the respondent for the purchase of merchandise and on the date of the deed of obligation in question the assignor owed the respondent a sum of about $5,000 and, notwithstanding the declaration in the said deed of obligation that the hypothec for the sum of $5,000 was given by the assignor as security for the payment of his debt for that amount, the respondent did not lend the said sum of $5,000 or any other sum to the assignor and the latter did not give this hypothec by way of security for the payment of the amount owing by him in respect of his current account;

6. This hypothec was so granted by the assignor within the 3 months preceding the above mentioned authorised assignment when he was insolvent, and its purpose and effect was to constitute a preference in favour of the respondent over the assignor's other creditors, and in the circumstances is fraudulent, null, and of no effect;

7. The registration of the said hypothec against the property of the assignor still exists and your petitioner is entitled to have it radiated;

8. The respondent refuses to consent to the radiation of the said hypothec, although duly called upon to do so;

9. Your petitioner has been authorised to take the present proceedings, as appears by a certified copy of the minutes of a meeting of the inspectors filed as ex. 3;

Wherefore your petitioner prays that by judgment to intervene the hypothec affecting the above mentioned immovable belonging to the authorised assignor by virtue of the deed of obligation passed December 15, 1921, at the city of Granby, before Jos. Lemieux, N.P., be declared fraudulent, null and void; that the radiation of the registration of the same made in the registry office of the county of Shefford under number 79,214 be therefore ordered; that the *mis-en-cause* be summoned to hear it said and declared as hereinabove demanded; the whole with costs against the respondent in any case, and also against the *mis-en-cause* only in the event of contestation on their part."

The respondent, Western Canada Flour Mills Co. pleads in substance that at the date when it took the hypothec in ques-

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RE ARTHUR RACINE.

Panneton, J.

tion the authorised assignor was not insolvent and that even if he was the said respondent was not aware of his insolvency, and adds that the declaration in the deed to the effect that the amount mentioned is due for a loan was inserted without the knowledge of respondent by the notary who drew the deed, and that the deed was passed in order to improve the assignor's credit and that in fact the respondent made him a further advance of $1,033 on the security of the said hypothecary obligation;

Issue was joined. Considering that it has been proved that at the time when the said deed of hypothec was passed the said authorised assignor was insolvent;

Considering that under art. 2 para. (t) a person is insolvent when he cannot meet his obligations in full as they become due or when he has ceased to meet his current obligations in the ordinary course of business, and that it has been shown that in spite of numerous debts which fell due to the respondent by the authorised assignor between July 8, 1921, and the 15th, of the following December, the date of the hypothecary deed, the said authorised assignor paid nothing to the respondent and was unable to meet his obligations in full as they became due, including not only those which he owed to the respondent but to other persons as well, and that the authorised assignor had ceased to meet his current liabilities in the ordinary course of business, and also knew of this state of affairs as a creditor towards whom the authorised assignor had failed to discharge his obligations;

Considering that in declaring in the contract that this obligation was for a loan when in reality it was given as security for what the authorised assignor owed to the respondent at that time, the natural conclusion is that this was inserted with the object of concealing the true nature of the obligation;

Considering that the petitioner has proved the essential allegations of his petition;

Considering that the *mis-en-cause* did not contest the present petition;

The Court declares that the hypothec affecting the hereinabove described immovable by virtue of the deed of obligation passed December 15, 1921, before Lemieux, notary, is null and void and fraudulent, and orders the radiation of the registration of that deed of hypothec made in the registry office of the county of Shefford under number 79,214, the whole with costs against the respondent and without costs against the *mis-en-cause*. *Petition granted.*

CANADA LAND & RANCH Co. v. REDCLIFFE REALTY Co.

Alta.

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Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart and Beck, JJ.A., Simmons, J., and Clarke, J.A. June 8, 1922.

MORTGAGE (§VIIB—150)—ORDER NISI AGAINST COMPANY HOLDING GAS FRANCHISE — MUNICIPALITY OBTAINING GAS FROM COMPANY — AGREEMENT FOR PURCHASE OF EQUIPMENT AT END OF TERM — RIGHT OF MUNICIPALITY TO BE JOINED AS PARTY DEFENDANT — RULES 40 AND 28 (2) ALTA.—CONSTRUCTION.

Where a municipality for valuable consideration has acquired the right to obtain natural gas from an incorporated company, with a right under the franchise agreement to purchase at the end of a certain time all the plant and equipment of the franchise holder, such municipality has a very appreciable interest in the result of a foreclosure action against the franchise holder, which entitles it to be joined as a party defendant under Rule 40 or alternatively under Rule 28 (2) if it desires an opportunity to redeem.

APPEAL by municipality from the refusal of McCarthy, J. of an application to be joined as a party defendant under Rule 40 or alternately under Rule 28 (2), Alta. Reversed.

D. M. Stirton, for appellant.

J. P. J. Jephson, for respondent.

SCOTT, C.J. and CLARKE, J.A. concurred with SIMMONS, J.

BECK, J.A. concurred with STUART, J.A.

STUART, J.A.:—I agree with the result arrived at by my brother Simmons. There can be no doubt that the town of Redcliffe has a very substantial interest in maintaining its supply of natural gas. Under the franchise granted to the Redcliffe Realty Co. the town may have no present property right in the source from which that company obtains its gas, but if there is a grave danger that if that company loses its source of supply because it cannot pay the moneys due under the order *nisi* and that, having no other source, it will be obliged to cease supplying gas, it seems to me that the town ought at least to be given an opportunity to contend that it should be permitted to come to the relief of the franchise holder by putting up the money on its behalf. I do not say that it is entitled to that permission nor does one now need to enquire upon what terms this might be done. But, certainly, I think the town is entitled to be heard. It will be for the Master or the Judge in Chambers to decide whether it should be permitted to pay the money, and if so upon what terms. The right given the town under the franchise agreement to purchase at the end of 20 years, that is in 1932, all the property of the franchise holder may perhaps be only a right to purchase what property that holder then may be found to have, but I think

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there is, to say the least, room for an argument, that in view of the relationship of the parties, the town has a right to protect from forfeiture and loss any property in the meantime used by the franchiseholder in supplying gas so that the eventual right of purchase may not be nugatory and to be subrogated to the rights of the persons to whom the money has to be paid in order to prevent that forfeiture. But the hearing of this application and appeal is not the right place to decide this finally, and I do not wish to be understood as in any way so deciding. But the town has certainly a right to an opportunity to put forward these contentions and in order to do that, it must be in some way a party to the proceedings. Rule 28 (2) is, I think, wide enough to justify the adding of the town for this purpose.

SIMMONS, J.:—Application made herein by the municipality of the town of Redcliffe to be joined as a party defendant under Rule (40) or alternately under Rule 28 (2) was opposed by the plaintiff, and the application was refused by McCarthy, J.

From this refusal the municipality of the town of Redcliffe appeals.

The Canadian Western Power and Fuel Co. are assignees by purchase from the Redcliffe Realty Co. of certain natural gas rights in fee simple for certain lands at or near the municipality of the town of Redcliffe, which were sold by the plaintiffs to the Redcliffe Realty Co. under an agreement for sale. The whole purchase price has not been paid and the plaintiff brought action against the Redcliffe Realty Co. and their assigns the Canadian Western Power and Fuel Co. for the purchase price remaining unpaid and have obtained an order *nisi* in this action and the period for redemption expires on June 30, 1922. The applicants say they are interested and wish to be joined so that they may have an opportunity to pay the amount due and redeem the property.

The applicant has no interest in the property itself. The applicant has an agreement with the Redcliffe Realty Co. whereby the latter acquired a franchise from the applicant carrying the right to lay mains and works within the municipality for supplying of natural gas.

The applicants in this agreement have the right at the expiration of 20 years to purchase the entire plant and equipment of the company and all real and personal property used by the company in connection with the working thereof of every

kind and description upon payment of its full value of the same.

The Redcliffe Realty Co. and its assignee, the Canadian Western Power and Fuel Co. are relieved from their obligations under the franchise agreement in the event of the natural gas supply from the company's wells declining to such an extent as to render the company unable to continue its gas at a reasonable profit.

It is admitted that the source of supply of this natural gas is the subject matter of the foreclosure proceeding and it is quite obvious that if the present defendants are foreclosed that source of supply of the gas to be furnished under the franchise agreement will disappear.

The indirect interest of the municipality in the result of the action is a very appreciable one. For a valuable consideration the municipality have acquired the right to obtain natural gas from the defendants as long as the defendants own such a supply. The defendants are liable to lose such supply and the applicants are liable to lose the right to obtain it if the defendants are not allowed to come in as defendants and redeem. It is true that to this it may be said they can obtain the same result by advancing this money directly to the defendants to enable them to redeem, but this might involve new contractual relations which might affect the present relations of the parties.

In *Rex* v. *Royal Bank of Canada* (1911), 3 Alta. L.R. 480, the plaintiffs opposed the application of the defendant bank to join the railway company and construction company. The plaintiff averred it sought no relief against the proposed defendants. The proposed defendants joined in the application to be added. The added defendants were ordered to file statements of defence showing their respective interests. The Court did not in that case determine their interest if any. In effect, the judgment proceeded, I think, on the ground that they had at least a colorable interest and should be allowed to come in and defend. Stuart, J. in the above case said at p. 491:—"Taking that material as it stands and reading the statute as it stands, it is, I think, conceivable that the companies will be able to suggest some principle or some defect in the statute which will assist them. Possibly they have a right to do that." See also *Esquimalt & Nanaimo R. Co.* v. *Wilson*, 50 D.L.R. 371, [1920] A.C. 358, and *C. P. R. Co.* v. *Canadian Wheat Growing Co.* (1919), 47 D.L.R. 102, 14 Alta. L.R. 452.

In the case under consideration the plaintiff is not prejudiced,

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rather the application may be for its benefit as it has an added defendant who desires an opportunity to redeem. In view, however, of the statement of counsel for the applicant, it should be added as a defendant to allow an opportunity to it to redeem under the order *nisi*, only, that is to say without the right to file a defence or to modify the order *nisi* except as to period fixed for redemption and that it should pay the plaintiff all costs, other than costs of this appeal incidental to the motion to add. Under these conditions I would allow the appeal with costs.

Appeal allowed.

DWORKIN v. GLOBE INDEMNITY Co. OF CANADA.

Ontario Supreme Court, Hodgins, J.A. October 26, 1921.

INSURANCE (§ X—500)—BURGLARY INSURANCE — LOSS — NEW POLICY — SECOND LOSS—ACTION ON POLICY—MISREPRESENTATION—LIABILITY.

The making of untrue and misleading statements, and the concealment of material facts prior to the issue of an insurance policy is sufficient to entitle the company to successfully resist liability on a loss by the assured.

[*Western Ass'ce. Co.* v. *Harrison* (1903), 33 Can. S.C.R. 473; *Anglo-American Ins. Co.* v. *Hendry* (1913), 15 D.L.R. 832, 48 Can. S.C.R. 577; *Condogianis* v. *Guardian Ass'ce Co.*, [1921] 2 A.C. 125, referred to.]

ACTION on a mercantile open stock burglary policy issued by the defendants in favour of the plaintiff firm, of 525 Dundas street west, Toronto, wholesale tobacco and cigar merchants. The policy was dated and countersigned on the 27th April, 1920, and was for $6,000.

F. J. Hughes, for the plaintiffs.

R. H. Parmenter, for the defendants.

HODGINS, J.A.:—The negotiations for insurance took place by telephone between one Ireland, an insurance agent, and Ferguson, manager of the defendants' burglary business in Ontario. After the telephone conversation, the defendants sent Brett, one of their employees, to inspect the plaintiffs' premises, and after his return, and acting upon his report, coupled with what Ireland had communicated, the policy in question was issued and sent to Ireland for the plaintiffs. The loss occurred on the night of the 18th or morning of the 19th May, 1920, and was discovered early on that morning. Counsel for the defendants admitted that a burglary, within the meaning of that word as used in the policy, occurred at the time stated, but asserted that the company were not liable by reason thereof. The loss is proved at $4,230.27, and this amount, while not admitted, was not questioned in cross-examination.

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On page 3 of the policy there appears what purports to be an application or declaration signed by the plaintiffs and witnessed by Ferguson, containing 16 items of information. No application in fact was ever signed, and Ferguson stated that he himself filled in an application-form so that a stenographer could copy it into the policy and that he signed the plaintiffs' name thereto, basing his information on what he had been told or learned from Ireland and Brett. He said it was the company's practice to do this instead of asking the applicant for insurance to sign a formal application. The result is that there is no formal application, and the plan of inserting a fictitious one in the form of a declaration in the policy is adopted, I suppose, to get rid of the provision regarding applications as found in sec. 156 of the Ontario Insurance Act, R.S.O. 1914, ch. 183.

The facts as they appear in evidence are as follows. The plaintiffs had a policy against burlary in the Gresham Insurance Company for $5,000, and suffered a loss of $6,200. The policy was thereby exhausted. This burglary took place on the 25th April, 1920.

On the day after this burglary, spoken of throughout the trial as the first burglary, Edward Dworkin, one of the plaintiffs, telephoned to Ireland to arrange burglary insurance to the extent of $6,000. Ireland's position, as stated by Edward Dworkin, was that he had acted as broker for the plaintiffs for 5 or 6 years in looking after their insurances and was the person to whom Dworkin would naturally go when he wanted to place insurance. Ireland himself says that in his judgment he was in this matter the agent of the plaintiffs. I agree with him. See *Empress Assurance Corporation* v. *Bowring* (1904), 11 Com. Cas. 107.

Ireland telephoned to Ferguson, not mentioning the fact of the first burglary, and asked him to send a representative to 525 Dundas street west, to inspect the property for burglary insurance, and if satisfied to issue a policy covering the risk for the amounts requested: he says he was not asked if this was good business, and that it was "up to them," and not to the broker, to decide as to the insurance. He further says that on the next day or the second day afterwards Ferguson telephoned stating that they had inspected the risk, that it was satisfactory, and that they would cover it from the 27th April. Ireland then advised the plaintiffs by telephone that he had arranged the insurance with the defendants. Ireland was special agent for the Gresham Insurance Company, whose policy had been a total loss as already mentioned, but he did not tell that to Mr. Ferguson.

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Ferguson said that he was called to the telephone by Ireland on the 27th April, and the risk was submitted to him; that Ireland said it was good physical hazard; and that, in answer to a further question as to whether the plaintiffs had had a loss at the address given, Ireland said, "Yes, a small loss, but that the place had been strengthened with iron bars." He then sent Brett, an employee of the defendants, on the 28th April, to inspect the risk, and on his return, having obtained particulars from him, felt satisfied, and ordered the policy to be issued. He says there was no arrangement or agreement other than the policy, that he was not asked for a binder, and did not agree to cover the risk until after the inspection. It will be noted from the above that the real difference between Ireland's and Ferguson's statements is that, while Ireland says he gave no information about the Gresham policy being a total loss, and said nothing about a small loss, Ferguson says that he admitted a loss but said it was a small one. Both agree that the policy was to be issued if the risk was satisfactory; and, as the loss in this case occurred after the issue of the policy and the receipt of it by Ireland as agent for the plaintiffs, no question arises as to liability by reason of the telephone conversation as for oral insurance.

I have no doubt that the policy was issued in due course, and was received by Ireland far earlier than he is willing to admit. He thinks it did not reach his office till about the 17th May. But he fails to give any sensible reason for that impression, and no one is called from his office to strengthen his evidence. Ferguson, on the other hand, asserts that the policy was sent forward to Ireland at once on the 28th April. I am convinced that it was in Ireland's possession with the assent of the plaintiffs, and on their account, for such a reasonable time before the loss as would have enabled Ireland to examine it. Section 155, sub-sec. 1, of the Ontario Insurance Act applies. If he had examined it, he would have found that the defendants had issued the policy upon the understanding stated in item 11 on page 3; and if he did not do so the plaintiffs cannot complain if it is found that they, through their agent, accepted the policy sued on herein as their contract with the defendants: *Provident Savings Life Assurance Society of New York* v. *Mowat* (1902), 32 Can. S.C.R. 147.

The two questions for decision are: (1) whether the defendants can avoid the insurance contract for misrepresentation; and (2), if not, whether the plaintiffs can succeed, having regard to the terms of the policy.

As to the first question the evidence is as follows:—

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Brett visited the premises on the 28th April, saw Edward Dworkin, who said he had had a loss but it was not very much, and he was just checking it up. Brett then asked him if he was covered by insurance, and, according to his testimony, Dworkin replied "no." On cross-examination he said that if Dworkin said that he mentioned previous insurance to him he would deny it. Dworkin was not recalled on this point in reply, but in his earlier cross-examination he said he could not remember whether he mentioned the name of the company he was insured in, but that he had said to Brett he was taking stock with the adjuster. I thought that perhaps the explanation of one difference between the evidence of Brett and Dworkin might lie in the use of the word "covered," and that while Brett used it in the sense of being insured, Dworkin may have understood it to main "fully protected having regard to the amount of the loss," but that point was quite cleared up in Brett's re-examination when he said that Dworkin's statement to him was to the effect that he had no insurance at all.

Judkin, an employee of the plaintiffs, says he was present and heard what passed between Dworkin and Brett, and he professes to give the exact words used by the former. He says the question was as to the amount of the loss, and Dworkin said, "I don't know yet, I am taking stock with Whitehouse" (representing the insurance company). Brett denies that any one was present at his conversation with Dworkin.

Dworkin, in giving his account, says that he did not tell Brett about the burglary, but said that he had had a loss; and, while he knew that the loss was $1,500 or $2,000, he did not mention the amount to Brett, but told him that he was taking stock with an adjuster, and did not know how much the loss was, and that the adjuster was present during his conversation with Brett.

The adjuster, Whitehouse, was called as a witness and he says he does not know Brett and heard no conversation between Edward Dworkin and any representative of the Globe Indemnity Company, in this agreeing with Brett.

On this conflict of evidence I have come to the conclusion that Edward Dworkin concealed for his own purposes the facts that he had been insured in the Gresham Insurance Company; that he had suffered a loss by burglary to a substantial amount, practically exhausting the policy; that he knew the amount or probable amount of the loss when stating that he did not know it, and also when his agent said it was small; and that he made the statements he did for the purpose of inducing the defendants to issue the policy in question. I have also come to the conclusion

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that there were misleading statements, and involved the suppression of information which he was bound to give, and that in both respects they had reference to a matter which was material to the risk: *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363; *Condogianis* v. *Guardian Assurance Co.*, [1921] 2 A.C. 125. I further find that the defendants acted upon these statements and were misled by them.

The first burglary took place on the 25th April, and stock was taken on the same day immediately after the burglary by Edward Dworkin and Whitehouse, the latter checking it over for the Gresham Insurance Company. On the following day Dworkin applied to Ireland, through whom he had insured in the Gresham Insurance Company, to procure him similar insurance. Ireland as his agent refrained from mentioning the loss which had just occurred under a policy which he had procured, or, according to Ferguson, minimised the effect of the loss without connecting it with any covering insurance. It is impossible to resist the conclusion that, with the first burglary so recent, the suppression of any reference to it and to the insurance against it, when applying for insurance against a similar loss, was deliberate. It indicated that what was concealed was material in some way to the insurers. It is much the same kind of information as was considered to be material in *Western Assurance Co.* v. *Harrison* (1903), 33 Can. S.C.R. 473, and, inferentially, in *Anglo-American Fire Insurance Co.* v. *Hendry* (1913), 15 D.L.R. 832, 48 Can. S.C.R. 577. Materiality has been well defined in England by the Marine Insurance Act, 1906, 6 Edw. VII. ch. 41, sec. 18, sub-sec. 2, as "every circumstance . . . . which would influence the judgment of a prudent insurer in fixing the premium, or in determining whether he will take the risk." It seems pretty obvious that, had the fact that the plaintiffs were covered by insurance on the occasion of the first burglary been disclosed, inquiry would have been made as to why the carrying company would not continue the insurance. There is a further reason why the information is material, and that is, that, while a small loss might not indicate insecure premises or want of proper precautions, a large loss might do so. It is a reasonable precaution, I think, for a company to take, to ascertain whether similar losses have occurred, whether the applicants were insured against loss, what the extent of the loss was in relation to the insurance, and why the insuring company was not asked to continue on the risk. The number of different kinds of goods that may be stolen make it reasonable that the company should know whether their insurance is intended to cover goods similar to those abstracted, and whether they

were covered by prior insurance. The probability of another loss on particular goods should be important in estimating the risk to be run. All these considerations may affect the moral hazard and throw light on the physical hazard.

No attempt was made at the trial to dispute by evidence what was said by Mr. Wilson, Ontario representative of the defendants, as to the materiality of what was concealed as viewed in the insurance business.

On this branch of the case I must find that Ireland, in doing his part, concealed material facts from the defendants; that the plaintiff Edward Dworkin concealed material facts from Brett, the agent of the defendant company, and made untrue and misleading statements to him on material matters; that it was the common understanding of the parties that a policy should issue as evidence of the insurance contract, and that the policy now sued on did issue and is the only contract between the parties; and that, having been obtained under the circumstances I have mentioned, the defendants are entitled to resist successfully liability thereunder.

It is not necessary to discuss the second question, but if it were I do not think the case of *Brock* v. *United States Fidelity and Guaranty Co.* (1921), 20 O.W.N. 278, is sufficiently like this case on the facts to be applicable here. It is not mentioned in the report whether any term of the policy stated the materiality of the statement therein in conformity with the amendment in 1915 (by sec. 19 of the Statute Law Amendment Act, 5 Geo. V. ch. 20) of sec. 156, sub-sec. 5, of the Ontario Insurance Act. With that amendment the section now requires both materiality in fact and by convention to be shewn; that is, the statement must be material and must be expressed in the contract to be so. Materiality in fact without an admission of its importance in the contract, or agreed as to materiality without proof of the fact, does not afford any defence where a condition or term of the policy is relied on to avoid the policy. There is in this policy no term or condition relating to avoidance for untruth or as to materiality such as sec. 156 requires. If the untruth of the statement in the policy and that it was material was the only defence I should be obliged to dismiss the action. I can see no reason for reformation, which is asked for by the defendants. But there still remains the defence based upon the untrue and material statements inducing the making of the contract and resulting in the issue of the policy of insurance, apart from that based upon its terms and conditions. See the cases cited in *Selick* v. *New York Life Insurance Co.* (1920), 57 D.L.R. 222, 48 O.L.R. 416, *Stebbing* v. *Liverpool and London and Globe*

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Insurance Co. [1917] 2 K.B. 433; *Woodall* v. *Pearl Assurance Co.*, [1919] 1 K.B. 593; *Condogianis* v. *Guardian Assurance Co. supra.*

The action will be dismissed with costs.

Action dismissed.

GIBSON v. WILSON AND DOWNER.

Yale County Court, B.C., Swanson, Co. Ct. J. March 31, 1922.

BAILMENT (§III—17)—MACHINE IN GOOD CONDITION—PLACED IN CARE OF CUSTODIAN—INJURY—ONUS OF PROOF—EVIDENCE.

When a machine which has previously done its work satisfactorily meets with an injury while in the care of a custodian, the onus of proof is on the custodian to shew that the injury did not happen in consequence of his neglect to use such care and diligence as a careful and prudent man would exercise in relation to his own property.

ACTION to recover damages for wrongful use of a machine outfit and for damages to such outfit while in the possession of the defendant.

C. E. Falkner, for plaintiff.

W. H. D. Ladner or defendants.

SWANSON, Co. Ct. J.:—The defendants are in my opinion clearly liable to the plaintiffs for damages for the wrongful use of the machine outfit, a wood cutting machine, Morse Fairbanks gasoline engine 4 H.P. and saw etc. and for injury to the engine water-jacket.

I find that the outfit was in good order when it was put by plaintiff in the custody of Fred Harwood at Vernon, and was in such condition when defendant Wilson obtained same from Harwood. I find both partners jointly liable for the damages in question.

Plaintiff says that he gave Wilson no permission to use the machine outfit. According to defendants' contention their only right to use the machine was for purposes of demonstration in an endeavour by Wilson to secure a purchaser. Wilson and Harwood were authorised to sell the outfit at $230 net to Gibson, they to divide any surplus over that sum between themselves as remuneration or commission for sale of machine. Wilson clearly had no right to take the machine out of Harwood's custody for the purpose to which he put it. What Wilson did was certainly for his own and his partner's purposes, using same for wood cutting in defendants' own wood yard and elsewhere for hire. Such a use was a wrongful one, an invasion of the rights of plaintiff, and as such punishable in damages. I do

not accept the testimony of Wilson that he had such authority from Gibson to use this machine as he did. Certainly cutting up 140 cords of wood with the machine is a wide amplification of the alleged right to use the machine for demonstration purposes for the exceedingly limited number of purchasers in sight.

Dealing with the injury to the engine water-jacket, I think defendants must be held also liable. Ellison's evidence is that it arose from frost, being a "frost crack" as he termed it. It occurred in the cold weather season November 1921. It was repaired by Ellison in that month, his book shewing that he charged the repairs done following the injury in question on November 26. He says that would be the correct date within a week. Leaving water in the water-jacket overnight in such weather would account for the accident. Wilson states that he always let out the water every night. I am very doubtful about accepting such testimony. We cannot argue the crack away, a very substantial injury to the machine. Is Wilson mistaken in saying that he let out the water every night? I am inclined to think he is. I was not satisfied with his evidence respecting his right to use the machine alleged by him. Neither am I satisfied with his testimony on this point. How did that crack get there? The onus of proof is cast on the defendants to free themselves of negligence. 1 Hals. article "Bailment" p. 545 para. 1109 says:—"When a chattel intrusted to a custodian is lost injured or destroyed, the onus of proof is on the custodian to shew that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property." *Mackenzie* v. *Cox* (1840), 9 C. & P. 632; *Reeve* v. *Palmer* (1858), 5 C.B. (N.S.) 84, 141 E.R. 33: see particularly judgment of Bray, J., in *Phipps* v. *New Claridge's Hotel* (1905), 22 Times L.R. 49 at 50. See also judgment of the Court of Appeal of Saskatchewan in *McCauley* v. *Huber* (1920), 54 D.L.R. 150, 13 S.L.R. 401. See also judgments of the Court of Appeal of B.C. applying the same principle in the case of bailment called "Agistment" *Comstock* v. *Ashcroft Estates* (1917), 23 B.C.R. 476; *Pye* v. *McClure* (1915), 22 D.L.R. 543, 21 B.C.R. 114: see also judgment of the Court of Appeal (England) *Coldman* v. *Hill*, [1919] 1 K.B. 443. See also Phipson on Evidence, 5th ed. p. 27: "Where the subject-matter of a party's allegation . . . is peculiarly within the knowledge of his opponent it lies upon the latter to rebut such allegation" *Abrath* v. *North Eastern R. Co.* (1883), 11 Q.B.D. 440 and 457, and other cases there cited.

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See also Odgers on Evidence 1911 ed. pp. 164 and 165, cases on doctrine of "*res ipsa loquitur*". *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596, 159 E.R. 665, (bag of sugar falling out of warehouse); *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 159 E.R. 299, (barrel of flour falling from upstairs window injuring pedestrian) *Dominion Gas* v. *Perkins* (1909), 101 L.T. 359. Have the defendants discharged this onus of proof? I am clearly of the opinion that they have not.

A great deal has been made of an alleged "pea-hole" opening near the top of the jacket, some water being said to have oozed therefrom. It is argued that this little opening has been the cause of the trouble—the "*fons et origo mali*"—joined with an alleged original flaw in the metal, in the casting or moulding of the metal put into the water-jacket. Ellison speaks of this as an "expert" as his theory in part. This "little rift within the lute" is alleged to have "spread" by natural causes, in the ordinary use of the machine. That it was only a matter of time when the "crack" would develop, and manifest itself. The injury or defect was "latent" like "original sin" and only awaiting the opportune moment to reveal itself, when by the attrition of time it would sometime go suddenly in collapse like "the deacon's one horse shay." (If one may be pardoned for using mixed figures of speech).

The crack was undoubtedly due to the action of "frost," the most reasonable explanation being that water had been at some time in the cold weather left over night in the water-jacket. This machine had previously done its work satisfactorily. It met with this injury, which I think is a serious one, whilst in the custody and control, wrongful as I find it to have been, of the defendants. The defendants' explanation is not satisfactory to me. I hold that they have failed to discharge the onus of disproving negligence, which onus is, under the circumstances, quite properly by law cast upon them. The same principle underlies the statutory provision as to casting the onus of proof on the motorist under certain circumstances under the Motor Vehicles Act. Even if there were some original flaw in the metal we cannot expect a "counsel of perfection" in machines any more than we can expect to find the same in men.

As to the important point of evidence raised during the hearing by Mr. Falkner that his opponent should not be allowed to go into any evidence of an alleged consent by plaintiff to defendant to use the machine outfit as the point is nowhere raised in the pleadings, I am, on reconsideration, inclined to

think that Mr. Falkner is right and that my ruling was wrong. I recall the exact point being ruled upon along the lines submitted by Mr. Falkner by Martin, J., (now of the Court of Appeal) as a trial Judge at the Kamloops Fall Assizes in the case of *Storey* v. *Latremouille* 1907 (unreported), in which I was of counsel for the plaintiff.

I award plaintiff the sum of $50 damages for the wrongful use of the machine outfit and $50 for the damages to the engine.

Judgment accordingly.

COSTANZA v. DOMINION CANNERS, LTD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. November 4, 1921.

DAMAGES (§ IIIA—52)—SUPPLY OF WATER TO EMPLOYEES—IMPURE—SICKNESS—LOSS—DAMAGES—COMMON LAW—WORKMEN'S COMPENSATION ACT.

An employer of labour who undertakes to supply water for the use of his employees must supply pure water, and is answerable in damages for sickness incurred through the use of impure water; the liability is a common law one, and is distinguishable from "accident" within the scope of the Workmen's Compensation Act, 1914 (Ont.), ch. 25.

[*Beal* v. *Michigan Central* (1909), 19 O.L.R. 502; *Scotland* v. *Canadian Cartridge Co.* (1919), 50 D.L.R. 666, 59 Can. S.C.R. 471, referred to.]

APPEAL by defendant from the judgment of Rose, J. in an action by Horace Costanza, his wife, and two infant children (suing by him as next friend) to recover damages for injury to the health of the wife and children and consequent loss and expense incurred by the plaintiff Horace Costanza, by reason, as the plaintiffs alleged, of the unsanitary condition of a tenement owned by the plaintiffs in which the wife and children were housed. The facts of the case are as follows:—

The wife and children were employed by the defendants in their factory at Jordan Station, and, at the invitation of the defendants, as the plaintiffs alleged, took up their abode in the tenement, which was maintained for the defendants' employees, and adjoined and was used in connection with the factory. The specific allegation of the plaintiffs was that a certain well upon the premises was the only source of supply of water for drinking, and that they, drinking the water, which was impure, contracted typhoid fever, and suffered the injury and loss complained of.

Questions were left to the jury, which they answered as follows:—

1. Was the illness of the plaintiffs Mary Costanza, Phillipine Costanza, and Horace Costanza the younger, caused by the negligence of the defendants? A. Yes.

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2. If so, in what did such negligence consist? A. (*a*) In continuing to use the impure water from the well. (*b*) In not providing a supply of wholesome drinking water.

3. Could the said plaintiffs, or could any of them, and if so which, have avoided the illness by the exercise of reasonable care? A. No.

4. If so, in what did their negligence, or the negligence of such of them as were negligent, consist?

5. Was the well in question in this action injurious or dangerous to the health during the months of June and July, 1920? A. Yes.

6. Did the plaintiffs Mary Costanza, Phillipine Costanza, and Horace Costanza the younger, or did any of them, and if so which, contract typhoid fever as a result of drinking water taken from such well? A. Yes, all of them.

7. Did the defendants, in the months of June and July, 1920, provide for the employees at their Jordan Station plant a sufficient supply of wholesome drinking water? A. No.

8. If not, did the plaintiffs Mary Costanza, Phillipine Costanza, and Horace Costanza the younger, or did any of them, and if so which, contract typhoid fever as a result of the defendants' failure to provide such supply? A. Yes, all of them.

9. What damage was caused to the plaintiff Horace Costanza by the illness of his wife, daughter, and son? A. Loss of time from work, and additional expense such as doctors' fees, hospital charges, medicine, special food, ice, and laundry. Amount $800.

10. What damage was caused to:—

(*a*) Mary Costanza by her illness? A. Loss of time from work, amount $200.

(*b*) To Phillipine Costanza by her illness? A. Loss of time from work and injury to health and hearing, amount, $2,000.

(*c*) To Horace Costanza the younger, by his illness? A. Loss of time from work, amount $200.

The trial Judge directed that judgment should be entered for the plaintiffs in accordance with the jury's findings, with costs.

George Lynch-Staunton, K.C., and *T. Hobson*, K.C., for appellants.

Peter White, K.C., and *J. S. Duggan*, for respondent.

RIDDELL, J.:—This appeal by the defendants was argued at considerable length and with great ability and fairness on either side—its importance justifies the time and labour expended upon it.

In the view which I take of the case, however, some of the

argument becomes unimportant—the case seems to me to depend and it may be decided upon common law principles.

In the first place: even where there is no antecedent duty of one person toward another to perform any act for the latter's advantage, if the duty be undertaken even gratuitously the further duty is implied to perform it without negligence. A recent case is *Turner* v. *Merrylees* (1892), 8 Times L.R. 695.

It may not be the duty of a railway company to have a platform upon which its passengers may alight, or a sidewalk to and from their stations, but if a company provides either it must be reasonably safe for use.

Leaving aside any statutory duty under the Factories Act R.S.O. 1914 ch. 229 and disregarding the duty owed by master to servant arising out of their relationship—as to which see Beven on Negligence, 2nd ed., pp. 609 *sqq.*—it seems to me that here the defendants undertook—gratuitously if you will—to supply the plaintiffs with drinking water. It then became the defendants' duty to use due care to supply pure drinking water. I think that they did not use such care. The evidence of Dr. Nasmith is that he advised them to discontinue the well—there is much to corroborate that, and the jury have believed it. Even if we take the formal report of Dr. Nasmith, we find that the defendants did not use the precautions which he recommended if they should continue to use the well. What would have been the result if they had used such precautions is most conjectural, and we need not, I think, enter into the inquiry.

That the plaintiffs were supplied with impure water is, I think, beyond question; and I am of the opinion that there is ample evidence to support the finding of negligence.

This water, the jury say, and I agree with them, caused the sickness of the plaintiffs—there are no such elements of doubt as appear in the cases cited in *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502.

It remains to consider the effect of the Workmen's Compensation Act 1914, (Ont.) ch. 25, sec. 15 (amended by 1915, ch. 24 sec. 8). This section takes away the right of a workman to sue his employer as at the common law in every case of a right of action "for or by reason of any accident which happens in the employment of such employer . . . " However this case would have stood without *Scotland* v. *Canadian Cartridge Co.* (1919), 50 D.L.R. 666, 59 Can. S.C.R. 471, I am of opinion that that case, when fairly read, concludes us to hold that the sickness here was not an "accident" within the meaning of the Act.

I would dismiss the appeal.

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LATCHFORD, J.:—The grounds upon which this appeal was argued are: (1) that there was no evidence of negligence on the part of the defendants proper to be submitted to the jury; (2) that there was no evidence that the water found by the jury to have caused disease to Mrs. Costanza and two of her children was infected by typhoid germs at any time; (3) that the remedy of these plaintiffs, if any, was to have applied to the Workmen's Compensation Board, and, not having so applied, their action is barred; and (4) that in any event the damages to Horace Costanza senior, are not recoverable.

Other grounds set forth in the notice of appeal are that there was misdirection by the learned trial Judge and that he admitted evidence which should have been excluded, but no argument was addressed to the Court based on these grounds, and a careful perusal of the whole evidence and the charge to the jury satisfies me that there was no misdirection and no improper admission of evidence which could have affected the decision of the jury.

The finding that the illness of Mary, Phillipine, and Horace Costanza was caused by the negligence of the defendants in continuing to use—that is, providing for such plaintiffs' use—impure drinking water, is, in my opinion, amply warranted by the evidence.

It was also a duty owed by the defendants to these plaintiffs, under the Public Health Act R.S.O. 1914, ch. 218, to provide them with a supply of wholesome drinking water; and that duty they plainly failed to discharge.

In 1918, 1919, and 1920 there were outbreaks of typhoid fever among the defendants' employees taking their drinking water from the only source supplied to them. The defendants' manager, Mr. Gunn,. swears that he was unaware of the outbreak of 1918, although four of the working people were ill and at least one died. The local health officer, Dr. Addy, a witness called by the defendants, entertained no doubt that the disease which broke out in 1918 among the users of the well-water was typhoid. He deposes, thus directly contradicting Mr. Gunn, that in 1918 Gunn was aware that some of the employees had typhoid; that he discussed the matter with Gunn in 1918, as in 1919 and 1920. Dr. Addy suspected the well as the source of the disease in 1918, as in the following years, and had a single sample of the water sent to the Provincial Board of Health to be tested. On receiving their report on the test, which was doubtless negative, he allowed the use of the well to be continued. Mr. Gunn positively denied the statement of Mrs. Scharino that, when she complained to him about the water(he and Mr. Audd, his assistant, lifted the whole pump—Miss Mangano calls it the cover—and that they saw

tomato-vines and peach-skins floating on the water—a plain indication that there was a defect in the factory sewers which allowed drainage to enter the well.

When operations began in June of 1919, no water was obtainable for drinking purposes. Mr. Gunn had had the handle taken off the pump over the well so that the water could not be used. A second sample of the water had been taken by the defendants and sent to their chemist at Brighton, who reported on the 1st July that his results shewed the water to be "sanitary at the present time," adding: "This does not mean that it may always be healthful unless it is free from all sources of possible contamination." On receiving this report, the defendants replaced the handle, and thus provided means of obtaining drinking water to their operatives.

In about two weeks, the usual period after infection, a frightful outbreak of typhoid occurred—what is called an explosive epidemic. From 16 to 20 of the 50 to 80 employees using the water were stricken with the disease, or about the full percentage liable upon the evidence out of a hundred partaking of food or water tainted by typhoid bacteria.

Dr. Addy sent a sample of the water from the defendants' well to the laboratories of the Provincial Board of Health, who reported to him on the 14th August that colon bacilli were present in one cubic centimeter of the water, at the same time warning him that water from the source of supply may shew variations at different sampling points and also vary from time to time at the same point. "Favourable reports from a limited number of samples were not," he was told, "to be interpreted as indicating that water from the supply is *always* of good quality and that contamination may be intermittent and *highly dangerous at times. The* laboratory report should always be considered in conjunction with the sanitary survey and epidemiological evidence."

Under the heading "Remarks" the report adds:—

"This specimen shews the presence of bacteria of intestinal origin. In arriving at a conclusion as to the origin of typhoid, other possible sources of infection, such as direct contact, carriers, flies, and food, should also be considered."

Dr. Addy took the report to Mr. Gunn and shewed it to him. The manager of the factory then knew, as Dr. Addy knew, that bacteria of intestinal origin were present in the well-water which his employees had been using. Dr. Addy may have told him, as the fact was, that the germs of typhoid had not been detected in the water. Their detection in water, according to the evidence, is a matter of great difficulty. Colon bacilli which occur in the

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same loci are now recognised with comparative ease, and their presence in large numbers is regarded as indicating that the typhoid bacteria are probably present. When, as in this case, an epidemic has broken out among the persons using the water containing organisms of intestinal origin, and a survey of the sanitary or insanitary conditions surrounding the infected source shew means of fæcal infection, and when, moreover, other possible sources are excluded, the inference which a reasonable man could and in my opinion should draw is that the water containing in quantity the colon bacillus and used by all the persons afflicted by the fever contained also the germs of typhoid.

Throughout his evidence, Dr. Addy appears to manifest a strong bias in favour of the defendants. He swears that, as the report did not shew "positively," a word which in this connection he uses more than once, that the suspected and intestinally contaminated water was the cause of the epidemic, he advised Mr. Gunn that it might be used. Pressed by Mr. White on cross-examination, Dr. Addy admitted with manifest reluctance that the bacteria mentioned in the report were of human origin.

"Q. So that the almost irresistible conclusion (is) that these intestinal bacilli found in there were of human origin is it not? A. It seems to be the only way I can get out of it is to say it is that."

Afterwards he said, "I cannot tell what origin it" (the colon bacillus found in the water) "is; it may be human.'

Then Mr. White: "I will ask you again, is not one "driven irresistibly to the conclusion that these bacilli found in this water were of human origin, please answer? A. I cannot answer it either in the negative or affirmative.

"Q. Is that not a reasonable conclusion? A. That is a reasonable conclusion."

Apart from a privy pit not far away, sewers from at least one flush-closet passed close to the well. According to one diagram in evidence, sewers surrounded the well. The means of human excretal infection of the well were present, according to the defendants' own witnesses.

Dr. McClenaghan, the district health officer, who visited the premises with Dr. Addy after the outbreak of 1919, says he found the sanitary conditions very bad. He says that the well from which the drinking water for all the employees was obtained could not help being polluted. He considered that the well was polluted, and that the water for the factory used in the processes of canning was from still a worse source.

After admitting on cross-examination that there were many cases of typhoid—16 or 20 in 1919—among persons using the

polluted well, Dr. McClenaghan was asked if the fact did not very strongly point to the well as the source of contamination, and answered, "I will not go that far with you." Thus in 1919 the defendants were aware that the water was infected by bacteria of intestinal origin, of possibilities and probabilities of fæcal infection of the well, and of an epidemic among those who were supplied with the water.

Dr. McClenaghan recommended the installation of a septic tank for the waste and sewage from the factory, and that a sanitary engineer should be consulted with a view to the prevention of other epidemics.

As recommended by the district health officer, a distinguished and experienced sanitary engineer, Dr. George G. Nasmith of Toronto, was brought over to Jordan early in 1920. While his statement that he recommended a new well is denied by Mr. Gunn, it is corroborated by Dr. Addy, and might well be believed by the jury. The denial seems based on the fact that such a recommendation does not appear on the face of the report made by Dr. Nasmith's firm to the defendants on the 26th April, 1920, where the statement is merely: "We understand you contemplate constructing a new well; if so, it should be constructed as far away as possible from the existing buildings."

Dr. Nasmith found the problem he had to deal with at Jordan was that of a defective water-supply from two sources—the well and a pond from which water was pumped to two overhead tanks in close proximity to the well. His firm reported as to the well: "There seems little doubt but that the well has been contaminated from the overflow and leakage coming from the overhead tanks, from lack of proper drainage in the neighbourhood of the well, and from insufficient protection to the well itself." His advice was that every precaution should be taken properly to drain the neighbourhood around the existing well, which he stated to be "in a very undesirable location, such that, even with precautions which were recommended to be taken, one would always feel suspicious about its surroundings, due to its close proximity to the buildings and to seepage from the inside of the buildings."

It was further recommended that several tests of the water from both wells—the old and the new—should be made at the same time, and, should the water from the new well prove the better, the old well should be abandoned for all purposes. If the new well was built immediately and on being tested was found satisfactory, then the improvements suggested in the old well need not be carried out.

The necessity for frequent tests had been brought to the

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notice of the defendants by the Provincial Laboratory in the previous year.

Some of the recommendations of Dr. Nasmith were carried out in June. The stone sides of the well were removed for a distance of 5 feet and replaced by concrete, and a covering of the same material placed over and around the well. A new well was sunk, but whether before or after another outbreak of typhoid does not appear.

It is important to note that, notwithstanding the warning of the Provincial Laboratory given in 1919, the knowledge on the part of the defendants that the well was polluted in that year, and that there had been an explosive epidemic among the employees using the water from the source infected by intestinal organisms, and the recommendation of Dr. Nasmith that several tests should be made of the well-water, no test whatever was made of it in 1920 until after a third epidemic of typhoid had broken out among the factory operatives and the bricklayers and their labourers engaged in erecting a new building. The canning season in that year began on the 29th June. Within two or three weeks, three of the plaintiffs and many others among those using the well were stricken. Five out of the six bricklayers took the disease, and one of them, the foreman, died. Four out of the six labourers who drank the water also took typhoid. All the bricklayers lived at St. Catharines and returned to their homes every night. There was no typhoid case in the family of any of them.

On the 15th July, Mr. Gunn again removed the handle from the pump. Some cases of typhoid developed later, but none after the expiry of the period during which ordinarily the disease manifests itself. Dr. Addy was asked: "When the people stopped drinking from the well the typhoid epidemic ceased, did it not? A. There were cases after.

"Q. But very shortly after, which might have been attributable to inoculation before the well was closed? A. I think that is right."

Dr. Anderson, the bacteriologist of the Provincial Board of Health, went from Toronto to investigate the cause of the epidemic, arriving at the defendants' premises on the 23rd July. Ten persons were there found ill of typhoid, and all had been working in the defendants' factory. Dr. Anderson tested the well-water and found it highly contaminated with intestinal organisms. He investigated the possibilities of infection from other sources and eliminated them as causes of the outbreak. His diagram made from information given him by Mr. Gunn shews drains or sewers passing near the well. A flush-closet used late in June, according to one witness, which stood near the well

though inside a building, had been removed before Dr. Anderson's arrival. The reason for its removal does not clearly appear in evidence, but may readily be inferred.

The finding of negligence may be supported on the ground that in the circumstances it was the duty of the defendants to have the water from the well tested several times in 1920 before supplying it to their employees. The defendants failed to discharge that and other duties, such as preventing, earlier in the season, the use of the adjacent closet or taking up the sewers near the well.

That such negligence caused the damages awarded to the plaintiffs is a probable and reasonable conclusion from the facts disclosed in the evidence.

In *Richard Evans & Co., Limited* v. *Astley*, [1911] A.C. 674, at 678, Lord Chancellor Loreburn says:—

"It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities."

It is strongly urged that, even if there was, as I think, a common law liability for breach of a duty owed by the masters to their servants,the defendants are relieved owing to the provisions of the Workmen's Compensation Act.

That contention must prevail if the diesase which affected three of the plaintiffs falls within the meaning of "accident," as that term occurs in the statute.

It is there declared, sec. 2 (1) (a), to include "a fortuitous event occasioned by a physical or natural cause." This appears to me not to affect the meaning of the word in the circumstances of the present case. I do not regard the outbreak of typhoid as fortuitous, that is, by chance. It was inevitable that every person who used the water while it was contaminated should be infected by it, though many could and did successfully resist the infection. The incidence of the disease could have been prevented by the defendants, and should have been expected by them. It had not the requisites of an accident in the popular and ordinary sense in which the term is used—"an unlooked-for mishap or an untoward event which is not expected or designed," as stated by Lord Macnaghten in *Fenton* v. *Thorley & Co. Limited*, [1903] A.C. 443, 448.

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The difficulty of defining, as used in a statute, such a general term as *accident*, has often been referred to. In *Scotland* v. *Canadian Cartridge Co.*, 50 D.L.R. 666, 59 Can. S.C.R. 471, Anglin, J., says that it had been more discussed than any other word, and that it means "some unexpected event happening without design and the time of which can be fixed."

In that case as in this, the time of the event could not be fixed, and it was held by the Supreme Court that injury to the health of a workman resulting from inhaling poisonous fumes was not an accident within the meaning of the term in the section of the Workmen's Compensation Act now relied on as a bar. The only difference between the *Scotland* case and this case is that the claim of the injured workman had been rejected by the Workmen's Compensation Board; but that rejection cannot have affected the meaning proper to be given by the Court to the word "accident."

Referring to the leading recent case of *Innes or Grant* v. *Kynoch*, [1919] A.C. 765, Davies, C.J., said 50 D.L.R. at 668:—

"I take it from reading the judgments delivered that in the absence of proof of the abrasion on the plaintiff's leg which became infected by certain noxious bacilli, there would not have been any ground for the holding their Lordships reached."

In the case followed in *Innes or Grant* v. *Kynoch—Brintons Limited* v. *Turvey*, [1905] A.C. 230, the House of Lords held, Lord Robertson dissenting, that the assault of a bacillus upon a workman proceeding from the wool upon which he was working, and affecting him with mortal anthrax, was an accident, and that the consequent and fatal disease was an injury. Lord Lindley, who agreed with the Lord Chancellor and Lord Macnaghten, was however careful to observe (pp. 237, 238): "I hope that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Act. That is very far from being my view of the Act." Then he adds: "In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental."

Scotland v. *Canadian Cartridge Co.*, decided after the *Innes* case, covers, in my opinion, the precise point raised here and is conclusive upon the defence raised by it.

The damages sustained by Horace Costanza flow directly from the negligence of the defendants. There is evidence to

justify the amount awarded, and the appeal against him, as against the other plaintiffs, should be dismissed.

MIDDLETON, J.:—I agree with the views of my brothers and need add nothing.

There was a breach of the common law duty owing to the plaintiffs when the defendants negligently supplied them with impure water for drinking purposes, and it is abundantly shewn that the illness which occurred was the result.

There was not an "accident" within the meaning of the Workmen's Compensation Act, as expounded by the Supreme Court of Canada in the *Scotland* case. (50 D.L.R. 666, 59 Can. S.C.R. 471.)

MEREDITH, C.J.C.P.:—If the injury which the plaintiffs sustained, and for which damages are sought in this action, were caused by accident, and if the accident arose out of and in the course of the plaintiffs' employment, this action must be dismissed—the law of this Province plainly so provides: the Workmen's Compensation Act, sec. 13.

That the accident arose out of and in the course of the employment—if it arose at all—is manifest: the plaintiffs' action is based, and can be supported only, on the ground that the injury was sustained whilst the plaintiffs were engaged in their work for the defendants, their masters, in drinking water which the defendants were by law bound to provide for their servants to be so drunk.

And as plainly too—so it seems to me—the injury was an accident: "a fortuitous event occasioned by a physical or natural cause:" same enactment, sec. 2 (1) (*a*). Indeed it was accidental in a double sense: by accident the water became contaminated; and by accident the plaintiffs drank the germs which caused their injury; neither was in any sense intentional.

How the water became contaminated—if it were—has not been proved. If obliged to conjecture, my guess should be that it was caused by servants of the defendants making use of disused privies, and other places, instead of the water-closets which were in use. But, from whatsoever source the pollution came, there was no intention that it should pass into the well; that, if it happened, was accidental. There was no intention to drink the poison of such pollution. Taking poison instead of pure water was altogether accidental. It is difficult for me to perceive how anything else could be more accidental, how it can reasonably be said that, in any sense, the plaintiffs' injury was not the result of an accident.

If poison of any other kind were taken in mistake for medicine, could it be said that the injury caused was not caused by

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accident? And it can make no difference whether the poison was mineral or vegetable, bacterial or microbial.

But is is said that the case of *Scotland supra* prevents us from giving effect to the obvious. There are two answers to that: first, that it was a very different case; and, second, that, as the question of accident or no accident was not open in the Courts in that case, there could be no decision upon the question; and we cannot avoid the duty to determine it now, in this case, no matter what may have been said upon the subject by any Judge of any of the Courts in which that case was considered.

In that case there was no poisoning of water by accident; all that was done to the water was done knowingly and intentionally, and there was no inhaling of the fumes by accident; if, as the jury found, the inhaling was detrimental to health, it was a detriment incidental to the work which was being done; and so an industrial or occupational cause of ill-health of which every person engaged in it knowingly took the risk. The fumes were inseparable from the work which had to be done; just as other diseases are more or less inseparable from the other occupations, as every one knows, and, knowing, every one engaged in them takes the risk, unless and until statute-law intervenes, as it does to some extent under the Workmen's Compensation Act.

Instead of the cases standing in the way of a workman having compensation under the Act for injuries such as those in question, all the cases, of the very highest authority, make it very plain that the workman is entitled to such compensation.

I find it impossible to perceive any kind of difference in principle between those cases and this. That in one the microbes entered through an abrasion of the skin, can surely make only this difference, that they were of that kind which are not able to penetrate a sound human epidermis, and so if there had been no door opened to them in the abrasion there could have been no ruling and no injury and no claim. It could make no difference in the effect, bodily or legally, whether the abrasion was caused intentionally or accidentally. In this case the germs were able to penetrate the lining of the alimentary canal, they needed no opening in it to let them in, and so the case is comparable to one in which by accident many minute poisoned needles had been swallowed in food or drink.

Mr. White suggested that we might in effect refer it to the Workmen's Compensation Board to determine this question: but why should the question be sent there for consideration? The plaintiffs might have made their claim there, as the plaintiff did in the case of Scotland; but he chose to bring this action and the defendants have a right to have that action dismissed

if this Court be of opinion that it does not lie, notwithstanding the fact that they might have applied to the Board to determine it—sec. 64 (4): and it is better that a question of such general importance should be determined by the highest Courts than by the Board, which shall have the benefit of that determination; a determination which would also be binding upon the parties, who, in bringing the action to trial, have sought such a determination rather than one by the Board.

I am in favour, therefore, of allowing this appeal and dismissing the action.

The action of each of the other two plaintiffs who were poisoned and suffered stands in the same position as this action and should be dealt with in the same manner.

The action of the fourth claimant—the husband and father of the others—is different. Though he was a fellow-servant of the defendants in a common employment with them, by chance the water he drank was uncontaminated, or his alimentary canal was impregnable, or his body contained enemies of the poisons in the water, enemies which were too much for them, or perchance in some other way he escaped. His claim is for money spent and time devoted to the other three in and during their illness: but such care and costs—even if otherwise recoverable—are among those things for which compensation is given under the provisions of the Act; and they are not to be paid for twice: this plaintiff's claim, if he really have any, is against those for whom he served and paid; and who are to be compensated for such things. His action therefore should be dismissed also.

LENNOX, J.:—I agree with the learned Chief Justice presiding in this Court that the Courts of this Province have no jurisdiction to entertain the claim set up in this action by and on behalf of Mary Costanza, Phillipine Costanza, her daughter, and Horace Costanza the younger, her son. The allegation of these plaintiffs is that, while working in the defendants'' factory, as their employees, and in the course of their employment, they were supplied by the defendants with drinking water impregnated with typhoid germs; that these plaintiffs drank of this water without knowledge of its noxious and disease-bearing character, from time to time, and, in consequence, severally contracted an illness or disease described in the statement of claim as ''castro-enteritis or para-typhoid fever.''

I do not know whether the other plaintiff—Horace Costanza who sues on his own behalf for incidental damages as the husband of Mary and father of Phillipine and Horace junior, and also as next friend of his son and daughter, was also an employee of the defendants. I think he was. In answer to the question

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(9), "What damage was caused to the plaintiff Horace Costanza by the illness of his wife, daughter, and son?" the jury said: "Loss of time from work and additional expense such as doctor's fees, hospital charges, medicine, special food, ice and laundry. Amount $800." And he has judgment for this sum.

Whether the plaintiff Horace Costanza happened to be a workman of the defendants or not, his right, if any he has, against the defendants is not for compensation for "personal injury by accident arising out of and in the course of (his) employment," referred to in sec. 3 of the Workmen's Compensation Act, 4 Geo. V. ch. 25, Ontario. I have therefore advisedly limited what I have said, and desire to be understood as limiting what I shall say, as to jurisdiction, to the other plaintiffs alone. Assuming that I am right in concluding, as I do, that the three workers claiming for personal injuries can obtain compensation only through the Board, it would be a rather unlooked for result if a supplementary or collateral common law action could also be maintained by this plaintiff; but, as I am in a minority in any case, it is not advisable, I think, to lengthen my judgment, liable to be too long in any event, by adverting to this matter beyond clearly defining what I propose to deal with. It was not suggested by Mr. White that this plaintiff's claim has a better footing than the others. I notice, too, that a dwelling house, said to have been furnished as the plaintiffs' habitation, by the defendants, is referred to in the statement of claim as being in an insanitary condition. The issue at the trial probably drifted away from this question, as the jury was not asked to pronounce upon it; and, as it was not referred to upon the argument of the appeal, I have not considered whether these facts, if established, would determine anything as to the proper method of trial. Here again an outsider, the husband and father, as head of the family, must be taken to be the tenant and occupant. Our Workmen's Compensation Act is, no doubt, largely based upon the provisions of the English Workmen's Compensation Act 1906 (Imp.) ch. 58; but, as to whether there is a radical difference in the scheme or policy of the Acts. I speak with hesitation, as I have not had the advantage of seeing any judicial reference to this point. It has not been and cannot be disputed that the defendants are carrying on an "industry" to which Part I of the Act applies, and are contributors, and bound to contribute, to the "accident fund" as therein defined. Carefully reading and comparing, these two Acts, I have come to the conclusion that "Where in any employment to which this part" (Part I) "applies, personal injury by accident arising out of and in the course of his employment is . . . caused to a

workman," the only remedy of the workman or his dependants is under Part I., and through the agency of the Workmen's Compensation Board; and this whether the injury was caused "by accident," in the ordinary sense of that term, and as it is used in the English Act, or by "a wilful and intentional act" of the employer.

If this interpretation is right, it follows that the jurisdiction of the Board under the Ontario Act is much wider than the jurisdiction of the arbitrators under the English Act.

Under sub-sec. 2 (*b*) of sec. (1) of the English Act, "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible," the person injured may, at his option, either obtain compensation or redress by an action or by proceedings under the Act. It is not so here. The policy of our Act is in a large measure to do away with litigation between employee and employer; and to substitute the Board for the Courts, and a scheduled scale of compensation or amends for the uncertain estimate of a jury; and to this end it directs that "no action shall lie for the recovery of the compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board:" sec. 13. Using the words "by accident" in sec. 3, it was obviously necessary, if a check were to be put upon litigation, on the one hand, and, if the workman was not to be left entirely to the tender mercy of his employer, on the other to do something more. The course adopted was to declare that "in this Act 'accident' shall include a wilful and intentional act, not being the act of the workman and a fortuitous event occasioned by a physical or natural cause:" sec. 2 (1) (*a*).

There is at least one other important distinction to be kept in mind in reading English cases decided before the judgment of the House of Lords in *Innes or Grant* v. *Kynoch*, [1919] A.C. 765, namely, the difference in the statutory requirements as to notice. Under our Act, "The notice shall give the name and address of the workman and shall be sufficient if it states in ordinary language the cause of the injury and *where* the accident happened:" sec. 20, sub-sec. 2. Under the English Act of 1906 (and it was the same in the Act of 1897), the notice "shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which the accident happened:" sec. (2).

Notwithstanding the exceptions and saving provisions in both Acts, the difference between "where" and "when" is important,

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in itself: that is, the necessity of stating a specific date, if literally construed, made it impossible to institute proceedings under the English Act in many instances where ascertainment of the actual time of the happening of the accident could not, in the end, be accomplished; in other words, where evidence of more than an approximate date was out of the question. It might be said that, the form of the notice to be given in this Province being so radically different, English decisions turning upon this point are not relevant. And this is quite true as regards the character of notice to be given in this Province, and it is also true that the interpretation of the English Act as to notice, and, consequently, in a measure at least, the meaning of the phrase "by accident," was put upon a new footing in April, 1919, by the judgment of the House of Lords in the *Innes or Grant* v. *Kynoch* case, in which it was declared that "the provisions of the Act as to fixing the date of the accident are satisfied if, having regard to the nature of the injury alleged, the date of the occurrence of the accident is reasonably fixed, so as to connect the injury with the accident."

As to the notice itself we are not likely to have much difficulty; but, assuming, as I think I must, that when our Act was passed in 1914 the Legislature had in mind the interpretation in the English Courts of an Act which we in part adopted and in part amended, I find it necessary to consider some of these decisions in ascertaining, if I can, the legislative purpose and intent where terms of the basic Act have been significantly departed from. What I have in view is the inquiry: Does the form of the notice, read in the light of decided cases, and in connection with the interpretation clause, and secs. 13 and 60 of our Act, point to a limitation of the jurisdiction of our Courts far beyond anything contemplated or provided for by the English Act? I think it does. It was successfully argued in a long line of cases decided in England before 1914 that the requirement as to notice was a key to the interpretation of the Act, and that where, upon the facts, an exact date could not be assigned and established, that, in itself was proof that the injury was not "by accident."

It is sufficient to refer to two cases. *Steel* v. *Cammell, Laird & Co., Limited*, [1905] 2 K.B. 232, is, perhaps, the most significant. The head-note is: "Held, that to bring a case within the Act there must be, by reason of sec. 2, sub-sec. 1, an injury by an accident of which notice can be given, and that, since it was not possible to indicate a time at which there was an accident which caused the injury to the workman, he was not entitled to an award under the Act." Collins, M.R., in that case, at p

236, said: "It is not possible to indicate any precise time at which the mischief arose. It seems to me that the provisions of sec. 2 of the Act" (1897) "shew that what is dealt with are cases in which a date can be fixed as that on which the injury by accident came about. I am unable to find such a date in this case."

In *Eke* v. *Hart-Dyke*, [1910] 2 K.B. 677, the deceased died of ptomaine poisoning occasioned by inhaling sewer gas. He was exposed to this while opening cesspools, pursuant to his employers' instructions, and the period of exposure did not cover, in all, more that 4 or 5 days. There appears to have been evidence, regarded as satisfactory, that on one or other of these days, while so engaged, he became infected with the poison of which he died. Referring to *Brintons Limited* v. *Turvey*, [1905] A.C. 230, Kennedy, L.J., at p. 688, said: "According to the judgment of the House of Lords, if you can prove that on a particular day, though nobody saw it, a particular bacterium from the wool struck his eye, because his eye" (the workman's in the *Brintons* case) "was afterwards found to be diseased, that is an accident. It is not easy, I think, to draw a clear line of distinction between that and what might, I think, have been found here, on the medical evidence, that the death was due to toxin poisoning which got into his body on one or other of the particular occasions on which the deceased worked in the cesspools." However, it being impossible to ascertain on which of the 4 or 5 days the sewer gas was taken into the system of the deceased, it was held that the injury was not "by accident" within the meaning of the Act.

It is common knowledge that our Act was framed by as eminent a jurist as we have in Canada, and it goes without saying that undoubtedly he supplemented his already extensive general knowledge of English case-law by special study and consideration of decisions under the English Acts. I do not suggest that Courts are completely bereft of jurisdiction, but I confess I find it easier to perceive the almost unlimited field of jurisdiction conferred upon the Board exclusively and finally to adjust difficulties arising between workmen and employers, in cases of mishaps, than to discover in advance the limited area reserved for the jurisdiction of the Courts. I am for the present not concerned as to the residue; it is enough if I am satisfied, as I am, even without the aid of conclusive decisions presently to be referred to, that the jurisdiction of the Board includes the issues to be determined in this instance.

How then does the matter stand, reading the Act in the

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light of the surrounding circumstances, and, for the moment, without reference to any subsequent decision?

1. The injury must be by accident, of course, but an accident, in the ordinary sense, plus the statutory meaning assigned to it: sec. 3 (1) and sec. 2 (1) (*a*).

2. Unless the contrary is shewn, it is to be presumed that an "accident arising out of the employment" occurred "in the course of the employment," and *vice versâ*: sec. 3 (2).

3. The Act provides for the appointment of three Commissioners with a tenure of office the same as a County Court Judge, with salaries exceeding the salaries of the Supreme Court Judges of the Provinces at the date of the Act, and with power to appoint a staff of officials at their discretion, fix their salaries, subject to the approval of the Lieutenant-Governor in Council, and to remove them at pleasure: secs. 3, 45, 59, 50, 52, 55, and 59.

4. The Board has exclusive jurisdiction as to all matters and questions arising under Part I. and "the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court, and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any Court or be removable by *certiorari* or otherwise into any Court:" sec. 60.

5. "No action shall lie for the recovery of the compensation . . but all claims for compensation shall be heard and determined by the Board: sec. 13. The Board has almost unlimited control over the "accident fund" and, concerning the employer and workman, broad and general discretionary powers, including the right to be beneficient as well as just. It is in effect an additional Court, but without the limitations that Courts must usually keep in view. The scheme of the Act throughout appears to secure a reasonable and moderate compensation for all workmen sustaining accidental injuries, as a substitute for the haphazard and occasional recovery of an extravagant or inadequate sum by a fortunate or unfortunate litigant. It manifestly includes cases where there was no common law right of action. The "accident fund" is in a way a provident and beneficient fund, a limited insurance for workmen generally; an accident policy; the statutory equivalent of a right of action, if a right of action there would otherwise be. Speaking of the scope of the Workmen's Compensation Act, 1906, it is said in Halsbury's Laws of England, vol. 20 para. 326 p. 153: "The liability to pay compensation under the Workmen's Compensation Act, 1906, attaches to the relation of employer and workman and is quite irrespective of negligence. With few exceptions, it is an obligation upon every employer of labour to make pecuniary

compensation to a limited extent, whenever death or disablement happens to a workman in the course of his employment."

6. If the Board determines that the subject-matter of a pending action is within its jurisdiction, its decision is final and the action shall be forever stayed: secs. 60 and 64 (4).

7. The Board may determine in advance as to its own jurisdiction, and as to the jurisdiction of the Courts, and the provisions of Part I. are "in lieu of all rights and rights of action, statutory or otherwise. . . . by reason of any accident:" sec. 15, as enacted by 5 Geo. V. ch. 24, sec. 8.

The jury found everything essential to the plaintiffs' success (again I am referring to the plaintiffs other than the husband and father), against the defendants. The finding does not matter either way. In the view I take of the claim, I have not to consider what the proof will be, but what is set up by these claimants, whether admitted or denied. They allege that the water supplied to them for drinking, and which they used, without suspicion of its impurity, was polluted, and that, in consequence, they became ill.

The defendants do not and cannot deny that they are compelled by statute to furnish pure water, nor can they dispute their common law obligation to furnish wholesome water, if they undertake to furnish it at all: *Ainslie Mining and R.W. Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420.

They say that the water was pure, and, if it was not, that they did everything humanly possible to that end. Very well. If they endeavoured to get pure water, thought they had succeeded, and, despite their care, and without their knowledge, it became contaminated, the contamination was an "accident" on their part, in the ordinary sense of the word—whether the soil beneath the tanks, or beneath their factory, or breaks in the drainage system, or unsuspected seepage from the water-closets, was the source of contamination: it was an unintentional and unforeseen occurrence, an accident.

The defendants would not care to say that the alleged condition of the water was "wilful and intentional" on their part; but, if they did, the injury would still be "by accident" within the meaning and specific terms of the Act. And in the same ordinary sense the plaintiffs, drinking the water in the belief that it was pure, and sustaining injury, were injured "by accident." A druggist fills prescriptions for A. and B. at the same time; a medicine for A. and a poison for B. Say that the bottles are similar, although properly labelled. By mistake B.'s poison is sent to A. and A takes it, without looking at the label, in the belief that it is what he sent for, and, as a consequence

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of his mistake, dies of poisoning. Was not his death accidental, the result of a double accident? Does it matter whether it is poison from a bottle or polluted water from a well? Why, only the other day a householder in this city got in something intended to be used for culinary purposes and harmless, perhaps serviceable, if properly used. Unfortunately, her mind being temporarily diverted to something else, she neglected to put it in a place of safety A roomer or lodger seeing it, and imagining that the bottle contained alcoholic liquor, or a beverage of some kind, and thinking, as he said, that "it would be a good joke," drank part of it directly from the bottle, was poisoned, and, as I recollect the newspaper accounts, died almost immediately. In popular language, "it was all an accident," and the statutory meaning is the ordinary popular meaning, with the "wilful and intentional acts" of the employer superadded.

Well then, without going outside the Act itself, I would feel no hesitation in saying that the claims here are within the exclusive jurisdiction of the Board.

There is, however, a pretty long line of directly relevant English cases. I refer particularly to two decisions in the House of Lords: *Innes or Grant* v. *Kynoch* [1919] A.C. 765, and *Brintons Limited* v. *Turvey*, [1905] A.C. 230, there reviewed and applied. These cases are so directly in point that I would not have thought the exclusive jurisdiction of the Board upon the claims here set up reasonably open to debate, were it not that members of the Court more experienced than I am, are of an entirely different opinion: interpreting the case of *Scotland* v. *Canadian Cartridge Co.*, 50 D.L.R. 666, 59 Can. S.C.R. 471, as deciding the issue here. I will refer to this decision presently.

The English cases are collected and reviewed in the *Innes-Kynoch* case. They afford instructive examples of the application of the phrase "injury by accident" to unexpected and unforeseen casualties, under varying conditions, but I need not discuss them. I have derived very great advantage from a careful study of the dissenting judgment of Lord Atkinson in the *Innes-Kynoch* case. I will only refer, particularly, to the judgment of Lord Buckmaster, [1919] A.C. at pp. 776-7; it directly touches a point dwelt upon during the argument of this appeal, namely, the number of persons who sustained injury from the same source before or about the time the plaintiffs became infected. As to the earlier cases of infection at the defendants' factory, it is to be kept in mind that the plaintiffs were new arrivals in this country, and, if they heard of what had previously occurred, the defendants asserted, and it was generally believed, that changes had been made that completely remedied

the previous condition. Lord Buckmaster said: "Lord Dundas, however, in *Drylie* v. *Alloa Coal Co.*, [1912-1913] S.C. 549, expressed his view that disease was not an accident at all unless it could be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising, at an ascertained time, out of the employment. . . . I doubt if this careful analysis is sufficient. If, for example, in the case of *Brintons Limited* v. *Turvey* it had been shewn that several other workmen had all contracted anthrax, so that the disease could not be described as unusual or entirely unexpected, I cannot think that such circumstance would have destroyed the foundation upon which Lord Macnaghten's opinion was based. The accident would have been more common, but it would still have been an accident. Nor again is it possible to relate with certainty the onset of any bacterial attack to a time ascertained with anything approaching the certainty that attaches to an ordinary physical injury. In the case then under consideration where the pneumonia was strictly traceable to the chill caused at a particular moment, these conditions could possibly be satisfied, but I cannot think that they are of universal application, nor, if disease be accepted as, in certain cases—*Brintons Limited* v. *Turvey* shews that it must—as an accident within the meaning of the statute, can the conditions of decision be formulated by any rigid or unyielding principle." This is all I intended to quote, but it recalls a passage in the judgment of Lord Atkinson in the same case—reasoning to a different conclusion it is true—and I cannot refrain from quoting it, in this connection, as well. At pp. 780-1, Lord Atkinson said: "In truth, in one sense, the catching of an infectious disease is always fortuitous or accidental. There is always an element of chance in it. The fact well known to everybody in his daily experience that if a given number of ordinary persons be at the same moment, and under the same external circumstances, brought into contact with the same source of infection, some of them will catch the disease, while others will escape it, proves this."

It was argued, and this view is adopted by a majority of the Court, that we are bound by the judgment of the Supreme Court of Canada in *Scotland* v. *Canadian Cartridge Co.*, 50 D.L.R. 666, 59 Can. S.C.R. 471. Assuming that a question of jurisdiction was decided in that action, and, with great respect, I am not of that opinion, the conditions surrounding Scotland's injury and the principles applicable in that case are so obviously different from the facts as found in this action that they can afford no guide as to where the plaintiff in this action should seek compen-

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sation for his injuries. The defendants' factory in the *Scotland* case was built and maintained according to the plan and intention of the defendants, and without any provision for proper ventilation. The poisonous gases occasioning the injury were perceptible to the senses, the odor was distinct, offensive, and nauseating, the vapours were visible to the eye, particularly in cold weather, with the windows closed. The conditions, and the probable effect of the conditions, was known to everybody about the factory, including Scotland himself. Knowing all this, he accepted the employment, and, experiencing the evil effects from time to time, he still kept on working until through illness he could work no longer. The case comes within a line of decisions under the English Act in which it was held that the condition occasioning the injury was so clearly incidental to the employment, the liability to infection or disease was so obvious, the occurrence was so clearly something to be expected, that it must be said that the workman knowingly understood the risk, and it could not be said that the injury was "by accident."

I refer to such cases as *Martin* v. *Manchester Corporation* (1912), 5 B.W.C.C. 259—a workman engaged to clean out the mortuary of a fever hospital: *Broderick* v. *London County Council*, [1908] 2 K.B. 807—a man working on sewers: and *Eke* v. *Hart-Dyke*, already referred to. These cases are all under a statute in which "by accident" is to be interpreted according to its plain ordinary meaning: *per* Mathew, L.J., in the *Steel-Cammell* case above referred to [1905] 2 K.B. at p. 237. It is not so under our Act, by reason of the interpretation clause, and for other reasons already discussed. Any happening, probable or improbable, foreseen or unforeseen, and "not being the act of the workmen," appears to be within the purview of our Act.

Upon Scotland's application for compensation under the Act, the Workmen's Compensation Board decided that it was not a case of "personal injury by accident," and, upon a hearing, at the instance of the employers, re-affirmed the decision. Scotland's rights, if any, were under Part I. of the Act (4 Geo. V. ch. 25, Ontario). By sec. 60 the Board is given "exclusive jurisdiction to examine into, hear and determine all matters and questions arising under " Part I., "and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court."

Scotland's right to redress, therefore, if any he had, was by action; and he brought action for damages, the action I have been referring to, and obtained judgment upon the findings of a jury. The defendants, amongst other things, set up the

exclusive jurisdiction of the Board. This plea should not have been allowed to remain upon the record, but apparently the defendants did not move to have it struck out. The Court of Appeal (1919) 48 D.L.R. 655, (45 O.L.R. 586) set aside the judgment upon the ground that there was no evidence to support the jury's findings, the Chief Justice of the Common Pleas, who delivered the judgment of the Court, pointing out that the decision of the Board referred to was not open to review.

Upon appeal, the judgment of this Court was unanimously reversed by the Supreme Court of Canada, upon the ground that there was evidence upon which the jury could reasonably find for the plaintiff. The head-note of the case is erroneous. There was not, and, by reason of the statute, could not be, any judicial review of the decision of the Board. It is true that three of the six Judges, the Chief Justice, Mr. Justice Idington, and Mr. Justice Brodeur, incidentally expressed the opinion that the Board's decision was right, the latter evidently overlooking that it is not necessary under our Act that the notice should specify the date of the accident. Mr. Justice Duff pointedly refrained from expressing any opinion. Mr. Justice Mignault adopted the judgment of Mr. Justice Anglin; and Mr. Justice Anglin, with characteristic brevity and clearness, defines his attitude, 50 D.L.R. at p. 680, in this way: "The reconsideration by the Board of the plaintiff's claim for compensation was at the instance of the present defendant, and I agree with the learned Chief Justice of the Common Pleas that the Board's conclusion that the plaintiff's claim was not founded on a personal injury by accident within the meaning of the Act is binding on the defendant and not open to review in this action—If the question were open I should incline to apply and follow the decisions in *Steel* v. *Cammell Laird & Co. Limited* [1905] 2 K.B. 232; *Martin* v. *Manchester Corporation* (1912), 5 B.W.C.C. 259; *Broderick* v. *London County Council*, [1908] 2 K.B. 807; and *Eke* v. *Hart-Dyke*, [1910] 2 K.B. 677."

With this weight of eminent opinion in its favour, and for this reason only, I will not challenge the decision of the Board: I point out that it is the decision of the Board only, and binding only between the parties to it; and it has not the weighty sanction of a judgment of the Supreme Court of Canada.

Quite aside from all this, the conditions there and here are clearly distinguishable. Scotland knew of the condtions when he entered the service, and was reminded of them every day he was at work. In this case no one knew, and it is charitable to assume that even the defendants did not suspect, that the water

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was impure. There was no other Canadian case referred to touching the question of jurisdiction.

I would allow the appeal and dismiss the action.

Appeal dismissed (MEREDITH, C.J.C.P., *and* LENNOX, J., *dissenting*).

REX v. REGINA WINE AND SPIRITS LTD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

APPEAL (§XI—720)—SASKATCHEWAN TEMPERANCE ACT, 1920, CH. 70, SEC. 39—BREACH—CONFISCATION OF LIQUOR—RULE 2, IMPERIAL ORDERS IN COUNCIL, JUNE 4, 1918—CONSTRUCTION—RIGHT TO APPEAL TO PRIVY COUNCIL.

The Saskatchewan Temperance Act as amended by, 1920, ch. 70, sec. 39, provides that no appeal shall lie from any order or conviction save to a Judge of the King's Bench who may reserve any question for the opinion of the Court of Appeal, the Court held that where these proceedings had been followed, the Court of Appeal had no jurisdiction to grant leave to appeal to the Privy Council, notwithstanding Rule 2 of the Imperial Order in Council of June 4, 1918, giving an appeal as of right where the matter in dispute amounts to or is of the value of $4,000, the rule not applying to the amount of a penalty imposed by fine or forfeiture under a penal statute, and the question involved not being of sufficient public importance to warrant such leave being granted under clause (b) of the Rule.

[*Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, 49 L.J. (P.C.) 63, applied.]

APPLICATION for leave to appeal from the judgment of the Saskatchewan Court of Appeal (1922), 65 D.L.R. 649, upon a case stated for the opinion of that Court as to the proper interpretation of certain sections of the Saskatchewan Temperance Act. Leave refused.

T. D. Brown, K.C., Director of Prosecutions, for the Crown.

D. A. McNiven, for respondent.

HAULTAIN, C.J.S.:—This is an application for conditional leave to appeal to His Majesty in Council from the judgment of this Court herein, dated May 16 last, and for an order fixing the conditions as to security or otherwise to be complied with in order to obtain final leave to appeal.

By the Imperial Order in Council of June 4, 1918, Rule 2 provides that appeals from this Court shall lie, (a) as of right, from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of four thousand dollars, or where the claim involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of four thousand dollars

or upwards, and (b) at the discretion of the Court from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

If the case comes within clause (b) of Rule 2, I do not think that leave to appeal should be granted. The judgment proposed to be appealed from, following the decision in *Boyle* v. *Smith*, [1906] 1 K.B. 432, 75 L.J. (K.B.) 282, 54 W.R. 519, applied a well established principle of law to the particular facts of the case.

It was argued on behalf of the Crown that the claimant company could not invoke that principle on account of the language of sec. 69 (13) of the Saskatchewan Temperance Act R.S.S. 1920, ch. 194.

As any doubt on this point seems to me to have been removed for the future by a recent amendment to the Act, which came into force on the first day of the present month, there is no question of general or public importance to be decided.

The application under Rule 2 (b) was made alternatively to an application for conditional leave to appeal and for an order fixing the conditions as to security and otherwise. Mr. Brown argued that, as the liquor seized was of a value exceeding $4,000, an appeal lies as of right under Rule 2 (a).

I am not disposed to give to the section of the Act (sec. 75 (3)) the binding effect attributed to it by counsel for the respondent, as, even if the Legislature has the power to limit the right of appeal to His Majesty in Council, that right is not explicitly taken away by the sub-section in question.

I agree with my brother Turgeon, but with the hesitation expressed by him, that Rule 2 (a) does not apply to the amount of a penalty imposed by fine or forfeiture under a penal statute. As was recently decided by the Privy Council in *R.* v. *Nat Bell Liquors, Ltd.*, 65 D.L.R. 1, 37 Can. Cr. Cas. 129, [1922] 2 A.C. 128, the proceedings in this case are criminal and not civil. In view of the usual rule of the Judicial Committee not to grant special leave to appeal in criminal cases, except under very exceptional circumstances, it may not be unreasonable to construe the rule in question, in so far as it allows an appeal "as of right" in certain cases, as referring exclusively to civil appeals.

I would, therefore, refuse the application, with costs.

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REX v. REGINA WINE & SPIRITS LTD.

Lamont, J.A.

LAMONT, J.A.:—This is an application on behalf of the Crown for leave to appeal from the decision of this Court to the Privy Council.

Section 75, sub-sec. (1) of the Saskatchewan Temperance Act provides for an appeal from an order or conviction made by a magistrate to a Judge of the Court of King's Bench. Sub-sec. (2) provides that the Judge of the Court of King's Bench appealed to may reserve for the opinion of the Court of Appeal any question of law arising out of the appeal or out of the proceedings preliminary, subsequent, or incidental thereto. It then goes on to provide, in sub-sec. (3), (added by 1920, ch. 70, sec. 39) as follows:—

"(3) No appeal save as is provided in this section shall be had from any order or conviction hereunder."

In this case, there was an appeal from an order made by a magistrate to a Judge of the Court of King's Bench 60 D.L.R. 461. That Judge reserved certain questions of law for the opinion of this Court. In the opinion of this Court, the liquor seized had not been properly forfeited to His Majesty. Hence the desire of the Crown for leave to appeal.

In *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, 49 L.J. (P.C.) 63, an application was made to the Court of Queen's Bench, Quebec, for leave to appeal in a matter arising under the Insolvency Act enacted by the Parliament of Canada. That Act provided that the judgment of the Court of Queen's Bench, which was the Appellate Court in Quebec for matters under the Act, should be final. That Court refused leave to appeal on the ground that no further appeal lay. An application was then made to the Privy Council, and this was granted; but their Lordships held that the Judges below were right in holding that they had no power to grant leave to appeal.

By an Order in Council dated June 4, 1918, rules were made under the Judicial Committee Act, 1844, ch. 69, respecting the Practice and Procedure in Appeals to His Majesty in Council. The Order provided that an appeal should lie (a) as of right from any final judgment of this Court where the matter in dispute on the appeal amounts to or is of the value of $4,000 or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of $4,000 or upwards, and (b) in the discretion of the Court, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise,

ought to be submitted to His Majesty in Council for decision.

In my opinion, these rules must be limited in their application to cases in which there is no statutory enactment prohibiting an appeal beyond the Canadian Courts. I do not think the Order in Council was intended to overrule federal or provincial legislation. Rule 28 of the Order, reads as follows:—

"28. Nothing in these rules contained shall be deemed to interfere with the right of His Majesty, upon the humble petition of any person aggrieved by any judgment of the Court to admit his appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose."

If, therefore, the person aggrieved should not be entitled to appeal under these rules, it is still open to him to petition His Majesty to hear the appeal. And that right, in my opinion, is not taken away by a provincial enactment prohibiting any appeal to lie beyond the provincial Courts. In other words, that, notwithstanding the prohibition, His Majesty may still entertain the appeal if he deems it advisable to do so. The prohibition, however, in my opinion, is effective to prevent provincial Courts from granting leave to appeal. Such leave must be obtained from His Majesty.

For these reasons, the application, in my opinion, must fail.

TURGEON, J.A.:—The Imperial Order in Council of June 4, 1918, governing appeals from decisions of this Court to His Majesty in Council, provides in Rule 2 that such appeals shall lie, (a) as of right when the matter in dispute on the appeal is of the value of $4,000 or upwards, and (b) at the discretion of this Court, in any other case where the question involved is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision. The Director of Prosecutions contended that the case at Bar comes within the provisions of clause (a) so as to confer upon the Crown an appeal as of right, as the liquor ordered to be forfeited by the judgment against the respondents in the Court below was of the value of $7,000. I have come to the conclusion, after a great deal of hesitation, I admit, that his contention upon this point is not well-founded. It is true that the value of the liquor ordered to be forfeited here is $7,000, but I do not think this clause was meant to include the amount of a penalty imposed by fine or forfeiture under a penal statute. However, if I am wrong upon this point, the Crown will not, I think be without redress, because, if the

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appeal lies as of right, I do not think anything contained in this judgment can destroy that right.

In the alternative, however, the Crown applies for leave to appeal under the provisions of clause (b), on the ground that the question involved is of sufficient public importance to warrant such leave being granted. Upon this point it is contended on behalf of the respondent that the application should be refused, (1) because the Saskatchewan Temperance Act provides in sec. 75 (3) that no appeal shall lie from any order or conviction save to a Judge of King's Bench, who may reserve any question of law for the opinion of this Court, as was done in this case; and (2), because, in any event, the reason of great public importance urged by the Crown does not exist.

I do not think it is necessary to decide the larger question raised in the first objection, as, in my opinion, the application for leave to appeal should be refused upon the second ground alleged against it. The question which the Director of Prosecutions urges as being of great public importance pertains to the liability of a principal for the wrongful acts of his agent committed in circumstances such as existed in this case and in the case of *R.* v. *Busy Bee Wine, etc. Co.* (1921), 60 D.L.R. 415, 14 S.L.R. 343, 36 Can. Cr. Cas. 93, which was decided by this Court on July 7, 1921. It seems to me, however, that the law upon this question has been settled for the future by the Legislature itself, which amended the Saskatchewan Temperance Act at its last session by adding the following sub-section to sec. 91 (as amended by 1921-22 ch. 76, sec. 18):

"(2) In any proceeding under this Act, proof of one unlawful sale of liquor shall suffice to establish the intent or purpose of unlawfully keeping liquor for sale in violation of this Act, and where such sale is by an agent or employee it shall be deemed, until the contrary is conclusively proven, that such agent or employee was acting within the scope of his authority or employment."

As I can find no ground, except the one of which I have just disposed, upon which it may be argued that there is a question of general or public importance involved, I think the application should be dismissed with costs.

McKAY, J.A., concurred with TURGEON, J.A.

Judgment accordingly.

FORSTER v. TORONTO R. Co.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 24, 1921.

CARRIERS (§ IIK—215)—ACCIDENT—PASSENGER ON WRONG CAR—TRANSFER—DIRECTIONS BY THE CONDUCTOR—INJURY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—FINDINGS OF JURY.

The question of contributory negligence is one for the jury, and an otherwise negligent act may be excused, when it is apparent from the evidence that the injured party was acting on the advice of, and under instructions from the defendant's employee.

[*Barr* v. *Toronto R. Co.* (1919), 49 D.L.R. 444, 46 O.L.R. 64, distinguished; *Ellis* v. *Hamilton Street R. Co.* (1920), 57 D.L.R. 33, 48 O.L.R. 380, referred to.]

AN appeal by the defendant company from the judgment of ROSE, J., at the trial, on his finding as to a release pleaded by the appellant company, and upon the findings of the jury, in favour of the plaintiff for the recovery of $1,350 and costs in an action for damages for personal injury sustained by the plaintiff by reason, as she alleged, of the negligence of a servant of the defendant company.

The plaintiff was a passenger upon a street-car of the defendants, which she had entered by mistake. Finding her mistake, she obtained from the conductor a transfer-slip and alighted from the car. She was directed by the conductor, as she alleged, to go behind the car in which she had been travelling, and cross to the opposite side of the street; she attempted to follow what she understood to be the instruction given her, and was knocked down by a car going in the opposite direction, and injured. The jury at the trial, in answer to questions, found negligence of the defendant company in "the conductor directing the lady into the danger," and negatived contributory negligence.

The trial Judge found in favour of the plaintiff upon the issue as to the validity of a release of the cause of action set up by the defendant company.

Gideon Grant, K.C., for appellant company.

A. G. Slaght, K.C., for respondent.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 27th May, 1921, which was directed to be entered by Rose, J., on his finding as to the release pleaded by the appellant, and on the findings of the jury, at the trial at Toronto on that and the previous day.

The respondent sues to recover damages for personal injuries alleged by her to have been sustained owing to the negligence of the appellant.

The respondent took passage on a south-bound Broadview car of the appellant, at the corner of that avenue and Danforth

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avenue, intending to go to Muriel street, the locality of which she did not know. She took passage on this car because she was informed by a gentleman that it was the proper one by which to reach her destination. Finding, as I gather from the evidence, that she was going in the wrong direction, she obtained from the conductor a transfer to the north-bound Broadview line. When the car reached the stopping-place at Withrow avenue, according to the respondent's testimony, the conductor told her to "jump out" or "now, get out quick"—she makes use of both expressions. The respondent, seeing an automobile approaching, desired to stop until it had passed, and the car she was on had moved on, when she intended to cross the road to take the upbound car or get to the nearest pavement—it is not clear which. According to her testimony, the automobile had not quite stopped, and the conductor said to her, "Get off the step, I must start this car." She replied, "Half a minute till the car stops," to which the conductor answered, "Come this way, that car won't hurt you, come this way," that the conductor got off the step and "pointed round with his arm" for her to go behind the car.

Acting, as she said, upon this, she proceeded to pass behind the car she had been on, on her way to the stopping place. She also testified that she told the conductor that that was not the right way, and that he said it was quite safe. The respondent was hurrying on on her way and after taking two steps she was knocked down by the north-bound car and injured. She did not look to see if a car was coming. It appears that there was a motor-truck also a few feet behind the car on which the respondent was. Mrs. Davis, who was on the car, testified that, when the car came to the stopping place, the respondent got up to get out, and that there was an auto-truck standing and it had scarcely stopped, that the engine was running, that the respondent got on the step, and the conductor motioned to her to come and spoke to her, but that she did not hear what he said, that the respondent then got on the pavement, and the conductor got one foot down and swung around the car and "pointed behind the car."

The testimony of the respondent and Mrs. Davis was contradicted in some respects by the conductor of the car (Leonard Gordon Spicer). According to his testimony, the auto-truck was 25 feet away and the other automobile just behind it; the respondent hesitated and did not want to get off, because she was afraid that they would pass the car while she was getting off, he told her it was quite safe for her to leave the car, as "autos" must stop behind standing street cars; she then stepped off; he

then rang the bell for the car to start and turned around and saw her stop "right immediately behind the car." He denied having gone down on the step and pointed around the back of the car for the respondent to go that way, or having indicated to her that she was to go behind the car, and said that he did not tell her to hurry; that all that he did was to tell her that she would have to cross the street to take the north-bound car; he admitted that it was a "hurry up job to get the car away from the transfer-point," and that he got a "little impatient at her at the end because she did not understand and did not mean to."

It appears also from the evidence of the conductor that the cars were running half a minute apart.

The jury found as follows:—

"Q. 1. Were the injuries of which the plaintiff complains caused by the negligence of the defendants? A. Yes.

"2. If so, in what did such negligence consists? A. By the conductor directing the lady into danger.

"3. Could the plaintiff have avoided the injury by the exercise of reasonable care? A. Being influenced by the conductor's directions, she was unable to avoid the accident."

It is plain that the jury accepted the account given by the respondent and Mrs. Davis as to her having been directed by the conductor to pass behind the car in order to reach the transfer-point, and if they accepted that account they were, in my opinion, warranted in finding negligence. It was, especially in view of the rapid service on the line, a dangerous way to take, and this was or should have been known to the conductor.

It was argued that, upon her own shewing, the respondent was guilty of contributory negligence; that she admitted that she did not look for an approaching car before proceeding to cross the uptown rails. It does not necessarily follow that because she did not look she was guilty of negligence. The question of contributory negligence is one eminently for the jury, and they may well have thought, as they did think, that she was to be excused for doing what ordinarily would be a negligent act, on account of what was said to her by the conductor, which she may well have thought to have been an assurance by him that there would be no danger from a north-bound car.

It was suggested upon the argument that she could not have thought, and if she had thought there was no warrant for her thinking, that the conductor's action was an assurance that there was no danger from other vehicles. Admitting that, the answer is, I think, that the question is not, had she been injured by another kind of vehicle, whether she would, as against it, have been guilty of contributory negligence; but the question is, as

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to the appellant and its cars, was she guilty of such negligence? It may well be that in crossing as she did she took the risk of injury by other vehicles, but it surely does not lie in the mouth of one, who has assured another that he may safely do something without fear of danger, to say to the person who has done it that he was negligent for not having done that which he had told him he need not do.

In dealing with the question of contributory negligence the jury in all probability took into consideration the age of the respondent and the excitement under which she was labouring owing to the urgency of the conductor in having her leave the car and the fear she was apparently under of danger from the motor-truck and the automobile.

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

We disposed of the appeal as to the finding of the learned Judge on the issue as to the release pleaded by the appellant adversely to it, and that appeal also should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—It is somewhat hard to believe that the conductor should have, in fact, directed the respondent to cross the street behind his car, a thing that is reprobated by the company and universally known to be wrong and dangerous. The question, however, is whether the findings of the jury are sufficient to make the appellant, as a company, liable: *Ogle* v. *B.C. Electric Co.* (1913), 12 D.L.R. 261, 18 B.C.R. 692, affirmed by Sup. Ct. of Canada (1914) 6 W.W.R. 683. It was the respondent who put herself in motion, and she, in following the conductor's direction, was bound to make her way with care and circumspection. It was argued that the company was under an obligation to a passenger, when making her way from one car to the other on a transfer, greater than had the passenger been put down upon the street at the end of her journey.

The case of *Barr* v. *Toronto R. Co. and City of Toronto* (1919), 49 D.L.R. 444, 46 O.L.R. 64, is cited as authority. I do not think that what was said in it necessarily establishes the proposition of law contended for. There, the company put the passengers down on the street under circumstances which left them no option as to the path they should take to get to the sidewalk, and then, while they were on that path, wrongly manipulated their car so as to injure them. This was sufficient to make the company liable, irrespective of the fact that they were intending

to resume their journey on another car of the company, by virtue of the transfer-slip. Here, however, when the respondent finally got down and stood waiting in apprehension that the motor-cars would start and so put her in peril, the conductor indicated that she could cross the street behind the car, and that she could do this safely. This amounts, not only to a direction of the way the respondent should take to utilise her transfer, but to an assurance that in so doing there was, at the moment, no danger to be apprehended.

The case of *Ellis* v. *Hamilton Street R. Co.* (1920), 57 D.L.R. 33, 48 O.L.R. 380, decides that an electric company discharging a passenger on the street is not responsible for that passenger's injury in crossing the street, and is not bound to warn the passenger. But, when the conductor undertakes to guide the passenger by indicating when and how she is to proceed so as to use a transfer-slip, and adds an assurance that his advice may be safely followed, I think the appellant cannot successfully argue that he has gone beyond the scope of his authority. What he did was in furtherance of the company's obligation to carry the passenger farther; and, while he need not help her on her way, it cannot be said that if he does do so he has performed an unwarranted action.

I think this case illustrates one of those positions which, as I ventured to point out in the *Ellis* case, might render a street railway company liable.

Whether or not the act that the conductor did was negligent may be judged by its consequences, if the result indicates that a reasonable man should have anticipated that what happened might be a natural result of that act. In this case the conductor was on the platform of a car in which the door was on the east side, and so permitted a view into the interior and through the windows of the car on that side. If he looked he was in a position to judge of the correctness of his advice, and if he did not look he was careless.

There is more difficulty upon the question of contributory negligence. But the respondent's want of care was met upon the instant by the danger into which she was led by the conductor, and it is unnecessary to consider what her rights might be had she escaped the immediate hazard and attempted to cross the remaining part of the street and failed to avoid a motor-car on it beyond the appellants' tracks.

On the whole and with some doubt, I think the appeal should be dismissed.

FERGUSON, J.A.:—To my way of thinking, the defendant railway company did not owe to the plaintiff the duty of giving her

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a transfer to go back to the point where she made her mistake, or of directing her how, after she left the car, to proceed to the transfer-point so as to avoid the traffic on the highway. Both acts were gratuitous acts of the conductor, not called for by the contract of carriage. No doubt they owed her the duty to provide a reasonably safe place to alight and to give her opportunity to do so—these things they did. Had the transfer been properly given, it would have been the duty of the defendant company, if asked to do so, to indicate the point of transfer and tell the plaintiff that, after she left the car, she must cross the highway in order to reach that point, but it seems to me a different thing to say that the company was under a legal duty to give the transfer and also to direct and instruct the plaintiff when and how she could cross the highway, so as to avoid being injured by other vehicles or persons on the highway: *Ellis* v. *Hamilton Street R.W. Co.*, 57 D.L.R. 33, 48 O.L.R. 380; *Oddy* v. *West End Street R.W. Co.* (1901), 178 Mass. 341, at p. 349.

It may be that, though neither the railway company nor its conductor was under any antecedent obligation to give the transfer, or to advise and direct the plaintiff how to proceed so as to avoid the dangers of the traffic, yet, the conductor having gratuitously undertaken to do so, the law cast on him the duty to do what he had undertaken without negligence; but I am of opinion that the conductor could not and did not, by gratuitously assuming to do something not called for by the contract between the plaintiff and the company, impose upon his employer a duty or obligation arising outside of its contract: see *Birmingham Railway Light and Power Co.* v. *Seaborn* (1910), 168 Alabama 658, at p. 662.

To hold the defendant company liable because its conductor, impelled by kindly and decent instincts, but without legal duty to do so, undertook to assist this lady by giving her a transfer which the company was under no legal obligation to supply, and advising her how and where to go to make use of such transfer, with the result that she was injured by the ordinary traffic, would, I think, be putting a premium on incivility.

I would allow the appeal.

Appeal dismissed (FERGUSON, J.A., *dissenting*).

PERRY v. CANADIAN PACIFIC R. CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

MASTER AND SERVANT (§V—350)—INJURY TO WORKMAN—ACTION AT COMMON LAW—VERDICT FOR PLAINTIFF—REVERSAL ON APPEAL—APPLICATION UNDER WORKMEN'S COMPENSATION ACT (SASK.)—DEDUCTION OF COSTS FROM COMPENSATION ALLOWED—RIGHT OF PLAINTIFF TO DISTRICT COURT COSTS—PROCEDURE UNDER THE ACT.

A workman who brings an action at common law for injuries received and after gaining a verdict at the trial, has his action dismissed by the Court of Appeal, and then makes an application to have compensation fixed under the Workmen's Compensation Act (Sask.) should have deducted from the compensation awarded him under the Act, the difference between the costs taxable to the defendant at the trial plus the costs of the appeal and the sum which the plaintiff would have been entitled to tax on the District Court scale if his action had been turned into a claim for compensation at the trial.

It is not necessary for the Judge on the trial to make any finding or endorse on the record, that the injury was one for which the defendants would be liable under the Act, in order to enable him to assess compensation and adjudge that same be paid on an application under the Act. It is sufficient if the notice to fix the compensation is given within 30 days after the disposition of the appeal.

[*Western Trust Co.* v. *City of Regina* (1917), 39 D.L.R. 759, 55 Can. S.C.R. 628; *Cohen* v. *Seabrook Bros.* (1908), 25 Times L.R. 176; *Cattermole* v. *Atlantic Transport Co.*, [1902] 1 K.B. 204, 71 L.J. (K.B.) 173, 50 W.R. 129; *Follis* v. *Schaake Machine Works* (1908), 13 B.C.R. 471, applied. See also 62 D.L.R. 688.]

APPEAL by defendant from an award (1922), 63 D.L.R. 702, made under the Workmen's Compensation Act R.S.S. 1920, ch. 210. Varied.

D. Buckles, K.C., for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an appeal from an award made under the Workmen's Compensation Act, R.S.S. 1920, ch. 210. The plaintiff was an employee of the defendants and was injured through being run over by one of their cars, losing his left leg thereby. He brought an action at common law against the defendants, alleging that his injuries had been caused through their negligence. The action was tried in June, 1921, at the city of Swift Current. The jury brought in a verdict for the plaintiff, and the trial Judge entered judgment for the amount awarded. On appeal to this Court that judgment was reversed, 62 D.L.R. 688, and judgment entered for the defendants, as in the opinion of the Court there was no evidence of any negligence on the part of the company. The judgment of this Court was delivered on December 14th, 1921. The plaintiff's solicitor then applied to the trial Judge to fix a date for the hearing of an application to have assessed the compensation to which the plaintiff would be entitled under the Workmen's Compensation Act. The Judge fixed February 7 at Swift Current, as the time and place at which he would hear the application. On January 12, 1922, notice of the application

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was served on the defendants. At the hearing the Judge assessed compensation to the plaintiff in the sum of $2,000, but refused to deduct therefrom the costs of the common law action and of the appeal. The defendants now appeal to this Court.

The grounds upon which the appeal is based are as follows:

1. That the trial Judge had no power to assess compensation and adjudge that the same be paid to the plaintiff, because, (a) he did not make any finding on the trial or endorse on the record that the injury to the plaintiff was one for which the defendants would be liable to the plaintiff under the Workmen's Compensation Act, and (b) he did not assess the compensation within 30 days after the judgment of this Court on the appeal: 2. The Judge erred in not deducting from the compensation which he awarded the defendants' costs of the trial and the costs of appeal.

Section 8 of the Workmen's Compensation Act reads as follows:—

"8. If within the time limited for bringing an action under this Act an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action that the injury is one for which the employer is not liable in such action but that he would have been liable to pay compensation under this Act the action shall be dismissed; but the Judge before whom such action is tried shall, if the plaintiff so chooses, either immediately or in case of an unsuccessful appeal upon notice to the opposite party within thirty days after the disposition of such appeal, proceed to assess such compensation and to adjudge the same to the plaintiff, and he shall be at liberty to deduct from such compensation all or part of the costs which in his judgment have been caused by the plaintiff bringing his action independently of this Act instead of proceeding under the same, and also, in cases where there has been an appeal the costs of the appeal."

In my opinion, the trial Judge was right in rejecting the contention of the defendants on both branches of the first ground of appeal, as above set out. On the first branch the judgment of the Supreme Court of Canada in *Western Trust Co.* v. *City of Regina* (1917), 39 D.L.R. 759, 55 Can. S.C.R. 628, is conclusive.

On the second branch, the appeal to this Court was an "unsuccessful appeal" so far as the plaintiff was concerned, and the notice to fix the compensation was given within 30 days after disposition of the appeal. In my opinion, the section

does not require that the assessment should be actually made within the 30 days.

The only other ground of appeal is as to costs. The Judge, 63 D.L.R. 702, refused to deduct from the compensation awarded the costs of the trial and of the appeal, which had been awarded to the defendants. For so refusing he gave at p. 705 the following reasons:—

"In this case the plaintiff had one leg removed in the accident; he is without any means of support, and I cannot bring myself to the view that this is a case where these costs should be deducted from the sum awarded. He is a young man and no sum awarded will not do much more than keep up an artificial limb, with the aid of which he may be enabled to secure some employment to keep himself and his family. There will be no costs of the application."

With all deference, I am of opinion that the above reasons cannot be supported as a proper principle upon which to base an award of costs. I am unable to see how the nature or extent of the workman's injuries or the financial needs of himself and family can be taken as a guiding principle for a refusal to deduct costs already awarded to the defendants, if such costs should, as a matter of right, be otherwise deducted.

The disposition of costs, it is true, is in the discretion of the trial Judge, but that discretion must be a judicial one and based upon proper principles. The reasons given by the Judge show that he exercised his discretion, not judicially, but benevolently towards the workman. Having based his refusal upon a wrong principle, it is necessary for this Court to determine whether or not, under the circumstances of the case, the deduction should be made.

This question has been before the English Courts under a Workmen's Compensation Act similar to ours. In *Cohen* v. *Seabrook Bros.* (1908), 25 Times L.R. 176, the plaintiff, as in the present case, brought his action at common law. That action was dismissed. He then applied to have compensation assessed under the Workmen's Compensation Act. It was assessed, but Darling, J., who was the trial Judge, said that the costs of the common law action must be deducted.

The subject was reviewed by the Court of Appeal in England in *Cattermole* v. *Atlantic Transport Co.*, [1902] 1 K.B. 204, 71 L.J. (K.B.) 173, 50 W.R. 129. In giving the judgment of the Court, Stirling, L.J., after pointing out that the assessment of compensation was a proceeding in the action pp. 209-210, said:—

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PERRY v. CANADIAN PACIFIC R. CO.

Lamont, J.A.

"In our judgment the effect of the sub-section is to leave the Court in which the action is tried full liberty to exercise any power of awarding costs which it may have in the action, and to confer the additional power of deducting from the compensation costs caused by the plaintiff bringing the action instead of proceeding under the Act. Such costs, it may be observed, do not necessarily include all the costs of the action. In general the Court to try such actions is a county court. By s. 113 of the County Courts Act of 1888, all the costs of any action or matter in a county court, not otherwise provided for by that Act, are to be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction are to abide the event."

And further on he said at p. 210:—

"The learned Judge has dismissed the action, but has ordered the defendants to pay all the costs of the proceedings, and has not ordered any costs to be deducted from the compensation. In general this would not be right; but such an order may be justified by special circumstances, as if, for example, the judge were satisfied that no costs had been caused by the plaintiff bringing an action instead of proceeding under the Act. This matter is one within the discretion of the judge; it has not been shewn that the judge exercised that discretion on a wrong principle; and in the result the appeal fails and must be dismissed with costs."

In *Follis* v. *Schaake Machine Works* (1908), 13 B.C.R. 471, Martin, J., at p. 473, after pointing out that the defendant was entitled to the costs of the abortive common law action, said:—

"Then the plaintiff is entitled to such costs as would have been occasioned by proceedings brought in the ordinary way under the Workmen's Compensation Act, which will be set off against or deducted from those of the defendant, and the balance, which presumably in this case will be in favour of the defendant, will be deducted from the plaintiff's compensation and the necessary certificate given."

In this Province the point came before MacDonald, J. in *Dalrymple* v. *C.P.R.*, as appears from the judgment of Elwood, J.A., (1920), 55 D.L.R. 166, 13 S.L.R. 482. In that case MacDonald, J., dismissed the plaintiff's common law action. Counsel for the plaintiff then requested him to assess compensation under the Workmen's Compensation Act, which he did, fixing the amount at $2,000, and directing that the plaintiff should have the costs of the action on the District Court scale, and from

these should be deducted the costs of the defendants on the King's Bench scale. In my opinion, this is the proper principle to apply.

Under our Act, the action to obtain compensation must be brought in the District Court. Had the plaintiff brought his action there, he would have been entitled to the compensation awarded and costs on the District Court scale. He did not bring that action, but the statute makes provision by which, where he brings an action at law independently of the Act, he may obtain compensation in that action if the evidence submitted is sufficient to establish his right to it. It would seem on principle, therefore, that, in such a case, the plaintiff should have the costs to which he would be entitled if he proceeded under the Act, and the defendants should have the costs thrown away by reason of the plaintiff bringing the action at common law, instead of under the Act.

It seems to me only fair that, where a plaintiff is not willing to accept the amount to which he is entitled under the Act but claims a larger sum, independently of the Act, to which it is found he is not entitled, there should be deducted from the compensation awarded to him the expense to which he has put the defendant by his improper demand. If such were not done, workmen would be encouraged to bring actions independently of the Act for large damages, when they were only entitled to the compensation provided under the Act.

In 20 Hals., 196, the author says:—

"The penalty for suing the employer in such a case is that the Court when assessing the compensation is at liberty to deduct therefrom all or part of the costs incurred through the workman bringing an action instead of proceeding for compensation under the Act."

I am, therefore, of opinion that, except where special circumstances are shewn, a workman who brings an unsuccessful action independently of the Act should have deducted from the compensation awarded him under the Act the costs which he compelled the defendant to waste by his improper demand. Those costs in the present case are the difference between the amounts taxable to the defendants on the trial, in accordance with the principle of the *Dalrymple* case, plus their costs of appeal, and the sum which the plaintiff would have been entitled to tax on the District Court scale had his action been turned into a claim for compensation at the trial.

The appeal should, therefore, be allowed. The costs should

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be computed as above set out, and the amount found to be in the defendants' favour deducted from the compensation. As the defendants fail on the major part of their appeal, but succeed on the question of costs, I would allow no costs of appeal.

Judgment accordingly.

HAMON v. DUFRESNE.

Quebec King's Bench, Allard, Howard and Bernier, JJ. February 6, 1922.

BILLS AND NOTES (§IC—15)—NOTE GIVEN TO CONTRACTOR TO ENABLE HIM TO COMPLETE WORK—WORK NOT COMPLETED—ACTION TO RECOVER ON NOTE—LIABILITY—CONSIDERATION.

A defendant who gives his promissory note as an advance payment to plaintiffs so that they might be able to carry out the work they had undertaken to do for him as quickly as possible, will not be held liable on the note when the party to whom it is given has not carried out his contract or at least done work of a value equivalent to the amount of the note.

APPEAL by plaintiff from the judgment of the Quebec Superior Court, dismissing an action to recover the amount of a promissory note. Affirmed.

The judgment appealed from was as follows:—

"Considering that it has been proved that the defendants, by their own act, fault and negligence, and notwithstanding several complaints and *mises en demeure*, both by the defendant and the said Francini, neglected and refused to carry out their sub-contract, thereby forcing the defendant, whose patience must have been almost exhausted, to cancel his contract with the said Francini, as he had a right to do, which contract was, in the circumstances revealed by the evidence, the only law governing the parties, and further obliging the defendant to have the remainder of the work in question done by other contractors and workmen at a cost which according to the evidence must have far exceeded any sum which the defendant might be called upon to pay to the plaintiffs under the sub-contract between the latter and the said E. Francini, including the note which forms the basis of this action and even the amount of another note for $250 given in partial renewal of a previous note for $500 which was also given to the plaintiffs for their accommodation but which is not sued upon in the present action;

It is a matter of principle established by jurisprudence that a contractor cannot claim to be paid in advance any part of the price stipulated in his contract without first having completed all the work which he undertook by that contract to carry

out to the satisfaction of the party who bound himself to pay, unless there has been a stipulation to that effect. *Painchaud* v. *Trahan* (1916), 26 Que. K.B. 188;

The plaintiffs cannot legally take advantage of the fact that the defendant had given them accommodation notes for the sole purpose of obliging them, in order to force them to pay those notes, if they have not themselves fulfilled the clauses and conditions of their contract in letter and in spirit; that their position towards their debtor should not, therefore, be any better than would have been the case if they had received no payment in advance on account of the price under the said contract; that the drawer of those notes may, therefore, always refuse payment, so long as they remain in the hands of third parties in good faith, if the contractor does not fulfil his obligations and fails to carry out his contract in its entirety, no matter how small a part of the contract has been left undone, as the Court of Appeal quite rightly held in the case of *Painchaud* v. *Trahan, supra.*

In the circumstances revealed by the evidence, the plaintiffs' claim for the amount of the note in question, which the defendant does not owe them, is unfounded in fact and law—and that, therefore, they must fail in their action; doth maintain defendant's plea and doth dismiss plaintiffs' action with costs."

Campbell, McMaster & Papineau-Couture, for plaintiffs.

Taillon, Bonin, Morin & Laramee, for defendants.

ALLARD, J.:—I think the judgment appealed from is well founded in fact and in law. The defendant gave his note as an advance payment to plaintiffs so that they might be able to carry out the work they had undertaken from Francini as quickly as possible. The defendant advanced $1,000 in this manner by two notes for $500 each, paid $500 in cash on account of the two notes and renewed them for $250 each. One of these notes is now sued upon. Plaintiffs cannot demand payment unless they have carried out their contract or at least done work of a value equivalent to the amount they received from defendant. Now, the evidence clearly shews that they only did a part of the work they contracted to do for Francini and that defendant would have had to spend more than $1,000 to finish the work which plaintiffs had contracted to do, according to the plans. In fact, the defendant spent, in addition to the $500 paid to plaintiffs as aforesaid, a sum of $997 in completing the work which plaintiffs neglected and refused to carry

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out. If we add this latter sum to that of $500 paid to plaintiffs by defendant, we have a grand total of $1,497, and if the defendant were condemned to pay the amount claimed and also the amount of another note for $250—which defendant also gave to plaintiffs as above mentioned—he would have to pay $1,997 for work which the plaintiffs had undertaken to do for $1,375. And the evidence shews that the plaintiffs were themselves responsible for the discontinuance of the work. The defendant was justified in refusing to pay the note sued upon in the present action. For these reasons, I would confirm the judgment *a quo* with costs.

BERNIER, J.:—I would dismiss the appeal with costs.

HOWARD, J., dissented.

Appeal dismissed.

THE KING v. WORKMEN'S COMPENSATION BOARD, Ex parte BATHURST LUMBER Co.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., Barry and Grimmer, JJ. April 21, 1922.

CERTIORARI (§II—28)—WORKMEN'S COMPENSATION ACT, 1918 (N.B.) CH. 37—ASSESSMENT FOR INJURIES—CERTIORARI—OTHER ACTION PENDING—DISCRETION OF COURT IN GRANTING.

A writ of certiorari is not granted *ex debito justitiae* or as a matter of legal right but is an application to the sound discretion of the Court, and will not be granted where there are disputed questions of fact, which cannot be satisfactorily tried out on affidavit, and, which will be raised and determined in another action which is pending.

APPLICATION for certiorari and to quash an assessment made by the Workmen's Compensation Board of the Province of New Brunswick under the Provisions of the Workmen's Compensation Act, 1918 (N.B.) ch. 37. Rule *nisi* discharged.

W. B. Wallace, K.C., shews cause against a rule *nisi* for certiorari.

G. Gilbert, K.C., and *M. G. Teed*, K.C., support rule.

The judgment of the Court was delivered by

HAZEN, C.J.:—In my opinion, for the reasons which I shall briefly give, the rule should be discharged.

A writ of certiorari is not granted *ex debito justitiae* or as a matter of legal right, but is an application to the sound discretion of the Court, and that being the case it is not granted as a matter of course. In the present case there are some disputed questions of fact which cannot be satisfactorily tried out on affidavit, and which should in my opinion be tried by *viva voce* testimony taken in open Court. As a general proposition

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in certiorari cases the merits upon which the proceedings took place cannot be discussed in the Court above, but merely the form and sufficiency of the proceedings as appears on the face of them. In the case of *Lord* v. *Turner* (1870), 13 N.B.R. 13, an action for damages for destroying plaintiff's net by defendant's vessel running over it, the City Court of Saint John found that the plaintiff might have navigated his vessel so as to have avoided the accident, and the Court refused to grant a certiorari, it being a mere question of fact, and this may be regarded as authority for saying that certiorari does not lie where the question is one of fact. It appears too that the questions involved in this application are now pending for decision in the Court of King's Bench, the promovents in this case being the defendants therein. The King's Bench Division is another division of this Court, and I cannot understand why the parties should be using two Courts concurrently in regard to the same controversy or why they should be further permitted to do so.

Now it appears to me that the questions of fact involved in this case can be more satisfactorily settled at *nisi prius*. The same questions of law will be raised as in this application, and if error should exist there is a right of appeal, and the Court of Appeal, the questions of fact having been determined by a jury or a trial Judge sitting without a jury, would then be in a better position to decide the matters in dispute. My opinion is that in view of the circumstances of the case, the writ being discretionary, questions of fact being in dispute and there being another action pending, the Court should exercise its discretion by discharging the rule.

The question of the constitutionality of the Act and the authority of the local Legislature to pass it was raised upon the argument, but it no doubt will also be raised on the trial of the cause now pending, brought by the Compensation Board against the Bathurst Companies, and whatever the decision may be of the trial Judge on that point, an appeal can be taken to this Court, and all matters in controversy can then be determined.

Rule nisi discharged.

BEST v. LEFROY.

Yale County Court, B.C., Swanson, Co. Ct. J. August 3, 1922.

AUTOMOBILES (§IIIB—220)—PERSON PUSHING BICYCLE ALONG HIGHWAY —DUTY OF PERSON OVERTAKING—BICYCLE AS A VEHICLE—B.C. HIGHWAY ACT AS AMENDED BY 1920, CH. 32, SEC. 2 (19) — COLLISION—DAMAGES—LIABILITY.

A bicycle is a vehicle within the meaning of the British Colum-

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bia Highway Act, and the driver of a motor car who overtakes a person walking along the highway on the proper side of the road and pushing along his bicycle, is guilty of a violation of sec. 2 (19) of the Act as amended by 1920 (B.C.) ch. 32, if he turns out to his right in passing such person, and is liable for damages resulting therefrom.

[*Stewart* v. *Steele* (1912), 6 D.L.R. 1, 5 S.L.R. 358; *Campbell* v. *Pugsley* (1912), 7 D.L.R. 177; referred to. See Annotation 39 D.L.R. 4.]

ACTION to recover damages for injuries received as a result of being run down by defendant's motor car, while pushing a bicycle along the highway. Judgment for the plaintiff.

C. E. Falkner, for plaintiff.

H. C. DeBeck, for defendant.

SWANSON, Co. Ct. J.:—The plaintiff claims that whilst proceeding with his bicycle on October 17 last, about 6 o'clock in the evening, along the right hand side of Seventh St. in the City of Vernon in this county, he was overtaken by the defendant driving his automobile, and that through the defendant's negligence he was run down and seriously injured, his bicycle being also destroyed. He claims $1,000 damages. The defendant denies any negligence, and alleges that the regrettable accident occurred through the hesitating and negligent conduct of the plaintiff at the critical moment. The plaintiff who is a teamster was proceeding home in a southerly direction up Seventh St., which has a fairly steep grade. He rode his bicycle from Barnard Ave. (the main business thoroughfare of the city) to the foot of the hill on Seventh St., dismounted, pushing his bicycle along the sidewalk on the left hand side of roadway. He kept on this sidewalk until he got to the point where the road to the hospital (on the crest of the hill) leads on to Seventh St. When he reached point "A", delineated on the rough sketch-plan ex. 1, plaintiff being on foot and pushing his bicycle angled across Seventh St. to a point "B" on the right hand side of the roadway. When he got to a point 4 or 5 feet from the sidewalk on the right hand side of this roadway he says he heard a "whistle" (tooting of an automobile horn) and heard the words "get out of the way." He was knocked down by defendant in his automobile. Plaintiff knew nothing more until he regained consciousness in his room in the hospital, to which he was promptly conveyed by defendant. Plaintiff says he was well over to his right hand side of the travelled portion of the road. The width of the

Editor's Note:—It is believed that this is the first time in which the question as to whether a "bicycle" is a "vehicle" has arisen in British Columbia.

roadway between sidewalks where accident occurred is by actual measurement 45 feet. It is a fine clear piece of roadway without any obstructions to travel. Plaintiff says he did not notice any car lights before the accident. The city lights were on at the time. Plaintiff's back was turned to defendant as defendant came up the hill. Plaintiff says he looked down the road just before he left the sidewalk to cross the road, and saw no car. He says that just before the accident he was looking straight ahead of him in case a car should come around the corner on the street leading into Seventh St. He says his hearing is not "extra good," having at one time had rheumatic fever. As he pushed his bicycle along he says his head was naturally bent down a little.

Joseph Harwood, one of defendant's witnesses, who saw plaintiff coming up the hill pushing his bicycle, described plaintiff as having his head right down on his bicycle, stating that he seemed "absolutely tired out" and walked quite slowly, only 2 or 3 miles per hour. James Mutas saw plaintiff coming up left hand sidewalk. Mutas crossed road to right hand sidewalk and proceeded on ahead of plaintiff, but did not see him cross roadway. Later, when Mutas reached point "D", he heard the automobile horn and the words "look out." Mutas looked around, and seeing the defendant's car there, ran back to it, and saw plaintiff and bicycle underneath the car. The front right hand wheel of car was about 4 or 5 feet from the right hand sidewalk—car angling towards sidewalk—rear wheel one foot further away. He cannot say whether the lights of car were burning or not. I am satisfied from the evidence that defendant's lights were on. Mutas says he did not hear any other motor horns.

Mrs. Harrison who lives at the corner of Seventh St. and Armoury Road, was out for water at that hour, and found there was an accident outside her gate. She went outside to see what had happened, and saw defendant's car a few feet off the right hand sidewalk—just a few feet above her gate, the right front wheel of car being from 3 to 5 feet from the edge of sidewalk, rear wheel further away—car on an angle, its headlight facing toward west. Plaintiff was lying between car and sidewalk, having been pulled right out. Defendant was driver of the car.

The defendant, Lefroy, is the local postmaster, an honourable man, well-known to the Judge of this Court. He says he has had 2½ years' experience in driving his car. He says he drove a motor transport in France during the War. He says he had

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got up to the corner where Seymour's house is on Seventh St. when he saw plaintiff. It was 6.30 o'clock in the evening. His lights and the city lights were on. He was driving up hill on his right hand side of road at about 10 miles per hour. His car was labouring, making quite a noise, and he states that he could not go at a greater speed until he got his car fixed. He says his brakes were in good condition. Plaintiff was 30 yards away when he first saw him. Plaintiff was then just crossing from left sidewalk to middle of road, and he "seemed to go so aimlessly angling across to the right." Defendant says he sounded his horn but plaintiff took no notice the first time. After going another 10 or 15 yards, defendant sounded his horn again. Defendant (as he put it) "wanted to know what he (plaintiff) was going to do, but he could not tell from his movements what he was going to do." Defendant says that when he sounded his horn a second time plaintiff was just a few feet from the centre of the road towards right hand side—possibly 4 or 5 feet. Defendant says he then had ample room to go in front of him (that is by defendant turning out to his right) if plaintiff stayed where he then was. Defendant says that when he sounded his horn the second time the plaintiff looked over his left shoulder, and in doing so he turned his bicycle so that it pointed up the road. Defendant says that he then naturally supposed that plaintiff was waiting for him (defendant) to pass him on the right side of the road. Plaintiff then (he said) turned round and walked towards the right hand sidewalk, and in doing so he got right in front of defendant's car. Defendant said he was proceeding to pass him on his right, that there was ample room if he stayed where he was. Defendant says it was the hesitating manner of the plaintiff which caused the accident. Defendant says that there was, of course, ample room to pass plaintiff had he (defendant) turned out to his left and passed plaintiff on his left.

Defendant says that as soon as plaintiff turned to go in front of the car, defendant called out "look out, man—where are you going?" and then jammed on both of his brakes. The car thereupon stopped dead. Defendant then got out of the car and went around car, and found plaintiff lying with his legs behind front wheel of the car—the car wheels in line with his knee, his head being almost parallel with car, the bicycle being under front wheel of the car. Defendant had plaintiff immediately removed to the hospital in the immediate vicinity of the accident, not touching his car until he had properly seen the injured man into the hospital. Defendant says that his car was

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standing straight up the road parallel to Seventh St. Defendant says that when he blew his horn the second time plaintiff was 5 yards away from him. Defendant also added that after he had sounded his horn on this occasion, plaintiff looked over his left shoulder, giving defendant the impression that he was either going to stand still or continue on up a middle course in the road. Defendant visited plaintiff whilst he was confined in hospital for a month and voluntarily paid Dr. Baldwin's bill $35, and the hospital charges $62.

Defendant says he attributes the accident to the way plaintiff wandered about on road, and claims he did everything he reasonably could to avoid the accident, which he holds was inevitable as far as his conduct was concerned. He takes the position that the accident arose through no fault or negligence of his, and declines to pay the plaintiff's claim.

Mr. Falkner argues that a "bicycle" is a "vehicle" within the meaning of the Highway Act, and that the defendant has, accordingly, been guilty of a violation of his statutory duty, which under sec. 2 (19) of Highway Act Amendment Act 1920, ch. 32, requires a person travelling upon a highway in charge of a "vehicle" "overtaking any vehicle" to turn out to his left. Admittedly, defendant turned out to his right in overtaking plaintiff, when he had an abundant and clear passage way if he turned out to his left. On looking carefully into the authorities submitted by Mr. Falkner I think he is clearly right in his contention that a "bicycle" is a "vehicle". He refers to Huddy on "Automobiles," 5th. ed. p. 13. This is established by a ruling of Rose, J. in *Reg.* v. *Justin* (1893), 24 O.R. 327. In this judgment, reference is made to *Taylor* v. *Goodwin* (1879), 4 Q.B.D. 228, 48 L.J. (M.C.) 104, a decision of Mellor, J. and Lush, J. holding that a "bicycle is a carriage" within meaning of 1830-1 (Imp.) ch. 50, sec. 78, which latter case is quoted in Stroud's Judicial Dictionary, vol. 1, under title "carriage". I find the following definitions given in Webster's Imperial Dictionary (1913); "'bicycle' (bicyclus) a '*vehicle*' consisting of two wheels etc. etc. propelled by the feet of the rider. 'Vehicle' (vehiculum) *Carriage* from veho-*carry*—any kind of a "*carriage*" moving on land, either on wheels or runners, comprehending coaches, chariots, buggies, wagons, carts of every kind, sleighs, sleds and the like—a '*conveyance.*' '*Carriage.*' That which carries—a wheeled vehicle, any conveyance for carrying persons of things."

Clearly then, defendant violated his statutory duty in not

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turning out to his left. Defendant might have been excused for violating the statutory rule of the road if in doing so he could most likely have avoided any impending accident. In the circumstances of this case, there was no such likelihood of an accident had he followed the rule of the road and turned out to the left. This I am clearly satisfied it was his duty as a careful and prudent driver to do. The plaintiff was well over on his own side of the road. He was not, in any sense whatever, guilty of any contributory negligence. The plaintiff was very tired and exhausted. This was clearly apparent to Harwood, who saw the man labouring painfully up the hill. Defendant might have seen this quite as readily as Harwood.

Even assuming that a "bicycle" is not a "vehicle" and that plaintiff was a mere "pedestrian," I think defendant must be held to have been guilty of negligence in running him down. I have read a number of authorities and beg to briefly refer to following points:—21 Hals., article "Negligence," para. 631, and particularly paras. 714, 715, 716, 720, dealing with "neglect of or negligence in performing statutory duty". In this connection, I have read with interest a judgment of Lamont, J. in *Stewart* v. *Steele* (1912), 6 D.L.R. 1, at p. 4, 5 S.L.R. 358, quoting Lord Kinnear's words in *Butler* v. *Fife Coal Co.*, [1912] A.C. 149, also the exhaustive judgment of His Honour Judge Borden in *Campbell* v. *Pugsley* (1912), 7 D.L.R. 177, 185, 186. Pollock on Torts, 9th ed., pp. 200, 201, 202, (dealing with breach of statutory duties).

I also refer to Huddy on "Automobiles" pp. 492, 493, 494, 495, 502, 534, 535.

The defendant is, therefore, in my opinion clearly responsible in law for the serious injuries done to the plaintiff. Plaintiff was seriously injured and incapacitated from work for several months. Previously to his injury he had been in steady employment with Neil & Cryderman at $91.50 per month. He is now back in their service.

I will allow him for loss of wages, 5 months at $91.50 per month, $457.50; for physical pain suffered and general damage, I allow $250; for the bicycle (which has been practically ruined) $25. Total, $732.50.

The hospital expenses $62 and medical expenses $35 have already been paid by the defendant.

Judgment will be entered in favour of the plaintiff for $732.50 and costs.

Judgment accordingly.

CARON v. DEBIEN.

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Quebec Superior Court, Belleau, J. November 14, 1921.

ARREST (§I—4a)—ILLEGAL—DAMAGES—CASE NOT TERMINATED BY ACQUITTAL.

An action for damages for illegal arrest will not be entertained unless the case has been terminated by an acquittal.

ACTION in damages for malicious arrest. Action dismissed.

Camillê Côté, for plaintiff.

Lapointe & Stein, for defendant.

BELLEAU, J:—Plaintiff was arrested in January, 1920, and brought before the Magistrate for assault, on defendant's complaint, and claims $250 damages.

The defendant pleads good faith and reasonable and probable cause.

The parties are landowners at St. Clément, the plaintiff being the defendant's neighbour on both the east and west sides. A dispute having arisen between them, the defendant, who wished to pass from one portion of his land to another by crossing plaintiff's property, petitioned the municipal council which passed a by-law opening a winter road on plaintiff's land.

The inspector opened this road, the plaintiff closed it, and since the defendant persisted in his efforts to use it, the plaintiff opposed him forcibly. It was at this juncture that the defendant made his complaint and had the plaintiff arrested.

Whilst the case was pending before the Magistrate, the plaintiff began a civil action before the Superior Court, to have his property declared exempt from the right of way which the defendant was attempting to exercise. The latter pleaded in defence the municipal by-law, but the Superior Court declared that the by-law had no legal value and supported the plaintiff in his opposition to the exercise of the servitude on his land. (See (1920), 27 Rev. de Jur. 91.)

After commencing his civil action the defendant raised the question of ownership before the Magistrate, who declared that he would not give judgment before the Superior Court had adjudicated in the civil action. Since then the proceedings have not been continued, neither party having manifested the intention to proceed to judgment. Matters had reached this pass when the present action in damages was commenced.

I would hesitate to say that the defendant acted maliciously and without probable cause in having the plaintiff arrested, although there had been a difference between them for a considerable time, and the plaintiff was justified in using force

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to prevent trespassing on his property. The previous year a winter road was opened on plaintiff's property and was used without protest. Defendant commenced using the road again under the impression doubtless that the municipal council acted by virtue of powers conferred upon it by law. But, in any event, the warrant issued against the plaintiff is still in force and it is well established by jurisprudence that no recourse for illegal arrest can be entertained unless the case has been terminated by an acquittal.

True, the plaintiff alleges that defendant neglected to proceed with his complaint; and that the latter admits in his testimony, in support of his allegation of good faith, that he renounces it after the Superior Court judgment; but that is not sufficient since he can always continue the proceedings before the magistrate as long as his complaint has not been withdrawn.

For these reasons I think the action is not well founded, and I dismiss it with costs.

Action dismissed.

McLEAN v. MULLIN.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., Barry and Grimmer, JJ. April 21, 1922.

NEW TRIAL (§IIIB—16)—TITLE TO PROPERTY — ALLEGED PAROL CONTRACT —EVIDENCE—FINDING OF TRIAL JUDGE NOT EXPLICIT.

Where the title to property depends upon whether a parol contract was in fact made as alleged by the defendant and the trial Judge has made no explicit finding of fact with regard to the alleged agreement and has stated that he is doubtful in regard to it, the Court on appeal will order a new trial to determine.

APPEAL by defendant from judgment of Chandler, J. ordering a verdict to be entered for plaintiff, or for a new trial in an action to determine the ownership of certain land. New trial ordered.

J. B. M. Baxter, K.C., supports appeal.

H. A. Powell, K.C., *contra.*

HAZEN, C. J:—The substantial question involved in this case is the ownership of a portion of lot No. 16 in the parish of North Esk on the easterly side of the north west branch of the Miramichi River, a description of which is set out on p. 2 of the record in the case.

The defendant claims a title by possession and also claims that he purchased it from the late Richard Hutchison, and his evidence in that regard is as follows: It appears that on or

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about February 28, 1865, the defendant purchased from the late Richard Hutchison lot No. 17, which adjoins lot No. 16 on the south, for the sum of £200. He paid this amount by instalments, and by July, 1878 or about that time he had paid the whole purchase price for the property and was given a deed of lot No. 17 by Richard Hutchison. The defendant in his evidence gives his account of the transaction. Lot No. 17 conveyed to him contained 250 acres, and he says that he (Hutchison) "gave me the deed of the 250 acres." I said "there is more than that." "Oh no," he says, "there is a piece there called the Macdonald lot I will give it to you for $100." "Well," I said, "that is not using me right. I bought the block of land from you." And after a spell I said, "well I will give you $100 for it, and I paid him $60 on it." He repeats this statement, and at p. 22 of the record says that he paid the $60 on account of the purchase of lot No. 16 in the year 1875.

It appears therefore from the evidence that the defendant's contention is that when he agreed to purchase the land from Hutchison for the sum of £200 he was of opinion that it included lot 17 as well as lot 16, and that when the deed was given to him conveying simply lot 17 he protested against it and Hutchison agreed to let him have lot 17 for $100 and that he paid $60 on account of this amount. He admits that he never paid anything more than this. He says that in the year 1918 he went to Ernest Hutchison, the son and successor in title of Richard Hutchison, and offered to pay him $40 the balance of the $100 aforesaid, but Ernest Hutchison refused to take the money and afterwards made an agreement for sale of the property to the plaintiffs.

The trial Judge came to the conclusion that the defendant proved that he had occupied the front part of lot No. 16 for considerably more than 20 years prior to the commencement of the action, and that he had proved a perfectly good title by possession to the front part of such lot, that is to that part of it which fronts on the Miramichi River and which runs back therefrom easterly a short distance to a strip of woods along which the plaintiff built and maintained a fence, but he finds that he has failed to prove a title by possession to the remaining part of lot No. 16. In coming to this conclusion he refers to the well known case of *Sherren* v. *Pearson* (1887), 14 Can. S.C.R. 581, in which the question of what is necessary to establish a title by possession to woodland is very fully discussed, and concludes that the acts relied on for the title by possession to this portion of lot No. 16 by the defendant were nothing

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more as against the true owner than isolated acts of trespass, having no connection one with another. So far as the Judge's finding to the effect that the defendant failed to prove a title by possession to the rear part of lot No. 16 is concerned I am of opinion that it should not be interfered with, and that under the facts in evidence in the case he was correct in coming to the conclusion which he did. It seems to me, however, that the trial Judge has not given sufficent consideration to the evidence given by the defendant with regard to the verbal agreement for the purchase of lot 17, and has not found explicitly as to whether or not the statement of the defendant in this regard is true. If it is true, it being admitted that at the time the verbal agreement was entered into and the $60. was paid, he was in possession of lot No. 16, and has continued in possession of it ever since, I agree with my brother Barry in the opinion that the defendant would be entitled to the ownership of the land in dispute. The defendant's evidence is uncontradicted and it is probably impossible to contradict it, as the other parties to the transaction are now dead, but the fact that at the time of the alleged purchase the appellant was living on lot 17 and occupying and using such parts of lot No. 16 as he required is not contradicted, and if as a matter of fact he was at that time in actual possession of any part of lot No. 16 he would in point of law be considered in possession of the whole. As to whether or not the verbal agreement that he alleges took place between Richard Hutchison and himself was actually entered into or not has not been explicitly and definitely found by the trial Judge and it is a fact it seems to me of the highest importance in connection with the right and proper decision of the case. I would have been disposed to conclude, in view of the Judge's decision in favor of the plaintiff that he had come to the conclusion that the defendant's evidence in regard to the agreement was not to be believed were it not for the language used by the Judge himself, which seems to imply a doubt in his mind in that respect. He says "It is true that the defendant claims that he entered upon this land in consequence of the arrangement which he claims was made by him with the late Richard Hutchison. The account given by him of this transaction is, as I have said before, rather extraordinary, and I have considerable doubt as to the actual making of any such agreement with Richard Hutchison." This is not an explicit finding of fact, but an expression of doubt on the part of the trial Judge as to whether the agreement sworn to by the defendant was actually entered in-

to. At another place in his charge he says, the story strikes him as a rather improbable one. This certainly cannot be regarded as an explicit finding on a point which to my mind is absolutely necessary for the determination of the question involved, for while the Judge, as I before pointed out, finds that the defendant had not acquired a title to the rear part of lot No. 16 by possession, he states that he proved that he had occupied the front part of lot No. 16 for considerably more than 20 years prior to the commencement of the action, and he thinks he proved a perfectly good title by possession to the front part of lot No. 16. If such is the case and he was in possession of any part of lot No. 16 at the time that the alleged agreement with Richard Hutchison was made, then, if that agreement was actually made as stated by the defendant, he is surely entitled under it and being in possession at the time, to the title to the property. Had the trial Judge found as a fact that the conversation as alleged by the defendant did not take place with Hutchison, and that no such agreement was entered into as he deposes to, I think the verdict should have stood as he had the opportunity of hearing the witness and noting his demeanour upon the stand, and possibly in view of the lack of corroboration which was impossible owing to the death of the other parties, he might have been justified in finding for the plaintiff, but having made no definite finding with regard to the alleged agreement, and having stated that he is doubtful with regard to it, I find that there should be a new trial, which should be confined to the question of title by purchase alone.

BARRY, J.:—In form the respondents' action is in replevin for the alleged wrongful taking of railway ties and round lumber from lot No. 16, known as the McDonald lot, situate on the easterly side of the north west branch of the Miramichi River in the parish of North Esk in the County of Northumberland, but, in substance, the controversy is as to the ownership of the lot.

It is not disputed that the documentary title to the lot No. 16 is in the respondents. From a time anterior to the year 1865 down to October 1888 the title was in Richard Hutchison; at the latter date Richard Hutchison conveyed to his son Ernest Hutchison, who, in turn, on October 22, 1918, conveyed the title to the respondents under an agreement of sale and purchase. Both the Hutchisons are now dead.

The appellant sets up title in himself in two ways; first,

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by adverse and continuous possession for more than the necessary statutory period; and secondly, as purchaser under a parol agreement of sale and purchase made between himself and the late Richard Hutchison, the then owner, in February 1865, under which agreement he went into possession and has continued in possession ever since.

It appears in the evidence given in the plaintiff's case that in February 1865 he purchased from the late Richard Hutchison lot No. 17, which abuts lot No. 16 (the ownership of which is here in dispute) on its southerly side. Both lots begin at the eastern side of the river and extend back, easterly, a considerable distance. Both are traversed by a highway road a short distance from the river, and lot No. 16 has a clearing on the front upon the river which extends nearly to the highway road. Between the clearing and the highway there is a belt of trees and shrubbery intervening. On the easterly side of the highway road both lots are uncleared; but both have been cut over and used by the appellant during the last 50 years, it is said, as he has from time to time required to cut upon and use them.

When in July, 1873, the last instalment of the purchase price of £200 for lot No. 17 having then been paid, he got his deed from Mr. Hutchison, the appellant claims he then first discovered that the deed conveyed only a portion of the land which he thought he had bought. He says he thought he was buying not only the land, which is now comprised in lot No. 17, and about which there is no dispute, but also the land which now, it appears, is not comprised within the delimitations of lot No. 17 at all, but was known to Mr. Hutchison, but not to the appellant as the McDonald lot or lot No. 16. On the appellant expressing dissatisfaction at the shortage in the land he was getting, Mr. Hutchison offered, as the easiest way out of the difficulty, to sell him lot No. 16 for $100, and this offer the appellant accepted, and two years afterward paid Mr. Hutchison $60 on account of the purchase price of the same. The $40 balance has never been paid, although the appellant says that long afterwards, in 1918, he offered to pay this balance to Ernest Hutchison, who had then succeeded to the paper title, but that he declined to accept it.

This is the uncontradicted evidence of the appellant; and the fact of its being uncontradicted affords, I suppose, a fair enough justification for the hostile criticism levelled against it by the respondents who say that the reason why no attempt has

been made at contradiction of the appellant's statements is a very obvious one that the only persons who could contradict them are dead. At the time of the alleged purchase of lot No. 16 the appellant was living on lot No. 17, and occupying or using such parts of lot No. 16 as he required; if he was then in actual possession of any part of lot No. 16, the land which he claims to have purchased, then, I think, after the agreement, he would in point of law be considered in possession of the whole. And that, doubtless would be the explanation of the circumstance, assuming for the moment that the appellant's statements are true, that nothing appears to have been said between the vendor and the vendee at the time of the alleged sale and purchase as to putting the latter in possession. If he was already in possession nothing more was required.

In the written reasons which he has given for entering judgment for the plaintiffs in the action, the trial Judge, after carefully reviewing the evidence and applying the principles enunciated in the well known cases of *Doe dem. Des Barres* v. *White* (1842), 3 N.B.R. 595; *Sherren* v. *Pearson* 14 Can. S.C.R. 581; and *Wood* v. *LeBlanc* (1904), 34 Can. S.C.R. 627, arrives at the conclusion that in regard to the whole of lot No. 16, and treating the defendant as a trespasser or disseisor, he has failed in establishing a statutory title by adverse possession. With that conclusion, after having read the evidence, I have no difficulty whatever in concurring.

The trial Judge has, however, found that, "The defendant proved that he had occupied the front part of the lot No. 16 for considerably more than 20 years prior to the commencement of the action and I think he proved a perfectly good title by possession to the front part of lot No. 16, that is, that part of lot No. 16 which fronts on the river Miramichi, and which runs back therefrom eastwardly a short distance to a strip of woods along which the defendant built and maintained a fence." In another place the Judge adds:—"I have come to the conclusion that the defendant has failed to make out a title by possession to lot No. 16, except as to the meadow on the front."

This is definite and specific, and had the appellant's defence ended with his claim of title by adverse possession, the Judge's finding would, doubtless, have been accepted as the end of the contest. But the appellant's defence does not end there. He sets up another and entirely different defence, one which gives rise to entirely different considerations and calls for the applica-

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tion of somewhat different rules. He says that he is the purchaser and owner of the lot under a parol agreement of sale and purchase made between the late Richard Hutchison and himself in February, 1865, under which agreement he went into possession and has continued in possession ever since. As between a trespasser or a disseisor and one who enters as a *bonâ fide* purchaser, there is a great difference as to the legal effect of his occupancy. The general principle to be extracted from the numerous decided cases upon the subject appears to be this. That while a mere trespasser only gains a possessory title to that portion of the land exclusively used or occupied by him, where a party under color of title, e. g., under an agreement to purchase, enters into the actual occupancy of the premises which he has acquired, his possession is not considered as confined to that part of the premises in his actual occupancy, but his possession extends to the whole.

In discussing the appellant's title under the alleged parol agreement the Judge says; "It was claimed by counsel for the defendant at the trial, that the defendant went into possession of the land in question as a purchaser under the verbal agreement made between him and Richard Hutchison, and that the title to the land in question passed to the defendant. I do not see myself how, under the circumstances in evidence the title to the land in question can be said to have passed to the defendant. There was a mere verbal agreement and even if the title could have passed to the defendant under a verbal agreement together with livery of seisin by the late Richard Hutchison, there is nothing to show anything approaching to livery of seisin by Richard Hutchison to the defendant; and I do not think that Mr. Baxter's contention as to the title to the land having passed to the defendant is correct."

Inasmuch as this language seems to imply a doubt as to whether by a mere parol agreement the title to the land could pass to the purchaser, it is important that we turn our attention for a moment to a few of the many authorities on the subject to be found in the books. Where the contract has been partly performed by one party to it, the Court, in a suitable case ascertains what the actual contract between the parties was, notwithstanding that there was no memorandum, and enforces its performance. *Ungley* v. *Ungley* (1877), 5 Ch. D. 887.

"The law is well established" says Jessel, M. R. at p. 890, that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Stat-

ute of Frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the Court to admit evidence of the terms of the contract in order that justice may be done between the parties."

See also, *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, at 475, per Lord Selborne, L.C. In a case very much in point, *Hodson* v. *Heuland*, [1896] 2 Ch. 428, it was held that "although the entry into possession was antecedent to the contract, yet the subsequent continuance in possession being, under the circumstances, unequivocally referable to the contract, constituted a part performance sufficient to take the case out of the Statute of Frauds."

Payment by a purchaser of the whole or any part of his purchase money is not, it is said, a sufficient act of part performance. But where possession is taken and money is expended in repairs and improvements, this amounts to part performance, provided the Court is satisfied the expenditure would not have been made if no contract had been in existence; and the mere taking possession of land under a verbal contract, without anything else, may be enough to take the contract out of the statute. 25 Hals. p. 295, par. 500. There are, however, nothwithstanding the authority of Halsbury, earlier cases which establish that payment of a substantial part of the purchase money is sufficient to take an agreement as to the sale of land out of the statute on the ground of part performance. *Main* v. *Melbourn* (1799), 4 Ves. 720, 31 E.R. 372. And it seems to me that there can be no difference in principle between spending money in repairs and improvements, and expending time and labour in the reclamation of wilderness or wooded lands and bringing them into a state of cultivation.

This discussion of the authorities bearing upon the subject of parol contracts for the sale of land and part performance of such contracts, has, of course, no significance unless the appellant has been able satisfactorily to establish the existence of the parol agreement which he sets up. And the difficulty that this appeal presents to me is that the Judge does not appear to me to have definitely and explicitly answered that question. He says, "the story told by the defendant as to his purchasing the land in question from the late Richard Hutchison strikes me as rather an improbable one," and again; "the account given by him (defendant) of this transaction, is, as I have said before, rather extraordinary, and I have considerable doubt as to the

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actual making of any such agreement with Richard Hutchison." Again, the Judge says:—"it seems very strange that a business man like Richard Hutchison should have made any such arrangement, especially in view of the fact that, according to the defendant's own admission, he never had any business transaction with Richard Hutchison after paying him the $60 which he claims he did pay him about the year 1875."

The story may be both improbable and extraordinary, it may even seem strange, and yet be true. And either a Judge or a jury may have doubts in regard to the genuineness of any claim set up by a party litigant in a civil action, and yet be obliged, ultimately, by some mental process to get around his or their doubts and find the fact according to the preponderance of the legal evidence. If the case were in course of trial before a jury, the jury would have to be asked to find definitely, yes or no, to the question whether the parol contract for the purchase of lot No. 16 was in fact made as alleged by the defendant. Now, with every deference to the Judge who tried this case, I feel compelled to say that he has not, in my opinion, answered that question, and, unless it has been answered, the result of the trial cannot prove otherwise than unsatisfactory. The language which the Judge has employed with special reference to this particular question—and I think I have quoted the whole of it—cannot in my opinion, be construed in any other way than as leaving the matter in doubt. I very much doubt whether, in the event of the title to lot No. 16 being brought into controversy at some future time, the finding of the Judge upon the question of fact could be accepted as satisfactory proof of a plea of *res judicata*.

Many authorities were cited by counsel for the respondents in support of the proposition that the Court is loath to act upon the uncorroborated testimony of a claimant against the estate of a deceased person. The true rule, I apprehend, is to be found in the judgment of Sir. J. Hannen in *Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, where, he says at p. 183:—"Now, it is said on behalf of the defendants that this evidence is not to be accepted by the Court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in

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the necessary absence through death, of one of the parties to the transaction, it is natural that in considering the statement of the survivor, we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon."

The claim set up by the appellant to the ownership of lot No. 16 cannot, in my opinion, be regarded as a claim against a dead person's estate. It is not a claim against the estate of Richard Hutchison because his estate is not in any way that I can see, concerned in the result. It is a claim of title to land which Hutchison once owned, it is true, and in establishing his title to it the respondent has necessarily to prove the alleged parol agreement upon which his title depends, the other party to the agreement being dead, and that, I think, is about all there is to be said about it. But if I am wrong in this view and the defence of ownership by purchase, is in effect a claim against the estate of a person who is now dead, and that in the circumstances the Court should as a matter of prudence, though not required to do so in strict point of law, look for corroboration, surely the very strongest corroboration is to be found in the circumstances that the alleged purchaser is found in the actual possession of the very property which he says he acquired by purchase from the deceased person. And that possession the trial Judge has found as a fact; found that the appellant has been in possession of it for more than 20 years.

I am of the opinion that upon the question of title by purchase, but on that question alone, the case should go back for a new trial.

GRIMMER, J. agrees.

Appeal allowed; new trial ordered.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. June 6, 1922.

AUTOMOBILES (§IIIB—221)—COLLISION—BOTH DRIVERS NEGLIGENT AND DRIVING IN CONTRAVENTION OF LAW — RIGHT TO RECOVER—DAMAGES.

Where the inference which ought to be drawn from the evidence, oral and physical, is that both parties to a motor car collision were driving their cars negligently and in contravention of law, and that such negligence continued up to the time of the impact, or until too late to avoid the collision, the plaintiff cannot recover damages for injuries caused by the collision.

[See Annotations, 39 D.L.R. 4, 40 D.L.R. 103.]

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APPEAL by defendant from the judgment of Murphy, J., in an action to recover damages for injuries received in an automobile collision. Reversed.

C. W. Craig, K.C., for appellant.

E. P. Davis, K.C., and *D. N. Hossie*, for respondent.

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

Both parties were to blame for the collision. Each admits a speed of from 15 to 20 miles an hour at the intersection of the streets, which is a speed prohibited by traffic by-laws of Vancouver. Each admits that he had no headlights, but only sidelights. The hour was about 1 o'clock in the morning, and the defendant and the driver of plaintiff's car, each admits that he was sober.

The defendant was proceeding along Robson St., a well lighted thoroughfare, 66 ft. in width, keeping upon the proper side, the left, it being before the change in the rule of the road; the driver of the plaintiff's car was also on his proper side of Bute St., a street running at right angles to Robson St., but being a badly lighted side street. To reach the place of collision, this driver had to cross about two-thirds of Robson St. The defendant, according to usage, if not of the law, was keeping, he says, a look out for vehicles coming from his left out of Bute St. The plaintiff's driver was coming out of Bute St., from the right and was bound according to the usage of traffic to watch for danger from the direction from which the defendant was coming. The plaintiff's car was driven by his brother and there were in the driver's seat beside him, two other young men. All three gave evidence. Clarke, one of them, says that he saw the defendant's car when the plaintiff's car was coming out of Bute St., but thought it was too far away to be dangerous, and did not warn the driver, who if he had been paying attention, would have himself seen it. This witness paid no further heed to the defendant and the next thing he knew the cars were in collision. Marshall, the second man in the car with the driver, did not see defendant's car till they were within a length or a length and a half of it and the driver himself saw a flash and the cars came together. The defendant did not know of the proximity of the plaintiff's car until the collision occurred. The defendant is a man getting on in years and was on his way home, and says that he looked at his speedometer shortly before the encounter, it indicated a speed of 15 miles an hour. According to the by-law governing traffic the defendant had the right of way. When the collision occurred, he was thrown from his car, and

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being unconscious knew nothing of the circumstances of the collision thereafter. The photograph shews that the plaintiff's car was struck on the rear door and over the rear wheel. The result of the collision is important. The defendant's car without a driver and with no brakes applied, though the clutch seems to have been out, ran a distance of from 60 to 75 ft. when it brought up against a guy wire near the sidewalk. The impact did not upset either car; they appear to have run for a few feet practically parallel when defendant's car swerved from the sidewalk, crossed the travelled part of Bute St. at an angle and brought up against the guy wire near the opposite sidewalk. The plaintiff's car ran over the sidewalk and up a two-and-a-half foot embankment, into a neighbouring lot, crossed the lot, carried away a fence at the back and brought up against another embankment with a jerk which lifted the occupants from their seats. The distance travelled over these impediments was greater than the distance travelled by defendant's car practically unimpeded and without brakes. The driver of plaintiff's car attempts to explain this occurrence, first, by saying that he was struck from behind by defendant's car which accelerated his speed, secondly, that he increased his speed for the purpose of getting out of the way, and, thirdly, that owing to an injury to his arm, although he was not struck by anything, he was unable to apply the emergency brake, although he does not deny that he applied the foot brake. The suggestion that he was hit from behind and had his speed thus accelerated is disproved by the photograph and by the evidence of one of the young men who was in the car with him, who says that the blow appeared to lift the plaintiff's car bodily sideways. The other excuses may be taken for what they are worth. The inference I would draw is that the car was going at even a greater speed than 20 miles an hour to have accomplished this plunge into a neighboring lot, over the sidewalk, embankment, lawn and back fence with the footbrake on. The plan shews that between the point of the collision and the first embankment is only a few feet, and I think the evidence indicates that he was trying to stop the car instead of increasing its speed when it was crossing the lot.

The trial Judge took a view of the *locus in quo*, but it is apparent that he was not assisted by it. He bases his judgment on this, that he was bound to find that the defendant's car ran into the plaintiff's car, and that the defendant's car was going at an excessive rate of speed, and also that defendant had failed to prove contributory negligence on the part of plaintiff's

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driver, but it is conclusively shewn that both cars were going at an excessive rate of speed and it does not appear to me to make any difference which ran into the other in the circumstances in evidence. He also says that he attaches particular importance to the evidence of one Beveridge, who crossed Robson St., just before the collision. Beveridge looked in the direction from which the defendant came and says he did not see him, and that after crossing Robson St. he walked 22 yards up Bute St. when he heard the crash of the collision. The inference which the Judge draws from this evidence is that the defendant must have been coming at a great rate of speed since he was not in sight of Beveridge when he (Beveridge) crossed the street. Now, Beveridge does not say that defendant was not in sight, he simply says he did not see him, and it is quite understandable when it is remembered that the car had no headlights, even if it were not a fair inference from the evidence that Beveridge was not an observant person.

Sitting in appeal upon a finding of fact of the trial Judge, I have to be satisfied that the Judge was clearly wrong in his conclusion. The mere fact however, that the trial Judge reaches a conclusion of fact does not oust the jurisdiction of the Court of Appeal. I must give the evidence and all the circumstances due consideration and if I am convinced that the judgment below is wrong, it is my duty to say so. I have to take into consideration not only the oral evidence but the physical evidence. The inference, in my opinion, which ought to be drawn from the whole evidence, oral and physical, is that both parties were negligent, and that that negligence continued up to the time of the impact, or at all events until too late to avoid the occurrence. It is quite apparent from such evidence that both parties were going at an excessive rate of speed; that neither car had headlights; that both parties were to a certain extent oblivious to their surroundings, and if either had exercised ordinary caution the occurrence would not have happened, and that no care on the part of either when the collision was imminent, could have saved the situation.

With deference, I think the Judge has failed to give due weight to this phase of the case.

Assuming everything, except ultimate negligence, of which there is not the slightest evidence against the defendant, yet the plaintiff cannot succeed. His car was driven right up to the time of impact negligently and in contravention of law and in such circumstances it is clear that he has no right of action.

The appeal should be allowed.

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MARTIN, J.A.:—I agree that the Judge below should have found the plaintiff respondent guilty of contributory negligence, and I am unable to discover anything in the cases cited which would, as a matter of law, prevent that finding in such circumstances as the present.

This subject of negligence has of late been over-refined, and I draw attention to the observations of the Irish Court of Appeal in the instructive case of *Neenan* v. *Hosford*, [1920] 2 I.R. 258, particularly at 308-9, and to the valuable and illuminating article by a member of that Court, O'Connor, L.J. entitled "Contributory Negligence" in the Law Quarterly Review for January last, p. 17. He there suggests, (p. 22) that the question should be simplified to this:—"Was the defendant's negligence the 'real' cause of the accident? or, perhaps, better still, try the case by one question: 'Whose fault was it?'

That is an excellent working solution, and I propose to adopt it, and after applying it to the present case, my answer is—one is as much to blame as the other, and so the loss must lie where it falls.

I note that my observations upon ultimate negligence in *Tait* v. *B. C. Electric R. Co.* (1916), 27 D.L.R. 538, 20 C.R.C. 408, 22 B.C.R. 571, are supported in the *Neenan* case, viz.: that the mere continuation of, e.g., excessive speed, or failure to look, or incapacitating drunkenness causing negligent driving, do not constitute ultimate negligence under *Loach* v. *B.C. Elec. R. Co.*, 23 D.L.R. 4, 20 C.R.C. 309, [1916] 1 A.C. 719, 85 L.J. (P.C.) 23, though, of course, if the continued failure to look were wilful or the excessive speed were persisted in after it became possible to avoid the accident by reducing it, it would be otherwise, just as in the case of the drunken driver who came to his senses in time to take appropriate steps to avoid the accident but did not do so.

GALLIGHER, J.A.:—With every respect to the trial Judge, I cannot agree that there was not contributory negligence on the part of Winch. Then given negligence and contributory negligence, there was nothing that either party could have done once the danger became apparent that would have avoided the accident.

The question of what is called ultimate negligence, therefore does not come into the question, nor was it found by the trial Judge whose judgment is based upon failure to prove contributory negligence on the part of Winch.

Mr. Hossie, junior counsel for Winch, urged that the negligence of Winch's brother, who was driving the car, could not

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be attributed to the plaintiff, who was not present at the time and that even if the brother was negligent, that did not disentitle plaintiff to recover.

The proposition is not borne out by the authorities cited, and on the other hand, I should need strong authority to cause me to adopt such a contention.

MCPHILLIPS, J.A.:—I would allow the appeal.

Appeal allowed.

GIRARD v. CORP'N OF ROBERVAL.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 20, 1921.

APPEAL (§IA—3)—SPECIAL LEAVE—SUPREME COURT ACT, 1920 (CAN.) CH. 32, SEC. 41—WHEN GRANTED FROM HIGHEST COURT OF FINAL RESORT OF PROVINCE.

If there is no important principle of law, nor any question of public interest, nor the construction of any public Act involved, the highest Court of final resort in the Province should not grant special leave to appeal to the Supreme Court of Canada under sec. 41 of the Supreme Court Act as amended by 1920, ch. 32.

APPEAL from the judgment of the Court of King's Bench, 32 Que. K.B. 65, appeal side, Province of Quebec, affirming the judgment of the Superior Court and dismissing the plaintiff's action.

The appellant brought an action to annul a by-law passed by the respondent for the opening of a street. The street was lying entirely within the municipality, but at its limits had no issue. The Court of King's Bench, affirming the judgment of the trial Court, held that the power to open the road was within the jurisdiction of the respondent; and special leave to appeal having been granted by the appellate Court, this judgment was affirmed by the Supreme Court of Canada.

G. Barclay and *A. Boily*, for appellant.

Belcourt, K.C., and *T. Lefebvre*, for respondent.

IDINGTON, J.:—I think this appeal should be dismissed with costs. It appears to me hardly arguable that the power to open a road over land lying entirely within a municipality is not in every respect within the jurisdiction of its council.

And the other objection as to its description being defective seems, if possible, less so when we turn thereto and find its boundaries so clearly defined as they are. The bit of land taken would hardly warrant a prudent litigant pushing such a case so far.

DUFF, J.:—I can discover no valid reason for differing from the conclusion reached by the Court of Appeal.

ANGLIN, J.:—I concur with Mignault, J.

BRODEUR, J.:—The appellant asked in his action that the by-law passed by the respondent's municipal council on July 30, 1919, ordering a road to be opened, be declared null and of no effect. The appellant is owner of one of the lots that were expropriated to make way for this road. The road was to extend into the neighbouring municipality as far as the Val Jalbert railway station; but the appellant alleges that the road that is now open and which crosses his property stops at the boundary of the municipality of Roberval thus forming a cul-de-sac.

It is quite possible that the corporation of Roberval committed an administrative error in opening this new road; but it certainly acted within the limits of its powers and it is not competent to the Superior Court to interfere with the exercise of the corporation's discretionary power by direct action.

The road which the council of Roberval ordered to be opened is situated entirely within the limits of its territory. Every road situated within a local municipality is by law a local road and retains its character as such unless and until the county council exercises the prerogatives conferred upon it by the Municipal Code. *Brunet and Hainault* v. *Corp. of County of Beauharnois* (1911), 18 Rev. de Jur. 141; art. 445 M.C.

I am of opinion that the council of Roberval had jurisdiction to open the road in question upon its territory. The judgment *a quo* should be confirmed with costs.

I am sorry that this case has been brought before this Court. The interests involved do not appear to justify the leave to appeal which was granted by the Court of King's Bench. Up to last year many cases affecting immovable rights came before us from the Province of Quebec. For the most part, these cases concerned miserable little strips of land of next to no value and involved certain servitudes of little importance. Most of the judgments were on points of fact which could be of no general or public interest.

Parliament saw fit last year (in 1920) to amend the jurisdiction of the Supreme Court so as to require that the dispute must involve at least $2,000. That eliminated at once all these appeals concerning immovable rights of insignificant value. But Parliament declared at the same time that the Court of Appeal might permit the unfortunate litigant to bring his case before the Supreme Court. Indeed, it may happen that the case involves a question of public interest or an important point of

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law, or else the interpretation of a statute; and then the case may be brought here by special leave.

It seems to me that in a case like the present one there was no reason for granting the permission asked for. There was no point of public interest involved. The matter in litigation was of insignificant value. The reason given by the Court below for granting leave to appeal is that the case was a petitory action "involving a title to land." This reason does not seem to me to be sufficient, for the Legislature evidently intended to refuse the right to appeal in petitory actions "involving a title to land," except in cases where the value of the property in litigation was at least $2,000 or at least in a case where a question of public interest was raised.

MIGNAULT, J.:—In this case, which originated subsequently to July 1, 1920, the date when the Act 1920, ch. 32, amending the Supreme Court Act, came into force, the right to appeal to this Court existed only on condition that the highest Court of last resort in the Province of Quebec—that is to say the Court of King's Bench sitting in appeal—had granted special leave to appeal (art. 41).

Before the passing of the Act of 1920, the right of appeal existed *de plano* if the matter in litigation involved, amongst other things, a title to land or some interest in such land. Thanks however to the litigious spirit amongst counsel, appeals had often been brought before this Court involving title to land it is true, or some interest in such lands, but where the value of the right in litigation was insignificant, so that the costs of suit had become the principal cause of dispute between the parties and the immovable right a matter of secondary importance.

With a view to avoiding this annoying result, the Act of 1920 requires, in order that the right of appeal may lie *de plano*, that the value of the matter in controversy in the appeal must exceed $2,000 (art. 39). This provision applies to all the provinces of the Dominion.

However, as it may very well happen that a question of very great importance may arise in a case in which the value of the matter in controversy in appeal does not exceed $2,000, the Act of 1920 makes appeal to the Supreme Court possible if the appellant has obtained leave to appeal from the highest Court of last resort in the province where judicial proceedings were originally instituted; and if this leave has been refused, the Supreme Court may grant it in the cases enumerated in art. 41 of the Act of 1920.

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In the case in question the Court of King's Bench, sitting in Appeal, granted special leave to appeal, Flynn, J. dissenting, on the following grounds:—

"Whereas the action is a petitory action involving the title to real estate and special leave to appeal from such final judgment of this Court should be granted."

I am of opinion, very respectfully, that special leave to appeal should not have been granted. The ground that the case involves the title to an immovable is manifestly insufficient, for, even in that case the Act of 1920 requires (except in the case of special leave) that the immovable right in question must be worth more than $2,000; and if such a reason were sufficient, it would be possible to obtain by means of special leave to appeal what the Legislature saw fit to refuse to grant *de plein droit* any longer.

According to the well established jurisprudence of this Court, when the right to appeal depends on special permission left to the discretion of a Judge or Court, that discretion must be exercised judiciously, that is to say for reasons sufficient to convince the Judge or Court that such leave should be granted or refused.

In the case of *Lake Erie and Detroit River R. Co.* v. *Marsh* (1904), 35 Can. S.C.R. 197, Nesbitt, J. speaking in the name of this Court, but without pretending to make an exclusive enumeration, indicated some cases where leave to appeal to the Supreme Court might be granted. He said at p. 200:—

"Where however the case involves matter of public interest, or some important question of law, or the construction of Imperial or Dominion statutes, or a conflict of provincial and Dominion authority, or questions of law applicable to the whole Dominion, leave may well be granted."

In another case, *Re Ontario Sugar Co.* (*McKinnon's* case) (1911), 44 Can. S.C.R. 659 at p. 662, Anglin J. refused leave to appeal the case from the Court of Appeal of Ontario, saying:—

"The proposed appeal raises no question of public importance. *Dominion Council of Royal Templars of Temperance* v. *Hargrove*. (31 Can. S.C.R. 385). The affirmance or reversal by this court of the judgment of the Ontario Court of Appeal would not settle any important question of law or dispose of any matter of public interest. *Whyte Packing Co.* v. *Pringle*, 42 Can. S.C.R. 691. These usual grounds for seeking leave to appeal are therefore absent."

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For analogous reasons I myself refused leave to appeal in the case of *Riley* v. *Curtis's & Harvey Ltd., and Apedaile* (1919), 50 D.L.R. 281, 59 Can. S.C.R. 206, where action was taken to recover the sum of $50,000 but in that case it was merely a question of the interpretation of a private contract.

It results from all this that when it is a question of granting special leave to appeal to this Court, one must enquire if the question at issue is sufficiently important, despite the insufficiency of the amount claimed or the object of the action, to bring the case before the highest Court in the country. This would be so, for example, if it were a question of putting an end to conflicting jurisprudence.

I therefore think—and since it is a question of a new statute, it seems to me that I must express my opinion quite frankly, but with great respect—that in the present case the special leave to appeal which allowed the appellant to bring his case before this Court, after having already tried two Courts without obtaining a single opinion in his favour, should not have been granted.

On the merits, I would dismiss the appeal as unfounded. It is a question involving a small piece of road entirely situated within the municipality of the respondent, and the by-law which ordered this road to be opened is attacked. The advisability of ordering the road to be opened is a question which must be left to the discretion of the municipal council, which does not appear to me to have abused that discretion. The municipal council manifestly had jurisdiction in the circumstances.

The appeal should be dismissed with costs.

Appeal dismissed.

THE GLOBE INDEMNITY CO. OF CANADA v. LOMAN.

Quebec King's Bench, Martin, Greenshields and Tellier, JJ.
June 28, 1921.

INSURANCE (§IIIC—56)—INSURANCE ACT, 1917 (CAN.) CH. 29, SEC. 134 (2)—CANCELLATION OF POLICY—SUFFICIENCY OF—RIGHT OF SUB-AGENT TO REVIVE.

A letter by an insured to an insurance company as follows:—"I notify you at once to cancel my policy, as the policy is not what I thought it was, and I am not able to keep it up," is a legal cancellation under the Insurance Act, 1917 (Can.) ch. 29, sec. 134 (2), and the entry of the cancellation in the company's books makes it binding on all parties, and, after it has been so cancelled a sub-agent of the company has no authority to revive such policy.

APPEAL by defendant from the judgment of the Quebec

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GLOBE INDEMNITY CO. v. LOMAX.

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Superior Court, in an action to recover on a policy of accident insurance. Reversed.

The judgment appealed from is as follows:—

"The defendant-appellant is an accident insurance company subject to the Insurance Act, 1917 (Can.) ch. 29. On March 11 the company insured G. W. Stewart, the respondent's husband, against loss caused, by bodily injury sustained through accident, to the amount of $1,000. The policy contained the following clause:—

'(10) The company may cancel this policy at any time by giving notice mailed to address of insured as stated in application, with company's cheque for the unearned portion of current year's premium paid; without prejudice to any claim originating prior to the date of cancellation; provided also that the policy holder may at any time cancel the policy and be entitled to receive on cancellation the premium paid less the usual short rate charged by the company for the period the policy has been in force.'

This clause is substantially in the same terms as the sub-sec. 2, of sec. 134 of the Insurance Act. On May 5, 1919, Stewart wrote to the company, the letter mentioned in the above summary.

F. W. Wilson, sub-agent of the company, answered:—

'In reply to yours of May 5th, forwarded to Montreal office. If you return us the policies we will comply with your request and have policies cancelled. We are sorry to think of you having your policies cancelled and wish I could see you personally about same. I expect to be in Smith Falls in about ten days. If we can help you in any way in extending the payments we would be pleased to do so as we are anxious that you continue your policies with us. However, we will be governed with whatever request that you make. W. F. Wilson.'

The insured was accidentally killed on May 25 following. The widow claimed the indemnity under the policy.

The company denied liability and pleaded that the respondent's husband had cancelled the policy, and, consequently, no claim exists now in her favour."

The Superior Court maintained the action and condemned the company to pay her the amount of the policy.

Ewing & McFadden, for appellant.

White & Buchanan, for respondent.

MARTIN, J.:—The whole question involved is whether or not the letter from Stewart on May 5, received by the company on

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May 7, amounted to an effective cancellation in the terms of the statutory condition, and more particularly in view of the action taken by the company on May 17 concerning this cancellation. Once there is a valid contract of insurance, neither party to such contract can cancel or withdraw itself from its obligations except by complying with the terms of the contract as to cancellation or by entering into a mutual agreement to cancel. Neither party can cancel without the consent of the other except in the terms of the contract and of the statutory conditions.

The company is given a statutory right to cancel and the policy holder is given alike option to cancel. The language of the statute and the terms of the condition are clear and no discretion or option is left to the company. The sole requirement to satisfy the condition is that the policy holder should at any time during the currency of the policy make option to cancel the same and notify the company accordingly.

This is precisely what the insured here did. By his letter to the company of May 5, he said [See head note].

Upon receipt of that letter by the company the contract was cancelled and the policy at an end and it required no action on the part of the company to complete such cancellation, and whether or not the insured was entitled to receive a return of unearned premium, such fact did not suspend, delay or postpone the effect of the cancellation.

Quite naturally the company's agent who had earned a commission on obtaining this business was adverse to the policy being cancelled as he would be compelled to return the commission on the unearned premium. However that may be, the insured had a legal right to cancel the policy and the company had no other alternative than to accept the cancellation so made.

It was not necessary that there should be any action on the part of the company. No physical defacement of the policy was required but even if any action was required to be taken by the company, I should say that the official entry of cancellation made in the company's books by Myrand under instructions from the manager on May 17, eight days before the accident, would be sufficient to make the cancellation effective and binding on all parties concerned. Surely it does not lie in the mouth of the representatives of the insured in the face of the latter's cancellation to urge that there was no cancellation.

It was urged that the company was bound by the letter of

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W. F. Wilson, June 10, stating that the policy was in good standing and sending blank proofs of claim to the respondent. Apart from the objection made that W. F. Wilson was not an agent of the company and had no authority to bind the latter, his power in any event would not extend to reinstating a policy that had been regularly cancelled. See remarks of Fitzpatrick, C.J., in *Kline* v. *Dominion Fire* (1912), 9 D.L.R. 231, 47 Can. S.C.R. 252.

I would reverse the judgment of the Superior Court and dismiss the respondent's action with costs here and below.

GREENSHIELDS, J.:—There is no doubt whatever, in my opinion, that the right of the assured to cancel was absolute, independent entirely of any consent on the part of the company. The letter of May 5, is an unconditional absolute statement of cancellation. I am of opinion that on May 7 the policy sued on was cancelled, and at an end, and that the company appellant's obligation thereunder, other than possibly the obligation to return a part of the unearned premium, ceased to exist. Under such a clause an assured may cancel and might waive any claim for unearned premium; in other words, in my opinion, the return of the unearned premium to an assured is not a condition necessary to bring about the cancellation or termination of the policy.

The learned counsel for the respondent urged that upon the receipt of the letter of May 17 the assured reconsidered his determination to cancel, and really consented to the continuance of the policy for a period of at least one year.

The Court is directed to the testimony of the respondent upon this point. Whatever reconsideration the respondent's husband, the assured, gave to his cancellation, it was certainly never communicated to the company. If my finding be correct, that the policy was cancelled on May 7, 1919, there is nothing in the record to justify the statement that it was revived or resurrected, or ever became again effective against the company.

I am unable to agree with the findings in fact and in law of the trial Judge, and should reverse the judgment with costs.

TELLIER, J.:—I am of opinion that the policy lapsed on the day when the company received this letter of May 5, 1919. Now the letter was received May 7, two days afterwards. I see nothing in all the correspondence which could have prevented the letter from taking effect. The consent of the defendant was not necessary in order to put an end to the contract. It was sufficient for the insured to express his will to that effect. This

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he did in no uncertain manner in his letter. The defendant was powerless in the circumstances; and the sub-agent W. F. Wilson was even more helpless than the company. The policy could only be revived by a new agreement, and no such agreement was made. On the contrary the defendant made an entry in its books on May 17, 1919, to the effect that the policy was cancelled. It was not this act on the part of the company but the assured's letter which terminated the contract. The company was not obliged therefore to give the assured any notice of the entry made in its books.

The fact that it had to make a refund is no obstacle to the nullity of the contract.

Death did not occur until May 25, 1919, so the defendant does not owe the indemnity claimed.

I would therefore maintain the appeal. I would reverse the judgment *a quo* and would dismiss the action with costs of both courts.

JUDGMENT. Considering that it appears that the insured on May 5, 1919, elected to cancel the said policy as he had a right to do by law and the conditions of the same, and notified appellant accordingly, which letter of cancellation was received by the appellant on May 7, that said policy could be so cancelled by the insured without any act or concurrence of the appellant; that no physical defacement of the policy was required and that even if any action on such cancellation had to be taken by the appellant the official entry of such cancellation made in the company's books on May 17 by the proper officer of the company under instructions from its manager, made the cancellation effective and binding on all parties concerned; that the said policy was never revived or re-instated and that W. F. Wilson, a sub-agent of appellant, had no power or authority to reinstate the said policy even if his letters are construed as importing an intention so to do; that there is error in the judgment of the Superior Court herein rendered on November 13, 1920; doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the action and demand of the respondent, with costs in the Superior Court, and doth condemn the respondent to pay the appellant its costs before this Court.

Appeal allowed.

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CANADIAN TRADING COMPANY v. CANADIAN GOVERNMENT MERCHANT MARINE CO. *

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 10, 1922.

CONTRACTS (§IVB—330)—IMPOSSIBILITY OF PERFORMANCE—AFFREIGHTMENT—VESSELS NOT BUILT—"SERVICE AND SAILINGS."

Inability to deliver vessels within the time required by a contract of affreightment, because of the delay in their construction by a firm of shipbuilders over whom the promisor had no control, does not amount to impossibility of performance. A provision in the contract making it conditional upon the "continuance of service and sailings of its steamers" is satisfied if such service was continued with other vessels.

APPEAL by plaintiff from judgment of Gregory, J.

L. G. McPhillips, K.C., and *G. B. Duncan*, for appellant.

E. C. Mayers and *R. W. Hannington*, for respondent.

MACDONALD, C.J.A.:—The defendants entered into two contracts of freightment with the plaintiffs, fixing definite periods for loading, the first in early April, the second in April and May. At the time of the contracts the ships were under construction by J. J. Coughlan & Son, for the Canadian Government and were to be turned over to the defendants, which was an operating company for the Canadian Government.

There was delay in delivery of the ships arising from causes which are not very clearly defined by the evidence, but apparently as to one of the ships, the "Canadian Inventor" by a dispute between the builders and the Canadian Government with regard to the work. It was suggested that the work was delayed by a strike in the Coughlan Co.'s yard, but this evidence is so vague and unsatisfactory as to amount to nothing. J. J. Coughlan says the strike might have commenced on March 5, if so, it was either ended or in progress at the time the contracts were entered into.

There are two defences: The defendants claim that the contracts were subject to implied conditions, that the ships should be ready at the times fixed for loading; that they were relieved by an express condition in the contract itself. The plaintiffs admit that they were aware that the ships were under construction when the contracts were made. They say that they were under the impression that they were under construction for the defendants, I do not think they were under any misapprehension in regard to this, the defendants are in effect the Canadian Government, or a department of the Canadian Government. Now then, J. J. Coughlan in his evidence says that a dispute in regard to a stern tube in the "Canadian Inventor" delayed de-

*Appeal to the Supreme Court of Canada dismissed. Decision to be reported in 68 D.L.R.

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livery of that vessel 2 months; he maintains that the stern tube was in accordance with the contract; he says that he finally made the change demanded by the Government not because the tube had been wrong in the first place, but to buy peace. There is no satisfactory explanation at all for the non-delivery of the other ship, the "Canadian Prospector," except the suggestion referred to above of a strike of painters. In these circumstances the defendants relied upon *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 122 E.R. 309, 32 L.J. (Q.B.) 164, 11 W.R. 726, and the other cases which follow it. In these cases there was a real impossibility of performance. In the case at Bar I do not think there was. It is by no means clear that the delay in the delivery of the ships was due to any default on the part of the Coughlan Co. It was by reason of the dispute no doubt, between that company and the Canadian Government, but I do not think the delay caused by the dispute as to the character of the work is sufficient to enable me to invoke the principle of those cases. I therefore think that the defendants have failed to make out a case of impossibility of performance. If the doctrine of *Taylor* v. *Caldwell*, *supra*, could be applied to a case of this character, there would be no certainty in commercial agreements.

The second defence is based upon the following words in the contracts:—

"This contract is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the ports named therein."

This, in my opinion has no reference to *delays* in sailings which was all that was occasioned by the delay in the delivery of the ships, the service was continued and the sailings went on without any real interruption.

The question of damages was spoken to by counsel at the trial and as I understood it, was in case of necessity to be referred to a referee. If the parties cannot agree there should be a new trial for the purpose of ascertaining the damages.

MARTIN, J.A., would dismiss the appeal.

GALLIHER, J.A.:—The respondents had ships plying between the Port of Vancouver in British Columbia, and Australia, at the time the contract in question here was entered into and had also on the stocks nearing completion, two other ships, the "Canadian Inventor," and the "Canadian Prospector."

The appellants made a contract with the respondents, V-69, for space on the "Inventor" for the shipment of one million

feet of lumber and further contract, V-74, for the shipment of 250,000 ft. of lumber on the "Prospector", both from Vancouver to Sydney or Melbourne, Australia, the former for early April, the latter for April or May, 1920. These contracts were dated respectively, March 19 and March 24, 1920, and it was assumed that these ships would be completed and ready to take on cargo during these months.

When it became apparent that the ships would not be delivered by the Coughlan Co. who was building them during the specified periods, the appellants wrote two letters, June 1, 1920, cancelling contract V-69, and same date cancelling contract V-74, for the reasons therein stated. These letters were acknowledged on June 4.

In the meantime upon an understanding with the respondents, the appellants had purchased the lumber, had placed it on scows and on the Government wharf so that when the ships were ready they could be more expeditiously loaded and get quick clearance. This was in the interest of the respondents and at their instance. In pursuance of this the appellants were put to certain expense all of which is set out in the particulars filed herein and it is to recover these expenses that the present action is brought.

The respondents say, first, that we should read into the contract an implied term that providing the ships which were building were not available during the terms specified that they would be relieved from carrying out their contract. This depends on the terms of the contract itself, and a consideration of the conditions and surrounding circumstances. In each of the contracts is the following clause:—

"This contract is not transferable and is entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named herein."

It is urged that this means the sailing of the particular ships in question.

The company were continuing their service with their other ships between these ports. I think it simply means that if the company went out of business or ceased sailing vessels between these ports, then the contract was off.

The implied term we are asked to import was not, I think, in the minds of the parties in the sense urged. If it was, it would have been a simple matter to have put it in the contract and it might very well be that had such a term been mooted the appellants would not have assented thereto and taken all the risk, but

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be that as it may, I am not satisfied that a case has been made out which would warrant us in giving effect to the respondents' contention.

The respondents however, further say, that they are not liable by reason of the fact that the ships to the knowledge of all parties were under construction by a firm of shipbuilders over which they had no control and through no fault of theirs the contract on their part became impossible of fulfilment, and seek to apply the principles laid down in the leading case of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 122 E.R. 309, and cases which have followed that.

I am far from satisfied upon the facts of this case that the contract was one impossible of fulfilment, and I think it would be extending the principles of *Taylor* v. *Caldwell* and the other cases following that were we to apply that principle here. This, I do not think we should do. There should be some point at which reasonable certainty as to commercial contracts should obtain. I would therefore hold, that the plaintiff in this action is entitled to damages and allow the appeal.

There was some discussion at the trial as to a reference as to the *quantum* of damages and while Mr. Mayers for the defendants, admitted that the amounts sued for had been paid and that the different charges were reasonable and proper charges, yet, maintained they were charges which they were not called upon to pay and owing to the finding of the trial Judge dismissing the action, it did not become necessary to enter into it and the question of the *quantum* not having been tried out the case should go back for a new trial on that issue.

McPHILLIPS, J.A.:—The action was one brought for damages for breach of two contracts of affreightment between British Columbia and Australia. The contracts sued upon are in the following terms:—

"Canadian National Railways
Vancouver, B.C., 19th March, 1920.
My Contract No. V-69.

Dear Sirs:

One million (1,000,000) feet lumber, Board measure, Vancouver, B.C. to Sydney and | or Melbourne, Aust.
$37.50 to Sydney, Aust.
$40.00 to Melbourne, Aust.
by the S.S. "Canadian Inventor," shipment early April.

To be alongside the steamer "Canadian Inventor" when

wanted by us at Government Dock or ship's option Genoa Bay, B.C.

This contract is not transferable and is *entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers* between the ports named herein. If, at any time, in the judgment of the steamship company, or its authorised agents, conditions of war or hostilities, actual or threatened, are such as to make it unsafe or imprudent for its vessels to sail, or if the vessels of the company shall be taken, sold, or chartered for the use of any Government, or in the event of loss of, or damage to, any of the vessels of the company, or vessels chartered by them, resulting from actions of an enemy, perils of the sea, or other cause, the steamship company may discontinue or curtail its service; and in that event the steamship company shall be relieved from any liability hereunder, except that if its service be only curtailed the shipper shall be entitled to the carriage of a proportionate part of this contract.

Customary form of bill of lading in use, to be used and accepted by the shipper. Steamer to have option of calling at any port or ports in any order to land or embark passengers, mails, cargo, live stock, or for any other purpose.

Canadian National Railways

Engagement Note

Vancouver, B.C., 24 March, 1920.
My Contract No. V-74.

Two hundred and fifty thousand (250M) feet lumber Vancouver, B.C., to Syndey, Aust., or Melbourne, Aust.
$37.50—Vancouver to Sydney, Aust.
$40.00—Vancouver to Melbourne, Aust.
by the S.S. "Canadian Prospector", shipment, April | May.

To be alongside the steamer "Canadian Prospector" when wanted by us at Government dock or ship's option.

This contract is not transferable and is entered into conditional upon the continuance of the steamship company's services and the sailing of its steamers between the ports named herein. If, at any time, in the judgment of the steamship company, or its authorised agents, conditions of war or hostilities, actual or threatened, are such as to make it unsafe or imprudent for its vessels to sail, or if the vessels of the company shall be taken, sold, or chartered for the use of any Government, or in the event of loss of, or damage to, any of the vessels of the company, or vessels chartered by them, resulting from actions of an

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enemy, perils of the sea, or other cause, the steamship company may discontinue or curtail its service; and in that event the steamship company shall be relieved from any liability hereunder, except that if its service be only curtailed the shipper shall be entitled to the carriage of a proportionate part of this contract.

Customary form of bill of lading in use, to be used and accepted by the shipper. Steamer to have option of calling at any port or ports in any order to land or embark passengers, mails, cargo, live stock, or for any other purpose.

Please confirm.

Canadian Trading Co., Ltd. B. C. Keeley,
W. C. Stripp, Mgr. General Agent."

In the preparation for the shipment of the lumber, a large quantity of the lumber, in compliance with the request of the respondent, was placed upon scows but neither of the ships became available to the appellant for the shipment of the lumber and no other ships were provided by the respondent to carry out the terms of the contracts made. It is not the case of the non-existence of the named ships but their unavailability, owing to non-completion. But it is to be observed that the contract is not really confined to the named ships. The contracts were "entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers." (See contracts or engagement notes above set forth).

The present case differs greatly from many of the cases to be found in the books. Here we have express contracts, subject only to expressed conditions of relief; but the defence made does not come within the conditions. Here, no safeguard was taken to cover the non-completion or non-availability of the ships. Such a contingency was provided for in *Oliver* v. *Fielden* (1849), 4 Exch. 135, 18 L.J. (Ex.) 353; (also see *Corkling* v. *Massey* (1873), L.R. 8 C.P. 395, 42 L.J. (C.P.) 153, 21 W.R. 680.

In *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180, 38 L.J. (Q.B.) 98, 17 W.R. 494, Hannen, J., at p. 185, said:—

"We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded

against in the contract, or where the impossibility arises from the act or default of the promissor."

In the present case, conditions are set forth, but the contingency of the non-completion of the ships was not dealt with, and it may also upon the facts of the present case be said that there was "default of the promissor" in not having the ships available and ready to provide the space and carry out the contracts of affreightment. In considering what should have been in the contracts here to give protection to the respondent, it is instructive to observe what Lord Ashbourne said in *Hick* v. *Raymond & Reid,* [1893] A.C. 22, at p. 37, 62 L.J. (Q.B.) 98, 41 W.R. 384.

"But, my Lords, it is not upon analogies or upon conflicting authorities alone that the decision of your Lordships can rest, although they are most valuable and important to elucidate the position. Principle and reason, in my opinion, alike oppose the contention of the appellant. It is somewhat hard to make either party suffer, but there is no help for it. It must be remembered that there are forms of bills of lading which expressly name strikes and such contingencies, and cast the responsibility upon the consignees. If the shipowner wishes the merchant to be answerable for such events, he can stipulate for it expressly. It is no doubt hard on the shipowner in this case, but I do not apprehend any disturbance in mercantile contracts, as parties can readily, if they please, change the terms of future contracts, and prevent the possibility of misunderstanding or surprise. On the grounds that I have referred to I think the judgment of the Court of Appeal should be affirmed."

The contention of the respondent is that upon the rule established by *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 833, it is excused from liability. That case was considered and a number of cases reviewed by Lord Atkinson in *Horlock* v. *Beal,* [1916] 1 A.C. 486 at p. 496, L.J. (K.B.) 602,—Lord Atkinson quotes the rule as laid down by Blackburn, J.,

"The rule I refer to is laid down by Blackburn, J., in the case of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 833, in these words: 'Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible . . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition express or implied; and there are auth-

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McPhillips, J.A.

orities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what there was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' This principle applies not only to contracts in their executory stage, but when they have been in part performed."

But we have Lord Atkinson at p. 506, saying:—

"Moreover, the judgments of Grose, J., and Lawrence, J., especially that of the latter, rather indicate that they treated the contract to carry the goods to Leghorn as a positive and absolute contract to do so within a reasonable time—the dangers of the seas only excepted. The latter learned Judge says they 'absolutely engaged to carry the goods, the dangers of the seas only excepted'; that therefore is the only excuse which they can make for not performing the contract; if they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract.

Of course, if the contract of the parties be thus positive and absolute, they are bound by it, however impossible the performance of it may become."

Now, in the present case the contracts are in form "positive and absolute," if the respondent desired to be excused upon the ground that there should be liability only if the ships were completed and available. Provision to that effect should have been incorporated in the contracts. The case is not one of the non-existence of the ships, nor do I think upon the facts, can it be successfully stated that the non-availability of the ships was "without default of the (respondent)"; (see Blackburn, J., in *Taylor* v. *Caldwell, supra,* at p. 833).

We have here no provision for the contingency that arose, the non-completion of the ships, but were they not so well on to the completion that the respondent took the chances? Lord Loreburn in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum*

Products Co., [1916] 2 A.C. 397, at p. 404, 85 L.J. (K.B.) 1389, put the question:—

"Since the parties had not provided for the contingency, ought a Court to say it is obvious they would have treated the thing as at an end."

And further on at p. 405, said:—

"Ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not. I think they took their chance of lesser interruptions and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or, in other words, impracticable, by some cause for which neither was responsible."

It cannot be said upon the facts of the present case that the non-completion of the ships was something the respondent was not responsible for, in any case it is the case of a special contract with some contingencies provided for and silent as to the contingency relied upon. When it is considered that the appellant was making contracts for the delivery of lumber to oversea ports and would suffer heavily in damages in case of non-fulfilment of contracts, it does not seem at all reasonable that any condition to excuse the respondent should be implied—rather that it is the case of the respondent undertaking a risk that has not been provided against and cannot be heard to the contrary. (See *Lebeaupin* v. *Crispin*, [1920] 2 K.B. 714, 89 L.J. (K.B.) 1024, at pp. 717, 718; *Leduc* v. *Ward* (1888), 20 Q.B.D. 475, at p. 477, 57 L.J. (Q.B.) 379, 36 W.R. 537; *Nelson* v. *Dundee East Coast Shipping Co.*, [1907] S.C. (Scotch), 927, at pp. 928, 929, 930).

The counsel for the respondent relied greatly upon the case of *Halcroft* v. *West End Playhouse*, [1916] S.C. (Scotch), at pp. 182, 183, 185, 186—but with deference, I consider the present case is exactly what that case was not. There, there was the clause, "subject to the theatre being in the occupancy and possession of the management"; here the contract was with respect to specially named ships; here there was by contract the representation and warranty that the ships were in existence and ready to carry out the contracts, and in my opinion, in the present case we have a sufficient statement of representation or warranty without provision for any excuse in case of there being any failure to provide the ships. We have here absolute

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and unqualified contracts for the contracted space in named ships.

I think that it may be well said that no term will be implied which is inconsistent with the express provisions of the contract. In the contracts we have before us, the respondent has made precise stipulations as to the terms on which it shall be liable and the non-completion of the ships is not made a matter of excuse, and *Tamplin Steamship Co.* v. *Anglo-Mexican*, shews that no term (see [1916] 2 A.C. 397, 422) will be implied which is inconsistent with the express provisions of the contract. The case of *Bank Line Limited* v. *Arthur Capel & Co.*, [1919] A.C. 435, 88 L.J. (K.B.) 211, is an example of a case where by the terms of the charter party liability was excused—but the care there taken was not taken in this case. Here we have the case of contracts, plain in their terms that the ships would be available, not dependent for the possibility of performance on their *availability, and the non-availability does not excuse.* Further there was default upon the part of the respondent over which it had control.

I would allow the appeal.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

GENEST v. LEGER.

Quebec Superior Court in Review, Archibald, A.C.J., Demers and DeLorimier, JJ. November 19, 1921.

CONTRACTS (§IVB—330)—SALE OF GOODS—TERM OF CONTRACT PROVIDING FOR IMPOSSIBILITY OF DELIVERY—FAILURE TO DELIVER—DEFENDANT BRINGING HIMSELF WITHIN PROVISION—RECOVERY OF DAMAGES—AMOUNT CLAIMABLE WHERE RECOVERY POSSIBLE.

Where a contract for the sale and purchase of goods is made subject to the impossibility of making delivery on the part of the railway companies, and the defendant proves that this was the reason for the delay in making delivery, and so brings himself within the situation provided for in the contract, the plaintiff cannot recover damages for failure to deliver. In any case, the damages claimed by way of lost profits can only be measured by the difference between the purchase price and the market price at the time the defendants failed to carry out the contract and not the difference between the price paid and the market price at the time the action is commenced.

APPEAL by plaintiff from the judgment of the Quebec Superior Court, Lafontaine, J., dismissing an action for damages for failure to deliver certain goods purchased. Affirmed.

The judgment appealed from is as follows:—

"The plaintiff, a dealer in grain, claims from defendants, also

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grain dealers, damages for failure to deliver three cars of grain which they had agreed to deliver about the beginning of January. The difference between the price paid and the market price at the time when the action was commenced was taken as the basis for estimating the damages.

The defendants pleaded: (1) that the contract of sale between the parties was made subject to the impossibility of making delivery on the part of the railway companies; (2) that in any case plaintiff could only claim the difference between the purchase price and the market price at the time when delivery should have been made; (3) defendants' tender of $160 plus $22.80 for costs was the amount of damages calculated on that basis; (4) that defendants had not been properly put in default."

Bernard and Sullivan, for plaintiff.

Perron, Taschereau, Rinfret, Vallée and Genest, for defendants.

The Superior Court dismissed the action for the following reasons:—

Considering that the sale of three cars of grain by defendant to plaintiff was made, as plaintiff himself alleges, subject to the impossibility of making delivery invoked by defendant, and that defendants have proved satisfactorily that they could not ship the cars of grain which they had bought in Chicago and Minneapolis, three of which had been resold to plaintiff, in time for delivery within the delay agreed upon, and that they consequently found themselves in the situation provided for in the contract;

Considering that in any case the damages claimed by plaintiff by way of lost profits can only be measured by the difference between the purchase price and the market price at the time when defendants failed to carry out their obligation to deliver the grain, namely at the beginning of January; that the plaintiff does not even show that he has been obliged to obtain grain elsewhere in order to fulfil his obligations and that he could have sold the grain again at a higher price, but on the contrary, defendants show that at the time when the obligation of delivery should have been carried out, the market price had barely increased at all, and considering that the sum of $160 offered by them would constitute full compensation for the profit which the plaintiff could have made at the time; that the plaintiff, who had apparently resold to customers of his own the cars of grain he had bought from defendants, since he had them con-

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signed to various places in the country, is very careful not to let us know the price at which he had sold them but emboldened by the continued increase in prices from January to May, due to the scarcity of grain during the winter of 1917, he bases his demand for 66 cents per bushel on the market price in the spring of 1917, which is inadmissible in law;

Considering that the plaintiff never put defendants regularly in default to deliver the grain he had bought from them by offering to pay the price in ready money, and that in bilateral contracts neither of the contracting parties is obliged to commence carrying out his obligations before the other; declares defendants' offers and tenders to be sufficient; maintains the plea and dismisses plaintiff's action with costs and regards the remainder of the sum demanded.

DELORIMIER, J., dissented.

Appeal dismissed.

ROBERTSON v. ROBERTSON.

Alberta Supreme Court, Hyndman, J. March 30, 1921.

LIBEL AND SLANDER (§IIB—15)—CHARGING WITH CRIME—BOOTLEGGING—SPECIAL DAMAGE.

Charging a person with being the recipient of money to buy liquor and "bootleg" it and thus make his living is not actional *per se* without proof of special damage.

ACTION for damages for alleged slander. Action dismissed.

R. E. McLaughlin, for plaintiff.

S. B. Woods, K.C., for defendant.

HYNDMAN, J.:—After the best consideration I have been able to give the matter I am of opinion that the defence to the effect "that as a matter of law the words complained of are not actionable without proof of special damages and that therefore the statement of claim discloses no cause of action" must be upheld. The law seems to be clear that as to an allegation of slander the offence charged must be one which involves corporal punishment such as imprisonment and not one where the punishment is a fine only although in default of payment imprisonment may result.

In *Ormiston* v. *Great Western Ry.*, [1917] 1 K.B. 598, 86 L.J. (K.B.) 759, 33 Times. L.R. 171, Rowlatt, J., at p. 172, said that "So far as the alleged slander was concerned the evidence was that a servant of the railway company said: 'This man has been travelling first class with a third-class ticket.' That offence when committed with intent to avoid payment of the proper fare

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was punishable by fine only, although on default it might be punishable by imprisonment. To charge such an offence was not a slander without proof of special damage. *There was no evidence that the porter had charged the plaintiff with having committed the offence for a second time.*" *Vide* also *Michael* v. *Spiers and Pond* (1909), 25 Times. L.R. 740, 101 L.T. 352; *Hellwig* v. *Mitchell*, [1910] 1 K.B. 609, 79 L.J. (K.B.) 270.

The words complained of undoubtedly mean that the plaintiff had committed more than one offence, rather a large number of them, and as the Liquor Act, 1916, ch. 4, stood prior to the amendment, 1918, (Alta.) ch. 4, sec. 55, sub-sec. 12, might, I think, properly be held as actionable for the reason that it was not the fact of a previous conviction which constituted a second offence for which imprisonment was the punishment but proof only of the defendant having formerly committed an offence against the Act. See *R.* v. *Tansley* (1917), 29 Can. Cr. Cas. 225, 12 Alta. L.R. 84, and dicta of Stuart, J.

In the original Act of 1916, sec. 40 thereof read:—

"For every offence against this Act or any of the provisions thereof, for which a penalty has not been specially provided by this Act, the person committing the offence shall be liable on summary conviction to a penalty for the first offence of not less than fifty dollars nor more than one hundred dollars, and in default of immediate payment to imprisonment for a period of not less than thirty days nor more than two months, and for the second offence to a penalty of not less than $200 nor more than $500, and in default of immediate payment to imprisonment for a term of not less than two months nor more than four months, and for any subsequent offence to imprisonment for not less than three months nor more than six months, without the option of a fine."

The amendment of 1918, ch. 4, sec. 55, sub-sec. 12, materially alters the original section and enacts:—"Any person offending against the provisions of section 23 of this Act shall be liable upon summary conviction to the following penalties, that is to say: (1) Upon a first conviction to— (a) A fine of not less than $100 nor more than $200 and costs, and in default of payment thereof to imprisonment with hard labour for a period of not more than three months; or, alternatively, to—(2) Upon conviction for any offence committed subsequently to a first conviction under this section, to imprisonment with hard labour for a period of not less than three months nor more than six months and without the option of a fine."

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It will thus be seen that to render himself liable to imprisonment there must first have been a *conviction* and then an offence committed subsequently to such conviction.

The decision of Murphy, J., in *Richards* v. *Anderson* (1915), 10 W.W.R. 893, was based on the British Columbia Act of 1912. The report is not by any means complete as it does not set out the facts of the case, but it would appear that the offence imputed was one for which the plaintiff could be made to suffer corporally, and not alternatively, in default of payment of a fine. The language of Murphy, J., is as follows:—

"It is conceded that the provision of the Liquor License Act in question here is *intra vires* and what was imputed to plaintiff was a breach of such provision for which imprisonment is the punishment."

The words in the case at Bar cannot in view of the wording of the section in the Liquor Act be said to impute an offence for which the plaintiff can be made to suffer corporal punishment except on failure to pay a fine.

This seems to bring it into complete harmony with the authorities cited wherein it is held that such words without special damages will not support an action.

The action must therefore be dismissed with costs.

Action dismissed.

GRAND TRUNK R. CO. v. BOURGEOIS.

Quebec Superior Court, Duplessis, J. September 7, 1921.

CARRIERS (§IIIE—425)—CONSIGNEE—LIABILITY FOR FREIGHT AND DEMURRAGE CHARGES—FAILURE TO LOCATE CONSIGNEE ON ARRIVAL OF GOODS AT DESTINATION—RESHIPPING TO ANOTHER AT DIFFERENT PLACE—LIABILITY OF CONSIGNOR FOR FREIGHT AND DEMURRAGE CHARGES.

The consignee of goods shipped over a railway, is *primâ facie* liable for the freight charges, and where, upon arrival of the goods at their destination the original consignee cannot be located and the goods are conveyed to another destination and delivered to another person the consignor cannot be held liable for the extra cost of shipping the goods to the final destination nor for demurrage.

ACTION by railway company to recover the amount of freight and demurrage charges on certain goods shipped by defendant. Action dismissed.

C. A. Harwood, K.C., for plaintiff.

Francois Desilets, K.C., for defendant.

DUPLESSIS, J.:—Considering that plaintiff in its action claims from defendant the sum of $115 as demurrage charges which it alleges were incurred by defendant in the following manner:

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Duplessis, J.

On March 22, 1918, the defendant placed 190 bales of hay weighing about 30,000 pounds in one of the plaintiff's cars bearing No. 26,347 at St. Celestin station in the county of Nicolet, for shipment to defendant's order to Joseph Lefebvre, consignee, 190 Marquette St., Cote St. Paul, Montreal; the said car loaded with hay arrived at Cote St. Paul, Montreal, on April 12, 1918; that notice of its arrival was given to the consignee, Joseph Lefebvre, 190 Marquette St., the same day, but that said notice was not answered; that on April 28, a second notice was given to the same consignee, Joseph Lefebvre, 190 Marquette St., Cote St. Paul, but still without any result; on May 5, plaintiff's agent at Cote St. Paul informed plaintiff's agent at Doucet's Landing in Nicolet County that the consignee (Joseph Lefebvre) could not be found; and on May 9 an answer was sent him not by the defendant but by the agent at Doucet's Landing, instructing him to address the car to Omer Laberge, St. Louis de Gonzague, Beauharnois County; the car seems to have been sent from Cote St. Paul to Omer Laberge, St. Louis de Gonzague, Beauharnois County, on May 6, 1918, with instructions not to deliver it unless the way-bill was presented duly endorsed, and to make sure that all charges had been paid before giving delivery; at that time the plaintiff's claim amounted to $36.68 for freight and $155 for demurrage; Omer Laberge seems to have refused to pay the demurrage charges, hence the present action; is the defendant obliged to pay these demurrage charges?

Considering that in the absence of special circumstances the contract of carriage is made by the carrier with the person who is owner of the goods shipped;

Considering that the consignee is *prima facie* considered to be the owner of the goods shipped by the carrier;

Considering, furthermore, that the 190 bales of hay weighing about 30,000 pounds which were placed by defendant in car No. 26,347 belonging to the company plaintiff at St. Celestin station on March 22, 1918, were, at the moment when they were placed in said car, a thing certain and determinate, and that, in the absence of special circumstances, the consignee became the owner of the said hay from the moment of such delivery;

Considering that no proof has been made of special circumstances which might show that the foregoing rule does not apply in the present case;

Considering that it appears from the record that the consignee was responsible for the payment of the cost of conveying the said hay from St. Celestin station to its destination;

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Considering that the act of the defendant in having the way-bill for the said hay made payable to his order at the point of arrival does not in any way change the consignee's right of ownership in the said hay, since defendant's said act does not affect the owner's right to dispose of the said goods but was merely a means of forcing the consignee to fulfil his obligation to pay;

Considering that plaintiff's action is unfounded for the foregoing reasons; dismisses the said action with costs.

Action dismissed.

BERRY v. ROBINSON.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer, J. September 23, 1921.

CONTRACTS (§IE—95)—SALE OF GOODS—STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—TERMS OF SALE.

A writing setting out the sale of "2,000,000 lath at $3.25 F.O.B. cars Newcastle" without stating the terms of payment, is insufficient as a memorandum required by sec. 4 of the New Brunswick Sale of Goods Act.

APPEAL by defendant from the trial judgment in an action for damages for breach of a contract. Reversed.

M. G. Teed, K.C., for defendant, moves to set aside verdict for plaintiff and enter a verdict for defendant, or for a new trial.

G. M. McDade and *J. B. M. Baxter*, K.C., *contra.*

The judgment of the Court was delivered by

MCKEOWN, C.J., K.B.D.:—In this action plaintiff is claiming damages for breach of a contract for the sale and delivery of certain laths to him by defendant, and he has put in evidence, as a note or memorandum of such contract, the following exhibit:—"M James Robinson No. .....Sent to H. V. Berry. Ship via ..... Terms: Agreed upon. 2,000,000 lath at $3.25 F.O.B. cars Newcastle. H. V. Berry. Shipping instructions to follow. All lath to be moved in 90 days. Jas. Robinson, Lingley."

Among a number of questions submitted to the jury on the trial of the cause, two were propounded by defendant's counsel as follows:—"1. Does the writing or memo, produced by Mr. Berry as signed by Mr. Lingley contain all the material or substantial terms of the agreement between the parties?" to which the jury answered "No." "2. If you say 'no' to this question, what substantial terms or conditions are not mentioned in the

paper?" And to this the jury replied—"Terms of payment."

In answer to plaintiff's claim, defendant raised many issues of fact even including fraud in the memorandum. He further claimed that the agreement which he had admittedly entered into with plaintiff for the sale of the laths in question, was subject to certain contingencies and conditions which had never been performed or fulfilled; also that it was wholly oral and, therefore, unenforceable in the face of sec. 4 of the New Brunswick Sale of Goods Act, 1919, ch. 4, the material part of which reads thus:—

"A contract for the sale of any goods of the value of forty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

Questions were submitted by the presiding Judge aptly framed to determine whether the contract between the parties was wholly oral, or was rightly evidenced by the exhibit above set out, as well as to elicit information concerning the particular terms of the contract if, in the opinion of the jurors, it was an oral one.

Without repeating the questions and answers, it may be said that they establish, as a fact, that the exhibit already quoted, evidences the contract which the parties voluntarily entered into. The matter is now before this Court upon defendant's motion to set aside a verdict for $4,300 damages assessed against him by the jury and awarded to plaintiff for the breach complained of. Defendant further asks that a verdict should be entered for him or for a new trial.

The ground urged in support of such motion is, that the exhibit put in evidence by plaintiff and relied on as a note or memorandum fulfilling the requirements of the statute, is shown to be insufficient by the answers of the jury to questions one and two submitted by defendant's counsel and above set out in full.

I think from the answer to Q. 2 above quoted, it must be concluded that all the terms and conditions of the contract are embodied in the written memorandum except what may be classed as "terms of payment." The first question put by defendant's counsel is as broad as it can well be made, and the jury were asked in reply thereto to say whether the memorandum in question contains "all the material or substantial terms of the agreement," and if not, what had been omitted.

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By these two questions and their replies, a number of defenses relied on have been declared groundless, indeed, the findings of fact, taken as a whole, negative everything set up by defendant in answer to plaintiff's claim, except whatever defence is available arising from the omission to state the "terms of payment" in the memorandum.

Before considering these questions and answers, a word may be spoken concerning the contention urged on plaintiff's behalf that the note or memorandum under the statute is sufficient, in case of a sale of goods of the value of $40 or upwards, if it sets out what was to be done by the party who is sought to be charged. A difference in the original wording of the 4th and 17th sections of the Statute of Frauds gave rise to the distinction noted in the cases of *Egerton* v. *Mathews* (1805), 6 East 307, 102 E.R. 1304, and *Sarl* v. *Bourdillon* (1856), 1 C.B. (N.S.) 188, 140 E.R. 79, 26 L.J. (C.P.) 78, 5 W.R. 196, cited and relied on by the counsel for the plaintiff. Cresswell, J., in delivering the judgment of the Court in the latter case said, at p. 196:—

"The memorandum states all that was to be done by the person charged, viz., the defendant, and according to the case of *Egerton* v. *Mathews*, 6 East 307, that is sufficient to satisfy the 17th section of the Statute of Frauds though not to make a valid agreement in cases within the 4th section."

But the distinction between the word "agreement" in sec. 4 and the word "bargain" in the 17th, is not in point to-day, for sec. 4 of our Sale of Goods Act, 9 Geo. V, ch. 4, following the English Act, contains the word "contract" instead of "bargain" throughout, which thereby makes applicable to it all the decisions from *Wain* v. *Warlters* (1804), 5 East 10, 102 E.R. 972, to *Thirkell* v. *Cambi*, [1919] 2 K.B. 590, 89 L.J. (K.B.) 1. It is too late at the present time to question the proposition that the note or memorandum, sufficient to support a contract such as the one now before the Court, must contain all the terms agreed upon by the parties at the time such memorandum was made and signed.

Turning now to the memorandum before us, the question is, I think, whether it is lacking in any material or substantial term of the contract entered into between the parties on the day in question. The jury says that it is, and that such lack consists in the omission to state the terms of payment. This answer may not necessarily be conclusive because an examination of the evidence might shew that there is nothing to base such finding upon, or that an issue concerning it had not been

properly submitted to the jury. Without discussing the question at length, it may be said that there were two considerations which the jury may have had in mind in answering this question. First—the defendant has said that the goods were to be paid for in American funds. The plaintiff does not admit this, although his denial is not very robust. If, as a matter of fact, it had been agreed that the goods were to be paid for in American currency, such understanding would, in my opinion, be a substantial term of the contract, because it would mean about 10% increase in the price, and not being contained in the memorandum, its absence would invalidate the same. The jury has made no finding on this question, and if it were the only matter involved under the head "terms of payment" I think a new trial would have to be ordered to see whether it was so agreed or not.

But a graver difficulty is raised in the contention put forward by defendant that the terms of payment provided for one month's credit to the purchaser, and by the statement of the plaintiff, who denies that he asked or was to receive credit, but says he was to pay for the goods as soon as the bill of lading was presented to him, with 2% off for cash. If the jury meant by their answer that plaintiff was to have 30 days' credit, I think such arrangement should have been embodied in a note or memorandum to make it sufficient. *Mahalen* v. *Dublin Distillery Co.* (1877), I.R. 11 C.L. 83; *Scott* v. *Melady* (1900), 27 A.R. (Ont.) 193; *McCaul* v. *Strauss* (1883), 1 Cab. & El. 106; *Calder* v. *Hallett* (1900), 5 Terr. L.R. 1. And I am further reluctantly compelled to conclude that the explanation given by plaintiff concerning the delivery and payment of the goods, shews that the memorandum in evidence is incomplete and insufficient. It says "2,000,000 lath at $3.25 F.O.B. cars Newcastle." No conditions of any kind are attached to payment, and this part of the memorandum must be construed as binding the seller to deliver the laths F.O.B., that is, at his own expense, upon cars at Newcastle, whereupon plaintiff's liability to pay immediately arises. Such delivery on the part of the defendant to the common carrier, would be a delivery to plaintiff himself, and the laths would be thereupon at plaintiff's risk. *Browne* v. *Hare* (1858), 3 H. & N. 484, 157 E.R. 561; *Stock* v. *Inglis* (1884), 12 Q.B.D. 564, 53 L.J. (Q.B.) 356. In Benjamin on Sale, (1920) 6th ed. at p. 838, the author thus comments on sub-sec. 1 of sec. 32 of the Sale of Goods Act 1893 (English), which has been enacted verbatim in this province as sec. 32 (1) of the Sale of Goods Act.—

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McKeown, C.J. K.B.D.

"The rule laid down in sub-section (1) was well established at common law, namely, that delivery to a common carrier, and, *a fortiori*, to one specially designated by the buyer, is a delivery to the buyer himself; the carrier being in contemplation of law, the bailee of the person *to* whom, not of the person *by* whom, the goods are sent; the latter when employing the carrier being regarded as the agent of the former for that purpose."

I am, therefore, forced to conclude that, no matter which view of this particular branch of the dispute the jury may have taken, the memorandum of contract and sale relied on by plaintiff is seriously defective and insufficient. The terms of sale as evidenced by the memorandum required absolute payment of cash on delivery of the laths. "This is always implied when nothing is said" Benj. p. 871. The terms of payment verbally put before the Court are very different from that, and herein, I fear, is where plaintiff must fail. He sets up as the real terms—cash against the bill of lading, and 2% off. In such case, he would be bound to pay only when a duly indorsed bill of lading, effectual to pass the property in the laths, is tendered to him. "Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as, under similar circumstances, the property would pass by an actual delivery of the goods." Bowen, L.J. in *Sanders* v. *MacLean* (1883), 11 Q.B.D. 327 at p. 341, 52 L.J. (Q.B.) 481, 31 W.R. 698.

In the case of *Thirkell* v. *Cambi*, [1919] 2 K.B. 590, it was sought to establish the sufficiency of a memorandum of contract by correspondence concerning the proposed purchase and sale. It was held that a material term of the contract was omitted because, in the words of Bankes, L.J. at p. 594:—"In the correspondence relating to these bills (of exchange) there is nothing to shew whether payment was to be made against delivery order." And Scrutton, L.J., alluding to the letters in evidence, says, p. 598:—

"But when all these documents are examined, which it is said contain the terms of the contract, and prove that there was no other contract, it is found that one term, the mode of delivery of the goods against payment, is not mentioned in the written statements of the contract. . . . The appellant then finds himself in this difficulty, that one of the terms on which he relies is not in writing, and has to be inferred from his statement of what the contract originally was. This is the point on which he fails."

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For the same reason the plaintiff in this action cannot succeed.

This appeal must be allowed, and a verdict entered for the defendant with costs of appeal and of the trial.

Appeal allowed.

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Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, and Duff, J. August 3, 1922.

VENDOR AND PURCHASER (§ID—21)—SALE AND PURCHASE OF PROPERTY—CONDITION THAT VENDOR WAS TO PURCHASE PROPERTY FROM SHERIFF—NO VALID AND EFFECTUAL PURCHASE MADE—VALIDITY OF TRANSACTION.

Where it is clear that the basis of a transaction for the sale and purchase of immoveables is to be the purchase of the property from the sheriff, this means a valid and effectual purchase and not a mere or pretended one, and where the circumstances shew that the vendor did not really become the purchaser, not by reason of any defect in the prior title but because of vice in the sale itself, which prevented its being a sale, the transaction is voidable at the option of the purchaser, and proceedings being commenced by him to set aside the sale the transaction becomes not voidable merely, but void.

APPEAL by plaintiff from the judgment of the Quebec Court of King's Bench (Appeal side) (1912), 8 D.L.R. 312, 22 Que. K.B. 142, in an action to have a sheriff's sale of real property annulled. Reversed.

The facts of the case are fully set out in the judgment of their Lordships.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—It will be convenient before dealing with the questions which remain in this long and complicated litigation, in the first place to state what their Lordships take the salient features in its history to be.

In the autumn of 1882 the respondent bank was a creditor of the Pioneer Beetroot Sugar Co, which carried on business in the Province of Quebec, for about $40,000. The real property of the company had been attached by another creditor, named Fairbanks, and was to be sold by the sheriff on January 12, 1883. One McDougall was a creditor and a shareholder of the company, and its vice-president and treasurer. Beard was the lessee of a factory belonging to it. Rough was the book-keeper of McDougall. These three, all now deceased, are respectively represented as regards their interests, in this appeal by the appellants. McDougall and Beard wanted to purchase the real property already referred to of the company, and they made

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an arrangement in order to secure this, with the bank. It was recorded in two letters dated January 6 and 8, 1883, written by Farwell, the general manager of the bank. By the first of these letters the bank agreed that in case they should become the purchasers of the sugar company's property advertised to be sold at the sale on January 12, they would sell it to McDougall and Beard within 10 days for certain amounts; by the second it was stipulated that the whole debt due from the company to the bank, with interest and costs was to be paid, and that they should convey without warranty. It was further provided that the agreement was to remain in force for 10 days, subject to the acceptance by McDougall and Beard of its conditions. The respondent bank accordingly affected to purchase at the sheriff's sale. On January 19 of the same year the bank made a notarial conveyance of the property to Rough on behalf of the purchasers for the price of $49,439.70, of which they acknowledged to have received from them $9,439.70. As to the remaining $40,000, the purchasers hypothecated the property bought, in order to pay what remained due to the bank by instalments, the whole to become due if default was made in the payment of any instalment. Notwithstanding what had been said in the second letter, the bank in the deed granted warranty against their own acts. The conveyance was taken in the name of Rough, by arrangement with McDougall and Beard. The former was a mere *prête-nom* of the two latter, and these immediately entered into possession in virtue of the conveyance to him.

In May, 1884, the bank began an action against Rough, McDougall and Beard for the balance due to them under the transaction; and Rough, in September of the same year, began the action out of which this appeal arises, to set aside the conveyance of January 19, 1883. Rough's case was that he was troubled in his possession and in danger of eviction, by reason of the bank having committed irregularities in its acquisition of the property, and that another creditor of the sugar company, the Hochelaga Bank, in June, 1883, had taken proceedings to set aside the sale to the respondent bank, by reason of these irregularities. The defence of the bank to Rough's action was that they bought the property at the sale on behalf of McDougall and Beard, that they had sold to them without warranty, and that the only grounds for impeaching the sale arose out of the very agreement with them under which it had acted. Judgment was ultimately given, in the Hochelaga Bank's

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petition in February, 1890, setting aside the sheriff's sale at which the respondent bank had bought, because of gross irregularities in the action of that bank. In March, 1890, the Superior Court (Taschereau, J.) gave judgment in the two actions (which had been consolidated for trial) of the bank against Rough, and the cross-action for rescission. In the action of the bank Rough, McDougall and Beard were found liable for a balance due of $31,717.16. The action of Rough to set aside the transaction was dismissed. Among the grounds given for this was that any irregularities that had been committed were committed with the knowledge and on behalf of the defendants themselves. An appeal was brought to the Court of Queen's Bench of the Province, and on June 23, 1893, that Court reversed the judgment in vital points, on the ground that the bank had granted warranty in the conveyance against its own acts that although it had entered into an agreement for resale to McDougall and Beard, it was acting in the purchase on its own account and not as their *prête-nom*, and that the allegation was really that the bank had themselves committed serious irregularities in obtaining the sale to which the warranty in the deed against their own acts extended. The Court of Queen's Bench therefore decreed that Rough, McDougall and Beard should be declared liable to pay to the bank the balance of the price, but that there should be a stay of execution until the bank should have put an end to the trouble about title and the danger of eviction, or had given security under art. 1535 of the Civil Code against these. The judgment went on to refer back the proceedings to the Court of first instance to proceed *de novo* in accordance with these directions, and to do such justice as would accord with them, and in particular to take cognisance of the judgment of nullity which had been obtained by the Hochelaga Bank.

An appeal to the Queen in Council followed, but the judgment of the Court of Queen's Bench was affirmed. Lord Herschell, who delivered the judgment of the Judicial Committee, concurred in the view of the Queen's Bench that the purchase by the bank at the sale by the sheriff was not one merely by a mandatory of McDougall and Rough, but was one of purchase by a principal, with an obligation to re-sell. He further held that the bank were parties to the irregularities which rendered the sale void, and that even on the footing of there having been no warranty by the bank it was clear that the purchase by the bank had to be a valid and effectual one, and not an unreal one with vice in it, as was the case. McDougall, Beard and Rough

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had applied to put in the judgment in favour of the Hochelaga Bank, but this application had been refused on technical grounds, although a stay of proceedings against them to recover the balance of price under the conveyance had been granted until the danger of eviction had been disposed of. The action brought by Rough against the bank had been remitted by the Queen's Bench to the Court of First Instance, to be proceeded with according to the rights and obligations of the parties as defined and established by the judgment of the Court of Appeal, but with the regular introduction in the cause of the decree of nullity obtained by the Hochelaga Bank. The Judicial Committee approved of this course in affirming the judgment of the Queen's Bench.

The judgment thus given was no doubt so far interlocutory only. But yet so great is the weight of the opinions expressed that even if their Lordships saw reason to question it, they would be reluctant to do so. But no such question arises inasmuch as their Lordships, for reasons to be stated later on, find themselves in full agreement with the conclusions thus come to by the Judicial Committee in 1895.

From this point the litigation entered on a fresh phase. From the time of the sale in 1883 to 1896 McDougall had remained in possession of the property, and had even sold portions of it. In February, 1896, the bank, however, took steps to comply with what it interpreted the judgments of the Queen's Bench and the Privy Council to allow, and to remove the danger of eviction even at that stage, and although Rough's action had been for repudiation. A new curator of the property of the sugar company was appointed on their application. In May the property was seized at the instance of another creditor and was brought to sale by the sheriff. The bank obtained an adjudication of the property, excepting two small lots which were bought by the appellants. Just before this, in May, 1896, the appellants, as the representatives of the original purchasers who had died, had applied in the action brought by Rough against the bank, alleging the judgment in favour of the Hochelaga Bank setting aside the sale, and claiming that further sums paid to the bank should be brought into the account to be taken. The appellants appear to have succeeded, on an *ex parte* application, in obtaining an immediate inscription of the action for trial. It was heard in the Superior Court by Curran, J. Taking the view that he had all necessary materials, he gave judgment on June 25, 1896, for the plaintiffs, set aside the sale by the bank to Rough, and ordered the bank to reimburse to the present appel-

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lants certain sums of money. Thereupon the bank filed a petition for a review, in the nature of a Requête Civile, praying that the judgment of Curran, J., might be revoked by the Court of First Instance itself, and the case fully tried. The reason assigned for the application was that the plaintiffs had proceeded, when they obtained the hearing before Curran, J., behind the back of the bank and their advisers, and *ex parte*, and that there had been surprise and haste, such that the bank had had no proper chance of presenting its case. Under the procedure in Quebec such an application is one which the Court of First Instance itself can entertain, without the necessity of procedure by way of appeal.

To the petition of the bank the appellants put in a demurrer. On March 4, 1897, Gill, J., allowed it, and dismissed the petition of the bank. On appeal to the Court of Queen's Bench his judgment was affirmed. But on appeal to the Supreme Court of Canada the judgment was reversed on November 21, 1898, 29 Can. S.C.R. 193, and the demurrer was overruled, on the ground that although the question was on the face of it one of mere procedure, there had been in fact a miscarriage of justice which rendered it necessary that the judgment of Curran, J., should be reconsidered adequately.

In the end the action came on for trial in the Superior Court before Archibald, J., on April 29, 1911. That Judge had before him the judgment given in favour of the Hochelaga Bank by Taschereau, J., on February 20, 1890. A motion had been made as long ago as November 15, 1892, in the Court of Queen's Bench for the purposes of the appeal from the judgment in the action of Rough of Taschereau, J., delivered on March 10, 1890, and varied, as already stated, by the Queen's Bench on June 23, 1893. This motion was for permission to introduce into the proceedings on the appeal the judgment in the Hochelaga Bank's case. It was ordered that this motion should come on with the hearing of the appeal on the merits. It appears from the judgment of the Queen's Bench that it treated as improper the proposal to take direct cognisance of the Hochelaga judgment, inasmuch as it had not been before the Court of First Instance. The motion was therefore refused, but with a direction that the judgment should be introduced properly on the new trial ordered. Archibald, J., when the case was tried in 1911, took the view that the Court of Queen's Bench must have thought that the bank might even at the stage before them, procure a title in such a way as that McDougall and the others would be compelled to pay the price. He thought, further,

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that the title from the bank to Rough had never been declared void by any judgment, inasmuch as the judgment of Curran, J., which declared it void, had been set aside in the proceedings on the Requête Civile. He held that McDougall and Beard having entered into possession, and the bank, by its subsequent purchase at the later sheriff's sale in 1896, having removed every possible cause of trouble before the plaintiff had succeeded in obtaining a final judgment, they had made out a good title in time. He relied on art. 1488 of the Civil Code, which provides that a sale is valid if the vendor subsequently becomes proprietor of the thing sold. He therefore delivered judgment, dismissing the action, maintaining the Requête Civile and the bank's plea of *puis d'arrein continuance*, and setting aside the judgment of Curran, J.

The case went on appeal to the Court of Queen's Bench, where judgment was delivered on October 31, 1912. The judgment of Archibald, J., in the Superior Court was affirmed by a majority of three to two, Archambeault, C.J., Trenholme, J., and Carroll, J., being for affirming, and Gervais, J., and Lavergne, J., being for reversing. Carroll, J., delivered the judgment of the majority (1912), 8 D.L.R. 312, 22 Que. K.B. 142.

After setting out the history of the case he states the conflicting views of the parties. The appellants were contending that the meaning of the judgment of the Queen's Bench, as affirmed by the Privy Council, was that the proceedings were referred back to the Superior Court merely in order that the decree of nullity obtained by the Hochelaga Bank might be introduced to enable the Court to give formal judgment in accordance with it. The respondents, on the other hand, denied this and said that the Queen's Bench had shown by its judgment that it meant to maintain the contract of sale, and had therefore condemned the appellants to pay the price, subject to the respondents putting an end to the difficulty about title or giving security against eviction. The respondents had obtained a good title by getting a curator to the sugar company nominated, and the curator had offered such a title. All this appeared in the proceedings on the Requête Civile and in the plea *puis d'arrein continuance*. Carroll, J., 8 D.L.R. 312, 22 Que. K.B. 142, held that Archibald, J., was right in thinking that the title had been made good within art. 1488 of the Civil Code, and in time. For the action brought by Rough against the respondents had not been disposed of by a judgment, although a title had been offered more than once. Moreover,

Rough and McDougall had been in possession since 1883, and had dealt with the property and lessened its value. As long as the sale was not annulled Carrol, J., thought that the action must fail if the vendor had become proprietor.

Gervais, J., delivered a dissenting judgment, in the result of which Lavergne, J., concurred. Gervais, J., held that by Quebec law a sale of the property of another might well be valid, and that the argument of the appellants for the application of a contrary principle could not succeed. Nor did he think that the subsequent ratification was insufficient by reason of two parcels of land comprised in the sale of January, 1883, not having been included in the second sale; for the reason of this was the action of the appellants themselves. Nor was a point made by the appellants material, that at the suit of the Crown the factory buildings had been seized for non-payment of duties, for this difficulty had been got rid of by arrangement with the Government. But he did think that where a plaintiff has taken proceedings to have a deed of sale declared void, he must be taken to have avoided what was, until his demand, only avoidable. A void obligation had no existence at all. No doubt there was authority for the other view, and the Supreme Court of Canada 29 Can. S.C.R. 193, had given some countenance to it; but it was in his opinion inconsistent with what had been finally decided in the present case by the Judicial Committee of the Privy Council when it affirmed the judgment of the Court of Queen's Bench. Nor did the fact that the appellants had entered into and remained in possession make any difference. Both parties had asserted titles of ownership, and while it might be right on a proper application to direct an account of profits received by the appellants, objection to the rescission based on their action could not be competently taken in view of the course the parties had adopted. He also held, apart from this, that the offer to the appellants of the adjudication of July 17, 1896, was not a sufficient offer of a complete new title or a ratification of that purporting to have been conferred by the conveyance from the respondents of January, 1883. The respondents had obtained no registered title by the transaction of 1896, and there was doubt about their right against the sheriff. But the most important difficulty, in the view of the Judge, in the way of the respondents was the judgment of the Judicial Committee; for when the judgment there was read along with the order of the Queen's Bench which it affirmed, it appeared that its meaning was that if the judgment of nullity obtained by the Hochelaga Bank was introduced into the pro-

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ceedings the deed of sale of 1883 must be deemed to be wholly gone.

Their Lordships, having stated the sequence of events in this litigation, now proceed to the construction which in their opinion must be placed on certain phases of that sequence. They agree with the view taken by Gervais, J., that the combined effect of the judgments of the Court of Queen's Bench in 1893 and of the Privy Council in 1895 really disposed of the litigation in favour of the appellants. By the first of these judgments it is quite true that the appellants were condemned to pay to the respondents the balance remaining due under the deed of 1883, but the declaration to this effect is immediately cut down by a stay put on its operation until the danger of eviction was removed by the respondents or security given under the Code. That this was in the view of the Court no unimportant qualification is indicated by the costs of the proceedings having been ordered to be paid by the respondents. A new trial was ordered to take place with the judgment of nullity obtained by the Hochelaga Bank introduced in order to be considered by the Judge at the new trial in its full effect. If it is asked why the question was dealt with in this somewhat hypothetical fashion, the answer is plain. The motion for the introduction into the proceedings of the Hochelaga Bank's judgment had not been before the trial Judge because it had been made only in the Court of Appeal, and the latter Court did not think it in accordance with the rules of procedure to deal with it for the first time on an appeal. A new trial was therefore required in order to give effect to this judgment. The circumstance, however, that the Court found itself precluded from treating the Hochelaga judgment as formally before it, did not prevent that Court from laying down that if the judgment resulted in the total setting aside of the sale in 1883 to the respondents it would make an end of the case against the appellants, both in the respondents' action and in that of Rough. The Judges could not treat what they knew of but what had not been yet proved to have taken effect as more than a menace of eviction, and it was to a mere menace that they temporarily confined this form of their judgment.

When the cases came before the Judicial Committee of the Privy Council the intimation of opinion was not less definite. In the judgment delivered by Lord Herschell the suggestion was rejected that the respondents in purchasing acted as mandatory for McDougall and Beard. The correspondence of 1883 was held to negative this. But not the less their Lordships held

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that the respondent bank were not strangers to the act which rendered the sale by the sheriff invalid, and that the warranty in the deed of conveyance against the sellers' own acts had not been complied with. Even if there had been no warranty their Lordships were of opinion that the respondent bank could not maintain its case.

For it was clear "that the basis of the whole transaction was to be a purchase by the bank from the sheriff, and this must mean a valid and effectual purchase and not a mere apparent or pretended one. The circumstances show that the bank did not really become the purchasers, not by reason of any defect in the prior title, but because of a vice in the sale itself, which prevented its being a sale. It was only in the event of their becoming the purchasers that the terms and conditions of the letters of January, 1883, became applicable, and their Lordships think that the bank never did, within the true meaning of these documents, become the purchasers."

Their Lordships on the present occasion have gone through the evidence afresh, with the Hochelaga judgment now formally before them, and they find themselves in full agreement with the view taken by the Judicial Committee in 1895. It follows that as soon as Rough began his action to set aside the sale the transaction of January, 1883, became, not voidable merely, but void—that is to say, a nullity.

The question that remains is whether the respondents, under these circumstances, can derive any assistance from the provisions of the Civil Code.

By the Roman law and the old French law, as in other well-known systems, an agreement to sell did not transfer the property so sold. It simply imposed on the seller an obligation to confer on the buyer peaceable possession in the capacity of proprietor. But the Code Napoleon altered this, and introduced the principle that the agreement normally passes the property without more. The Province of Quebec has adopted the substance of this principle. By art. 1487 of the Civil Code the sale of a thing not belonging to the seller is declared null, subject to certain exceptions; but by art. 1488 the sale is declared valid if the seller afterwards becomes owner of the thing sold.

It appears to their Lordships that these articles do not render absolutely void every sale where the seller does not at the time of sale own the things he sells. If the contract were to transfer specific property at once the articles may well have that effect; but if the contract were one to transfer in the future, not a specific thing but some quantity of a general description of

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article, a contract of the executory character which the Roman law recognised may in such cases be valid. It is therefore necessary to exercise much caution before coming to a conclusion that when the expression "nullity" is used in the Civil Code of Quebec it can be assumed to mean what it would import if used in English law. It may really signify nullity arising only out of a demand or rescission legitimately made. Their Lordships consider the importance of arriving at a reliable conclusion as to the Quebec jurisprudence on the meaning of the two articles so great that, excepting in a case where there have been full arguments before the Courts there on the point, they are reluctant to express themselves upon it. It may be that nullity, as the word is used in the two articles, means neither a mere title to avoid what is only voidable nor the mere non-existence of the contract.

But on this difficult question, on which the Judges in the Courts below have differed, it is not necessary for their Lordships, to pronounce. For reasons which they have already given fully they think that the real agreement made in January, 1883, by the respondent bank was, as said by Lord Herschell in 1895, to make a valid and effectual purchase from the sheriff as a preliminary basis for their transaction with McDougall and Rough. It was only a subject of title that was to be really and effectually so acquired by the bank that formed the subject of the sale to McDougall and Rough. Such a purchase was never made, not because of any defect in prior title but because of vice in the sale itself, which prevented it from being a sale at all. There was therefore no agreement capable of having the articles in question of the Civil Code applied with a view to ascertaining whether defects in title could be cured. Once the facts were established the agreement turned out to have had no binding effect of any kind.

The result is that their Lordships think that the judgment of Curran, J., of June 25, 1896, was right, and that this should be restored and the judgment maintaining the petition in revocation reversed. The appellants are entitled to have their costs here and in the Courts below except the costs allowed to the respondents by the judgment of the Supreme Court of Canada, 29 Can. S.C.R. 193.

They will humbly advise His Majesty in accordance with this judgment.

Appeal allowed.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., Barry and Grimmer, JJ. April 21, 1922.

BROKERS (§IIIB—35)—SALE OF PULPWOOD—AGREEMENT TO PAY COMMISSION ON SALE—CONSTRUCTION OF AGREEMENT—SUFFICIENCY OF SERVICES.

Where the language used in an agreement to pay a commission for services in selling a quantity of pulpwood is plain and unequivocal, and contains an unqualified promise to pay for services which have been rendered, it being clear that payment of the commission was not intended by the parties to be dependent on payment of the purchase price, the right to recover the commission under the agreement is not affected by failure on the part of the purchaser to pay the second or subsequent payments of the purchase price.

APPEAL by defendant from the trial judgment in an action to recover commission on the sale of pulpwood by the plaintiff for the defendant. Affirmed.

J. B. M. Baxter, K.C., supports appeal.

M. G. Teed, K.C., and *Jacob DeWitt*, of the Quebec Bar, contra.

HAZEN, C.J.:—Having carefully read the evidence and the judgment of Crocket, J. the trial Judge, and considered the questions involved, I have come to the conclusion that the appeal should be dismissed with costs. As I am of opinion that the trial Judge was right in ordering a verdict to be entered for the plaintiff for the full amount claimed and costs, and fully agree with the reasons that he gives therefor, I feel that nothing could be usefully added by me to what he has said.

The appeal should be dismissed with costs.

BARRY, J., agrees.

GRIMMER, J.:—This action, involving $13,500 was brought to recover commission on the sale of pulpwood by the plaintiff for the defendants, being the balance of the sum of $15,000 which it is claimed the defendants agreed to pay the plaintiff for his services in selling for them 15,000 cords of peeled pulpwood. The case was tried before Crocket, J., without a jury at the St. John Circuit in April last, and later a judgment was rendered and a verdict ordered to be entered for the full amount of the claim with costs, and from this the defendants now appeal.

The plaintiff, a broker, undertook to sell pulpwood for the defendants, and as a result of his efforts two contracts were executed and delivered to him of 10,000 to 11,000 and 5,000 to 6,000 cords of peeled spruce pulpwood, respectively at $20 per cord. The contracts save as to quantity were similar in terms and provided for advances of $1 per cord on or before June

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25, 1920—$9 when the wood was peeled and piled in the woods, $5 more when it was hauled to the railway, and the balance of the price to be paid on receipt of the mill return. The original price of the wood was $19 but as a result of negotiations between the parties the sum was advanced to $20, out of which the defendants agreed to pay plaintiff a commission of $1 per cord on 15,000 cords of wood under the following letter:—

"Newcastle, N.B., June 17th, 1920.

C. R. Carmichael, Esq.,
212 McGill Street, Montreal, Que.

Dear Sir:

In consideration of your services and for value received we the undersigned do hereby agree to pay to you the sum of fifteen thousand dollars ($15,000), said sum payable to you for your services in selling fifteen thousand (15,000), cords of peeled pulpwood this day to C. W. Hallahan, of Canton, N.Y. Said amount to be paid as follows: ten per cent. (10%), of the first cash payment and five per cent. (5%), of all future payments received by us. Balance of your commission to be paid when wood is hauled to railway sidings.

(Signed) R. B. McCabe
J. W. Bowes."

Hallahan expected to resell the wood at a profit, but failing to do so the preliminary payment of $1 per cord was not made and the contracts went off. Negotiations were however reopened through the plaintiff and a new or further contract of sale was executed between the defendants and Hallahan, on June 30 of the same year, which provided for the sale by defendants to Hallahan, his "heirs, executors and assigns" of 17,000 cords of wood at $20 per cord. The plaintiff also prepared a new agreement as to his commission providing for $17,000 instead of $15,000. The defendants however declined to sign the letter but did execute a memorandum or footnote to the commission agreement of June 17, which is as follows:—

"Chatham, N.B.

The above agreement was signed on June 30th, instead of June 17th, 1920, and is for seventeen thousand (17,000), cords instead of fifteen thousand (15,000). Commission to C. R. Carmichael to be fifteen thousand dollars ($15,000), to be paid as above stipulated.

(Signed) R. B. McCabe
J. W. Bowes."

The new contract provided that $1,000 should be paid at the

time of the execution thereof; $14,000 on or before July 7; $9,000 when the wood was peeled and piled in the woods; $5 per cord when the wood was piled at the point of shipment, and the balance on receipt of the mill report. The $1,000 was paid as agreed, the $14,000 later on, and the plaintiff was paid $1,500 on account of his commission agreement with the defendants. Hallahan however was not able to carry out his contract as arranged, and later on was notified by the defendants it had been cancelled. Before this occurred, however, he had organised a syndicate to take over the contract of which an assignment has been duly made, and the $15,000 paid defendants came from this source. This syndicate, however, proved unable to finance the contract, and in seeking a way out of the difficulty some of its members interested the Dexter Sulphite Pulp & Paper Co., which eventually acquired the whole of the 17,000 cords of wood, and relieved the syndicate of liability to the bank for the $15,000 paid the defendants. The company paid $20 per cord for 11,000 cords of the wood, and $21.50 per cord for 6,000 cords, from which it would seem the defendants did not suffer loss by or through the change of purchasers.

Without detailing at greater length the various steps through which this matter passed, and which are recited at considerable length in the judgment of the trial Judge, I shall confine myself to a consideration of what I conceive the agreement between the plaintiff and the defendants means, and its effect. The language used therein to me is plain and unequivocal, and contains an unqualified promise or agreement to pay the plaintiff the sum of $15,000 for an act or service already rendered to the defendants by the plaintiff, viz.: the selling of 15,000 cords of peeled pulpwood this day to C. W. Hallahan of Canton, N.Y. The act had been done, the service rendered, the sale made before the agreement was executed, and even though the footnote was added thereto on June 30 it does not change the matter other than to shew that the volume of wood sold by plaintiff for the defendants had grown by some 2,000 cords. It is true the commission was not to be paid immediately, but the provision therefor was made in order to make it easy and convenient for the defendants, and this is the only condition stipulated for in the agreement. That the plaintiff should be paid and be entitled to receive the full amount of the commission before the complete performance of the contract appears from, to me, to say the least, a casual examination of the agree-

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ment. He was to get 10% of the first cash payment on account of the sale, 5% of all future payments, and the balance when the wood was hauled to the railway siding. The defendants were under the sale contract to be paid $1,000 on account at a date specified; $9 per cord further when the wood was peeled and piled in the woods; $5, per cord more when the wood was piled at the shipping point, but had to await the receipt of the mill return before the balance of the purchase price was paid, from which it is abundantly evident the defendants contracted and intended to discharge their agreement with the plaintiffs before the full performance of the contract.

Under these conditions I do not think it can successfully be argued that the agreement intended the commission or the balance due on account thereof should only be paid or be payable only upon the wood hauled and piled at the shipping point, supposing all the payments required by the sale contract had been duly made. Neither do I think it can successfully be contended that a default in the second or any subsequent payment on the part of the purchaser would render void the agreement of the defendants to pay the plaintiff his commission. The only conclusion I can come to is that there was a firm and binding agreement made by the defendants with the plaintiff to compensate him for a service rendered, and that the agreement was not voided by any subsequent act in respect to the contract of sale made by the defendants with the purchaser found by the plaintiff and in which he had no part.

I think the Judge arrived at a just conclusion upon the commission agreement and the facts of the case as presented before him, and his finding should not be disturbed.

Appeal dismissed with costs.

Appeal dismissed.

ROYAL TRUST Co. v. CANADIAN PACIFIC R. Co.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Parmoor and Duff, J. July 31, 1922.

DAMAGES (§III I—188)—ACCIDENT ON RAILWAY—DEATH OF PASSENGER—ACTION UNDER ORDINANCE RESPECTING COMPENSATION TO FAMILIES OF PERSONS KILLED IN ACCIDENTS—COURTS BELOW ACTING UPON PROPER PRINCIPLE BUT DIFFERING AS TO SUM ALLOWED—DUTY OF PRIVY COUNCIL TO FIX PROPER SUM.

Where in an action for damages under Con. Ord. N.W.T. 1898, ch. 48, which gives compensation to families of persons killed by accidents, the Courts below have proceeded upon the proper principle in assessing the damages, but owing to differences in the estimates formed by the Judges as to the future earnings of the deceased and differences in the value which they put upon his

actual and anticipated savings, have arrived, at sums to be allowed, with neither of which their Lordships of the Privy Council can agree, their Lordships will, acting upon the proper principle, fix an amount to be allowed as compensation.

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ROYAL TRUST CO. v. CANADIAN PACIFIC R. CO.

Lord Parmoor.

APPEAL by the administrators of an estate from the judgment of the Supreme Court of Alberta (1921), 60 D.L.R. 379, in an action for damages under the Ordinance respecting compensation to the families of persons killed in accidents. Varied.

The judgment of the Board was delivered by

LORD PARMOOR:—The appellant is the administrator of the estate of the late William John Chambers, who was killed in a railway accident on the line of the respondents. The respondents do not dispute their liability for damages under the Con. Ord. N.W.T., 1898, ch. 48, which gives compensation to families of persons killed by accidents, and which, so far as is material, corresponds to the Fatal Accidents Act, 9 & 10 Vict., 1846, ch. 93, ordinarily known as Lord Campbell's Act. The only question at issue in the appeal is the amount of compensation payable for the benefit of the widow and son of the late William John Chambers. On the trial before Hyndman, J., the amount of compensation was fixed at the sum of $80,000, apportioned in the sum of $65,000 to the widow and $15,000 to the child. On appeal to the Appellate Division of the Supreme Court of Alberta (1921), 60 D.L.R. 379, the judgment in the Court below was varied, and the amount awarded was reduced to $40,000, $25,000 being apportioned to the widow and $15,000 to the son. In both the Courts, therefore, the same amount was apportioned to the son, and no further question arises under this head; but in the opinion of their Lordships it is advisable in cases of this kind to proceed on the principle adopted before Hyndman, J., namely, to assess the total amount in the first instance, and then to apportion it.

The material facts can be shortly stated. William John Chambers was an eye, ear and throat specialist, thoroughly competent and reliable in his professional work. He is said to have been one of the best men in his profession at Calgary. He was in good physical condition at the time of his death. He was 46 years old, and his expectation of life, calculated on an actuarial basis, was, at the time of his death, 23 years. During the two years immediately preceding his death his net annual professional earnings had amounted to $12,862.83 and $18,056.95 respectively. He left an estate which was producing at the time an annual income of $1,830. It is not, however, necessary further to consider this item, or the items of accident or life

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assurance, until the question arises as to the deductions which should be made from the total sum which, but for such deductions, would be payable as compensation or damage. He left his whole estate to his wife, the appellant, whose expectation of life was then 35 years.

When a claim for compensation to families of persons killed through negligence is made, the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed. It is not competent for a Court or a jury to make in addition a compassionate allowance. The principle, as stated by Lord Watson in *G.T.R. Co.* v. *Jennings* (1888), 13 App. Cas. 800, at 804, is applicable in cases where the loss, in respect of which compensation is claimed, is based on the cessation of an income derived from professional skill:—

"It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work and remuneration; and also how far these, if realised, would have conduced to the benefit of the individual claiming compensation."

The difficulty arises not in the statement of the principle, but in its application to a case in which the extent of the actual pecuniary loss is largely a matter of estimate, founded on probabilities, of which no accurate forecast is possible.

In the present case it appears to be the duty of the Court, following the lines laid down in the above and other cases, first to estimate as nearly as possible the capitalised value to the widow and child of the share which they would have enjoyed in the future earnings and probable savings of the deceased, and then to deduct from the sum so ascertained the amount received for accident insurance, with proper allowances in respect of the life policies and in respect of the acceleration, by reason of the death, of the benefits coming to the dependents under the will of the deceased. Both Courts appear to have acted on this principle, but with different results. The differences are accounted for partly by a difference in the estimates formed by the Judges as to the future earnings of the deceased, and partly by a difference in the value which they severally put upon his actual and anticipated savings; and their Lordships find themselves unable to agree with the decision of either Court as to the sum to be allowed. In these circumstances, it becomes the duty of their Lordships on this appeal to fix a sum; and, acting on the above principles and forming the best esti-

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mate they can, they have arrived at the sum of $57,000 as the amount proper to be allowed by way of compensation, such sum to be apportioned as to $42,000 to the widow and as to $15,000 to the infant son.

Their Lordships will humbly advise His Majesty that the judgment of the Appellate Court, 60 D.L.R. 379, should be varied by substituting the said sum of $57,000 for $40,000, to be apportioned as follows:—To Olive Watson Chambers, widow of William John Chambers, $42,000; to Ewan Buchanan Chambers son of William John Chambers, $15,000; and that the respondents do pay to the appellants two-thirds of their costs of the appeal, but that no alteration be made in respect of the orders as to the costs in the Courts below.

Judgment varied.

EVANS v. HAMILTON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

CONTRACTS (§IIA—170)—SALE AND PURCHASE OF LAND—AGREEMENT TO REPURCHASE BY VENDOR—CONSTRUCTION OF CONTRACT.

An agreement for the sale and purchase of certain lots contained *inter alia* the following clause, "I hereby agree that in the event of your desiring to sell one lot or more for any reason after six months. . . . . I will upon one month's notice pay you back all moneys paid by you for the said lots with interest at 10% per annum, and take the lot or lots off your hands." The Court held that this clause was part of the agreement which induced the purchasers to purchase, and that it could not be cancelled by the vendor without giving some notice to the purchasers, but as no time was fixed the vendor might fix such time by serving notice requiring the purchasers to inform the vendor within a certain time, whether they intended to keep the lots or not, and not having called upon them to exercise their option, the purchasers had not waived their right under the agreement and were entitled to the return of the purchase money and interest.

APPEAL by defendant from the trial judgment, (1922), 63 D.L.R. 710, in an action for the return of the purchase price of certain lots and interest in accordance with the terms of the agreement. Affirmed.

W. F. Dunn, for appellant.

P. H. Gordon, for respondents.

HAULTAIN, C.J.S., I agree that the appeal should be dismissed.

LAMONT, J.A., concurs with MCKAY, J.A.

TURGEON, J.A.:—I agree that the appeal should be dismissed and that the respondents should be entitled to receive the amount awarded to them in the judgment appealed from upon conveying the lands in question to the appellant free of all in-

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EVANS v. HAMILTON.

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cumbrances and of all claims for taxes to March 2, 1921, as provided by my brother McKay in his judgment. I do not think, however, that it is necessary to determine whether the appellant might, by notice, have limited the time within which the respondent's right of election was to run. He gave no such notice and I refrain from expressing any opinion upon the abstract question involved which, I think, is not free from doubt.

McKAY, J.A.:—On December 19, 1911, the appellants sold to the respondents the 3 lots hereinafter particularly described for $325 each, and signed and delivered the following agreement to the respondents:

"December 19, 1911.—In consideration of your purchasing three (3) lots, each 25'x125', on Lynbrook Heights, in the City of Moose Jaw, between Laurier and McDonald Sts. on Connaught Ave. Nos. 14, 15 and 16, block 23, at $325 each, I hereby agree that in the event of your desiring to sell one lot or more for any reason after six months from this date I will, upon one month's notice, pay you back all moneys paid by you for the said lots with interest at 10% per annum, and take the said lot or lots entirely off your hands.

The lots are all guaranteed high and dry and level, and good building lots in every way, and good value for the money at present ruling prices, the building is going up in their direction, and lots should raise rapidly in value.

A. E. Hamilton."

On August 18, 1920, the respondent George H. Evans wrote to appellant offering to lease the said lots to the appellant on certain terms. Appellant did not reply to this offer, and respondent withdrew this offer on September 23, 1920. On the 2nd and 23rd days of February, 1921, the respondents demanded in writing from the appellant, in accordance with the said written agreement, the repayment of monies paid for the said lots with interest as therein set out. The appellant not repaying the money, the respondents brought this action to recover payment, and the trial Judge (1922), 63 D.L.R. 710, gave judgment against appellant in their favour for $975, with interest from December 19, 1911, at the rate of 10% per annum.

From this judgment the appellant appeals on the following grounds:—1. That the said letter of December 19, 1911, is an offer to repurchase and should have been accepted by respondents within a reasonable time, and that failing to accept same until February 2, 1921, was not accepting within a reasonable

time. 2. That the letter of the respondents of August 18, 1920, was a counter offer to appellants and operated as a rejection of appellant's offer and that appellant's offer could not, thereafter be accepted. 3. That the respondents are barred by laches. 4. That the trial Judge found that the agreement sued on is a hard one on the appellant and the action is one for specific performance and Courts of Equity refuse to grant specific performance where to do so would constitute a hardship upon the party against whom it was ordered.

I do not think the appellant can succeed on any of the above grounds. I cannot agree with appellant's counsel that the letter above quoted was simply an offer to repurchase. It was part of the agreement that induced the respondents to purchase the lots. An offer may be cancelled at any time before acceptance, but this agreement could not be cancelled by appellant without giving some notice to the respondents, as the respondents had accepted his agreement when the respondents bought the lots, on the terms of this agreement. The agreement, however, does not fix the time within which the respondents are to say whether they intend to keep the lots or ask for the return of their purchase money, and, in my opinion, the appellant could have fixed such time by serving notice upon respondents calling upon them to exercise their rights under the agreement within a certain time, namely, to decide and inform him whether they intended to keep the lots or require a return of the purchase money.

In *Moss* v. *Barton* (1866), L.R. 1 Eq. 474, 35 Beav. 197, 55 E.R. 870, the plaintiff Moss brought an action for the specific performance of an agreement for the lease of a house. The facts were shortly these: By an agreement dated November 30, 1857, D. W. Wire agreed to let to the plaintiff Moss the house therein mentioned, at the yearly rental of £111 for a period of 3 years, to be computed from Christmas then next; D. W. Wire agreed, at the request of the plaintiff, to grant him a lease of the premises for 5, 7, 14 or 21 years from the expiration of the aforesaid 3 years' occupancy, at the same rent; that the plaintiff should, during his occupancy, keep the premises in good and substantial and ornamental repair; and that during and after the said 3 years' occupancy, D. W. Wire should have all the landlord's usual rights to compel payment of rent, if neglected. The plaintiff continued to occupy the premises, but no formal lease was executed. In November, 1900, D. W. Wire died, having by his will appointed the defendants, S. Barton and

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J. B. Wire, his executors. The rent was paid by the plaintiff to D. W. Wire during his life, and afterwards to the defendants. The plaintiff, in 1864, claimed to be entitled to exercise his option for a lease under the said agreement; and the present suit was instituted for specific performance of that agreement, the plaintiff alleging that he had never waived or abandoned the right. The defendants, by their answer, stated that they were not aware of the existence of the agreement till some time after their testator's death; that in 1862 the plaintiff applied for a lease of the premises for 7, 14 or 21 years, at a reduced rent, to which proposal they declined to accede, and the plaintiff then continued to occupy the house as tenant from year to year; that the plaintiff, though bound to repair the house at his own expense if the agreement were subsisting, applied to the plaintiffs for £16.8s for the expense of repairing the front of the house, which sum the defendants paid. They submitted that the plaintiff was not now entitled to claim a lease, and that, if that right continued after the expiration of the 3 years' occupancy, the plaintiff had waived and abandoned it. Lord Romilly, M.R., at p. 477, delivered the following judgment:—

"I am of opinion that the Plaintiff is entitled to a decree. Under the original document, which was an agreement for a lease, the Plaintiff is entitled to call on the Defendants for specific performance, unless he has done something to bar his rights, at any time afterwards. There was nothing to prevent his continuing as tenant from year to year after the three years had expired, and the right to require a lease still existed. The Defendants say that they did not know of the original document; but they had notice of it by the Plaintiff's application. Why did they not, at the end of 1862, call on the Plaintiff to exercise his option? They allowed him to continue in occupation, though they knew that the option continued till the agreement was carried into effect or waived. The case of *Hersey* v. *Giblett* (1854), 18 Beav. 174, 52 E.R. 69, shews that a person entering into an agreement of that description may execute it at any time, if no time is stipulated for within which it is to be exercised, unless the landlord calls upon him to do so and he makes default, in which case the landlord may determine the tenancy. The application on the part of the plaintiff to be paid the £16.8s expended in repairs was not a waiver of the contract, though the Plaintiff in so doing mistook his right, and he is bound to repay the money. I am of opinion that

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he is entitled to a decree for specific performance, and the costs must follow the event."

See also *Buckland* v. *Papillon* (in appeal) (1866), L.R. 2 Ch. 67, 36 L.J. (Ch.) 81, 15 W.R. 92.

In the case at Bar the appellant did not at any time call upon respondents to exercise their option under the agreement, and the respondents did not do anything to waive their rights under the agreement. I do not think the respondents' letter of August 18, 1920, can possibly be construed into a waiver of their right to the return of the purchase money. This letter asserts the agreement, but to make it easy for the appellant submits a certain proposal which, the appellant not accepting, was withdrawn by their letter of September 23, 1920.

While the enforcement of this agreement against the appellant may be hard on him, I do not think it is of such a nature as to justify the Court in refusing to grant relief.

The appeal will be dismissed with costs, but the judgment below varied by ordering that the respondents will only be entitled to said judgment upon their depositing with the Local Registrar at Moose Jaw, a transfer of said lots in favour of the appellant, and certificate of title for the same free and clear of all encumbrances. Taxes to be paid up to March 2, 1921.

Appeal dismissed.

B.W. NAVIGATION Co. v. THE "KILTUISH." BARNET LIGHTERAGE Co. v. THE "KILTUISH."

Exchequer Court of Canada, B.C. Admiralty District, Martin, L.J. in Adm. June 22, 1922.

COLLISION (§IA—1)—BETWEEN SHIP AND TUG AND TOW—BOTH TO BLAME—LIABILITY—APPORTIONMENT OF—MARITIME CONVENTIONS ACT CAN. STATS. 1914 CH. 13.

The Court will, in a proper case, where both parties are to blame for a collision between a ship and a tug and its tow, apportion the liability equally under the Maritime Conventions Act 1914 Can. stats. ch. 13, and order each delinquent to bear its own costs.

[*Pallen* v. *The "Iroquois"* (1913), 11 D.L.R. 41, 18 B.C.R. 76, 17 Can. Ex. 185, referred to.]

TRIAL of a collision action in admiralty.

MARTIN, L.J.A.:—Largely owing to the conflict of evidence the questions raised in this consolidated action have occasioned me much reflection, and after a reconsideration of the whole matter I have reached the conclusion that both parties are to blame for the collision, the fault on the part of the "Kiltuish" being the neglect to stop and navigate with caution when the danger became apparent, and that on the part of the tug and

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tow being the misleading of the "Kiltuish" by failure to exhibit the regulation lights on the tow, and also allowing the tow to drift too far across the channel. In all the circumstances, I am of the opinion that this is a case where the liability should be apportioned equally under the Maritime Conventions Act, 1914, Can. ch. 13, and each delinquent should bear its own costs —*Pallen* v. *The "Iroquois"* (1913), 11 D.L.R. 41, 18 B.C.R. 76, 17 Can. Ex. 185.

I should perhaps say, to avoid misunderstanding, that in coming to this conclusion I have considered the liability of the tug and tow as being on the facts, inseparable, and that according to my very full notes of the argument, the plaintiff's counsel did not contest the submission of the defendant's counsel to that effect, but if, by chance, I am under a misapprehension on this point, the matter may be spoken to. If required, there will be the usual reference to the Registrar, with merchants to assess damages.

Judgment accordingly.

MOHL v. BRACHMAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

ACTIONS (§IIB—45)—LIBEL—TWO DISTINCT AND SEPARATE ACTS ALLEGED IN PLEADINGS—RULE 35 (SASK.) ALLOWING TWO OR MORE DEFENDANTS TO BE JOINED—RULE 36—SEPARATE TRIALS ORDERED BY TRIAL JUDGE—CORRECTNESS OF FINDING—INTERFERENCE WITH BY APPELLATE COURT.

Rule 35 (Sask.) has been interpreted as enabling a plaintiff to join several defendants in an action not only where the causes of action are identical but in all cases in which the subject matter of complaint against several defendants is substantially the same, although the respective causes of action against them are different in form and their respective liabilities are to some extent based on different grounds. The power given under this rule is subject to the right of the Court to strike out any party under Rule 36, and where a Judge has found that it is not desirable that two separate and distinct issues should be tried together, and there is no good ground for questioning the correctness of his finding, it will not be interfered with.

APPEAL by plaintiff from an order of the trial Judge in an action for libel. Affirmed.

C. E. Gregory, K.C., for appellant.

T. D. Brown, K.C., for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The material paragraphs of the statement of claim in this action are as follows:—

"5. The defendants Jacob Mohl and Benjamin Brachman in or about the month of August, 1921, falsely and maliciously published in both German and English languages the words following: (It will not be necessary to set out the alleged defamatory words).

6. The defendant the Saskatchewan Courier Publishing Co., Ltd., in or about the month of August printed falsely and maliciously or caused and procured to be printed and published in both German and English languages the words particularly set out in paragraph 5 hereof.

7. The defendants Jacob Mohl and Benjamin Brachman published and circulated through His Majesty's Post Office and elsewhere the words alleged in paragraph 6 hereof by mailing or causing the same to be mailed to a large number of persons residing in the vicinity of Edenwold, in the Province of Saskatchewan, and by distributing and delivering or causing to be distributed or delivered a paper or papers containing the said words to a large number of people."

Whatever the intention of the draftsman may have been, these paragraphs allege: 1. The joint publication of certain defamatory words by the defendants Mohl and Brachman. (para. 5). 2. The publication of the same defamatory words by the defendant company. (para. 6.) 3. the joint publication of the same defamatory words by the defendants Mohl and Brachman. (para. 7.)

As the pleadings stand, para. 7 is an unnecessary repetition of para. 5.

It was argued on behalf of the appellant that the reference in para. 7 to "the words alleged in paragraph 6" had the effect, when reading paras. 6 and 7 together, of an allegation of joint publication of the same defamatory words by the three defendants. Such a construction cannot in my opinion be given to the paragraphs in question.

The pleading alleges two distinct and separate acts, that is, the joint publication by Mohl and Brachman and the publication by the defendant company, and each of these separate acts constitutes a distinct and separate cause of action.

Our Rule 35, which is the same as the English Rule, O.16.2.4., is as follows:—

"35. All persons may be joined as defendants, against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable.

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according to their respective liabilities, without any amendment."

The decisions upon this rule are very conflicting, and are given very fully at p. 220 *et seq.* of the Annual Practice, 1922.

As a general rule, separate and distinct causes of action against different persons cannot be sued together. *Sadler* v. *G.W. Ry. Co.*, [1896] A.C. 450, 65 L.J. (Q.B.) 462. The above rule, however, has been interpreted as enabling a plaintiff to join several defendants in an action not only where the causes of action are identical, but in "all cases in which the subject-matter of complaint against the several defendants is substantially the same, although the respective causes of action against them are different in form and their respective liabilities are to some extent based on different grounds." Odgers on Libel and Slander, 5th ed. 605. *Compania Sansinena*, etc., v. *Houlder Bros. & Co., Ltd.*, [1910] 2 K.B. 354, 79 L.J. (K.B.) 1094. *Oesterreichische Export A.G.* v. *British Indemnity Ins. Co.*, [1914] 2 K.B. 747, 83 L.J. (K.B.) 971.

The power thus given under R. 35 is, of course, subject to the right of the Court to strike out any party under R. 36, which is identical with O.16.7.5.

In the present case the Judge from whose decision this appeal is taken has found that it is not desirable or convenient that these separate and distinct issues should be tried together, and there does not appear to me to be any good ground for questioning the correctness of his finding.

I think, however, that in view of statements made by counsel in the argument before us, that plaintiff should have leave to amend his statement of claim for the purpose of setting up a joint publication by the three defendants, if he so desires.

The appeal should be dismissed with costs.

Appeal dismissed.

McKINNON v. CAMPBELL RIVER LUMBER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., McPhillips and Eberts, JJ.A. January, 10, 1922.

COMPANIES (§IVD—80)—CONTRACT—ULTRA VIRES—RECEIVING BENEFITS —LIABILITY.

A company receiving funds under an agreement for the acquisition of shares in another company, which is *ultra vires*, is liable for their repayment, if shown that the company benefitted thereby and used the funds to pay corporate debts.

[See Annotation, 63 D.L.R. 1.]

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MCKINNON v. CAMPBELL RIVER LUMBER CO.

Macdonald, C.J.A.

APPEAL by plaintiff from judgment of Gregory, J.

J. Martin, K.C., for appellant.

S. S. Taylor, K.C., and *C. W. Craig*, K.C., for respondent.

MACDONALD, C.J.A. (dissenting):—I would dismiss the appeal for the reasons given by the trial Judge.

I think there was but one transaction and that it was agreed before the sale was made to Rounds that the extra $65,000 added to the plaintiff's price should go to the defendant company; that plaintiff should accept the shares as part payment from Rounds and that the company should agree to take them over.

When the parties went to Mr. Carter to have this part of the agreement put in writing and secured by mortgage on the mill, the mortgage was not to be a security for money then paid over, but was to secure performance of the purchase agreement of the shares. It is only necessary to read what plaintiff himself says on this matter at pp. 46-7. The whole trouble arose from the fact that the company has no power to purchase shares in another company. If the payment of the $65,000 could be separated from the rest of the transaction, there would have been a total failure of consideration for its payment, but it is evident that it was a part of the earlier transaction.

The appeal should be dismissed.

MCPHILLIPS, J.A.:—This appeal presents phases of complexity when first approached—but all complexity vanishes when the salient point is kept in view—and that is that the sale of standing timber was only possible of being effected if the sale could be financed and the financing of the same was done in a somewhat circumlocutory way.

In the carrying out of the transaction the sale was first made to one Rounds, and then from Rounds to the respondents. I do not propose to deal in detail with all that took place, as, much of it is extraneous to the real matter at issue in this action, all resolving itself into admittedly this one point, the appellants were entitled to a sum of $65,000, being a part of the purchase-price of the property; and which sum was payable by the respondents to the appellants; that can be said to be common ground, when the situation was that and indisputably that, an agreement was entered into which if carried out would have paid the $65,000, and also discharged a further sum due and owing of $25,000, *i.e.*, $85,000 was to be accepted in full discharge of an amount due in the whole of $90,000. That which forms the subject matter of this action is confined to the balance of the purchase-money, viz., $65,000. The $65,000, it is true was to constitute working capital for the respondents but

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that did not mean that it should never be paid to the appellants. In the interim of time, the appellants were holding 800 shares of the capital stock of the North America Lumber Co. as security for the $25,000, and as well it might be said as security for the $65,000, but the shares were not the shares of the appellants, they were the holders thereof as trustees for the respondents. In short it may well be said upon the facts that the balance of the purchase money coming from the respondents to the appellants, *i.e.*, the $65,000 was a loan made by the appellants to the respondents, extraneous to and apart from the sale transaction altogether, when it is properly viewed. This sum of $65,000 was to be retained as working capital by the respondents but it was nevertheless money of the appellants, being admittedly a portion of the sale price of the property sold, and the agreement was that its repayment was to be secured by the respondents to the appellants by the execution of a mortgage upon the property sold. When matters were at this stage and when the appellants were pressing for the mortgage—then it was that the respondents pointed out that the giving of a mortgage would destroy the commercial credit of the respondents. After some negotiations it was then agreed upon that a contract should be entered into whereby the shares above referred to would be taken over by the respondents at $85,000 within 4 years. The contract was in the following terms:—

"THIS AGREEMENT made and entered into this 24th day of April, in the year of our Lord 1914, by and between Albert McKillop of the City of Vancouver in the Province of British Columbia, Lumber Merchant, hereinafter called the party of First Part, and Campbell River Lumber Co., Ltd., a company duly incorporated under the Joint Stock Companies Act of the Province of British Columbia, and with its head office at White Rock in the said Province.

Whereas the said Albert McKillop is the owner of 800 shares of the capital stock of the North American Lumber Co. a corporation duly incorporated under the laws of the State of Maine and with its head office at the City of Portland in the said state of Maine, of the par value of $100 per share, and the said Albert McKillop has agreed to sell the same to the party of the second part, and the said party of the second part pursuant to a resolution of the directors thereof has agreed to purchase the same.

Now this indenture witnesseth that the said Albert McKillop for and in consideration of the sum of one dollar of lawful money of Canada to him paid this day by the party of the second part (the receipt whereof is hereby acknowledged) agrees

to sell to the party of the second part the eight hundred shares of the capital stock of the said North American Lumber Co. and the said party of the second part agrees to purchase the same and to pay therefor the sum of eighty-five thousand ($85,000) dollars within four years from the date of this indenture with interest thereon from this date until paid at the rate of 6½% per annum, payable half yearly, all payments to be made to the Royal Bank of Canada, East End, to the credit of the said Albert McKillop, and upon completion of the said payments of $85,000 and interest as aforesaid the said Albert McKillop agrees to transfer the said stock to the said party of the second part.

And it is further agreed between the parties hereto that the said party of the second part shall not sell, mortgage or dispose in any way of their lumber mill and premises at White Rock, B.C., until the said $85,000 and interest shall have been fully paid without the consent in writing of the said Albert McKillop thereto.

In testimony whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of N. A. McKinnon.

Albert McKillop (seal), Campbell River Lumber Co., Ltd.

N. W. Hunter, president.

F. G. Fox, vice-president."

Whilst the appellants had taken the shares from Rounds in the carrying out of the sale, unquestionably the appellants held the shares as trustees for the respondents and were not the beneficial owners of the shares, and had the shares become of great value and in excess of the amount due by the respondents to the appellants, that excess would undoubtedly have been monies payable by the appellants to the respondents, that is if same were realised upon. The shares were always held and only held as a security; then it was that the above contract was made. What the appellants were entitled to was a mortgage upon the property, and if the mortgage had been given would not the consideration therefor, namely, the $65,000, have been due and payable at the end of the four years? (as that was to be the term thereof, the $65,000 in the meantime forming the required working capital).

The evidence conclusively establishes that the $65,000 was an admitted amount due by the respondents to the appellants, it is part of the purchase-price and without it being paid the appel-

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lants will have had taken from them the property sold without receiving the full purchase-price.

Now if the contract above set forth had not been *ultra vires* of the corporation, *i.e.*, in excess of the corporate powers of the respondents, all might have been well, but it was so determined in an action brought to enforce the contract, therefore in the result it is as if the contract had never been made, and as the contract was made in the year 1914 the term of credit—the four years—having elapsed, it follows that the amount is due and payable by the respondents to the appellants.

With great respect, I cannot follow or agree with the view of the trial Judge that the case is one of a partial failure of consideration and that there can be no relief accorded. The sale transaction was finally concluded. The $65,000 sued for is money payable by the respondents to the appellants, by reason of an extraneous transaction. The procedure adopted to admit of the working capital being available to the respondents does not sweep the $65,000 into the sale transaction; it stands out separate and distinct therefrom. To visualise it clearly, the $65,000 was paid in cash by the respondents to the appellants, thereby fully completing payment of the total purchase-price going to the appellants, and the appellants advanced the $65,000 to the respondents, the respondents to use the same as working capital, but not in a venture in which the appellants were in any way concerned, and what the appellants were to receive was a mortgage upon the property sold which would have been a sound security. This was changed to the contract providing for the purchase of the shares held later to be an illegal contract and valueless. The amazing contention though is, and I say this with the greatest respect to all contrary opinion, that because of the invalidity of the contract, the debt is paid. This certainly is a most surprising result if it can be said to be the result in law. Rather should it be said that it merely leaves the parties where they were originally and that was that the respondents had $65,000 of the appellants, which they were to secure by a mortgage on the property sold, the mortgage to be payable in four years, and at its maturity of course it would have been payable, and such a mortgage would have been a valid mortgage.

The submission is—upon the part of the respondents—that the invalid contract constitutes payment of the debt—if not in terms that is the effect of the contention. Any such contention affronts one, and cannot, in my opinion, be given effect to, as it would be subversive of all fair dealing, and certainly is unsupportable by any authority that I am conversant with, and it

indeed would be surprising if any authority could be cited to support any such astounding proposition. The commercial position of the respondents was one of financial embarrassment in carrying on, and money was wanted to tide the respondents over; a mill had been built and timber land was desired. The course adopted cannot be said to be one that can be approved but yet there is no issue of fraud raised or any finding of that nature, or such a state of facts as really calls for or entitles the Court to refuse relief in the action. The scheme worked out, as the respondents upon their own evidence show, was to purchase the property through a sale being first made to Rounds for $230,000, $165,000 of the $230,000 to be the purchase price to go to the appellants—and the shares above referred to were at that time, the shares of Rounds and he would not carry out the transaction unless they were taken into consideration as part of the purchase price. But the appellants were not willing to take the shares as part payment, but were willing to take a mortgage upon the property sold for the balance of the purchase price, namely, $65,000, the shares, in the meantime, were to be held in the name of one of the appellants, in the name of McKillop. The shares were originally held in the name of Mrs. Rounds, and were said to be of the value of $80,000 and in the sale the shares were treated as of that value to be held by McKillop for the respondents. Unless the shares were taken as part of the purchase price the transaction could not go through, and the respondents agreed to this, and if so taken, Rounds would finance the transaction, and this was all at the instance of the respondents. In the course of the transaction, the respondents said that as to the shares they would guarantee their value or take them off the hands of the appellants at the guaranteed value; in fact it was so agreed. In the carrying out of the matter, the appellants paid to the respondents the $65,000 which is the amount sued for in this action. One cogent matter of evidence, to show that the appellants were to be secured in the repayment of the $65,000 by the respondents to them, is the clause in the contract above set forth, which provides that the respondents would not sell, mortgage or dispose of the lumber mill or premises until the $85,000 and interest should be fully paid, unless consented to in writing by McKillop. The $65,000 was used by the respondents to pay indebtedness of the corporation.

It is to be observed that the trial Judge accepted the evidence of McKillop, one of the appellants, as being credible evidence and proceeded wholly upon a point of law in dismissing the action. Further, the trial Judge held that:—

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"The payment of the $65,000 to the company was never intended by anyone to be a commission for a sale to Mr. Rounds, but was the company's scheme to get some working capital out of Rounds. The defendant company is unable to carry out a portion of its agreement and it seems perfectly clear that there has only been a partial failure of consideration and the usual principle of law must apply."

Later on in his reasons for judgment the trial Judge said:—

"There being only one agreement, a partial failure of the consideration does not enable the plaintiffs to recover back a portion of what he parted with."

That which the plaintiffs, the appellants, parted with as referred to by the Judge is the amount sued for in the action, namely, the $65,000.

The corporation, the respondents, would appear to have been in financial difficulty after the happenings here set forth and made an assignment, but has apparently relieved itself of this situation and is again a going concern, so that nothing requires attention upon this score as to whether there can be liability imposed. That there is the requirement to repay monies advanced and used to pay indebtedness of the corporation, cannot ,in my opinion upon the facts of the present case, be gainsaid—and I would refer to Brice on Ultra Vires, 3rd ed. (1893), pp. 641 to 650, para. 259a, at p. 650, reads as follows:—

259a. "But a corporation is liable in respect of an *ultra vires* engagement only to the extent of the benefits it may have received therefrom."

Here there can be no question and it is not contested that the $65,000 went to the benefit of the corporation.

See *Re Cork & Youghal R. Co.* (1869), L.R. 4 Ch. 748, 39 L.J. (Ch.) 277, 18 W.R. 26; *Re Exmouth Docks Co.* (1873), L.R. 17 Eq. 181, 43 L.J. (Ch.) 110, 22 W.R. 104; *Cunliffe, Brooks & Co.* v. *Blackburn and District Benefit Bldg. Soc.* (1882), 22 Ch. D. 61; (1884), 9 App. Cas. 857, 54 L.J. (Ch.) 376, 33 W.R. 309; *Wenlock* v. *River Dee Co.* (1887), 19 Q.B.D. 155, 56 L.J. (Q.B.) 589, 35 W.R. 822; *Re German Mining Co.; ex parte Chippendale* (1854), 4 DeG. M. & G. 19, 43 E.R. 415, 22 L.J. (Ch.) 926, 2 W.R. 543; *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P.C. 152, 13 E.R. 642, *Sinclair* v. *Brougham*, [1914] A.C. 398, 83 L.J. (Ch.) 465; and see *Royal Bank* v. *B.C. Accident & Employers' Liability Ins. Co.* (1917), 35 D.L.R. 650, 24 B.C.R. 197.

I see no difficulty whatever in according the relief claimed in this action; the $65,000 is an amount due by the respondents to the appellants, and no injury is imposed upon the corporation

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in any way. The monies were used to pay the indebtedness of the company, this is admitted upon the evidence. The monies went to the credit of the corporation upon their own showing, being paid into the Bank of Montreal to the credit of the corporation and paid out in the discharge of indebtedness of the corporation. Upon this state of admitted facts, how is it possible to hold otherwise than that it is a liability that must be discharged. The law is perfectly clear upon the point, it is idle to attempt to evade payment by setting up that the contract was *ultra vires*. That merely leaves the position as it was originally, and that was the advance by way of loan by the appellants to the respondents of $65,000 which must be repaid. The action, in my opinion, was well founded. The judgment of the Court below was wrong, and judgment should be entered for the appellants for the amount claimed. The appeal to be allowed.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

MUNDAY v. TRUMBLEY AND IMPERIAL ELEVATOR & LUMBER CO.

Saskatchewan King's Bench, MacDonald, J. June 21, 1922.

PARTIES (§IIB—119)—HOLDER OF MECHANICS' LIEN—ACTION TO CANCEL AGREEMENT FOR SALE OF LAND—LIENHOLDER AS PARTY DEFENDANT—SETTLEMENT OF ACTION—PAYMENT OF LIEN—RIGHT OF LIENHOLDER TO COSTS OF ACTION.

The holder of a mechanics' lien registered against property, who is made a party defendant to an action for the cancellation of an agreement for the sale of the property is a defendant within the meaning of the rules, and where the action is discontinued before the lien is discharged, the holder of the lien, upon giving a discharge of the lien, is protected under Rule 237 (Sask.) as to his costs of the action.

APPEAL by defendant (holder of a mechanics' lien) from an order of the Master in Chambers allowing an application by the plaintiff to set aside the taxation of a bill of costs of the appellant. Reversed.

J. W. Gorman, for appellant, Imperial Elevator & Lumber Co.

W. R. Kinsman, for respondent.

MACDONALD, J.:—The facts are that the plaintiff commenced an action for the cancellation of an agreement for the sale of land between himself and the defendant Trumbley. The Imperial Elevator & Lumber Co., Ltd., held a registered mechanics' lien against the property in question, and so it was added as a party defendant. The plaintiff and the defendant Trumbley arrived at some settlement of the action, a term of which was that the defendant Trumbley should secure a discharge of the Imperial Elevator & Lumber Co., Ltd.'s lien. Thereupon the

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plaintiff discontinued the action against both defendants. Subsequently the defendant Trumbley paid off and obtained a discharge of the mechanics' lien in question. The Imperial Elevator & Lumber Co., Ltd., under R. 237 of the Rules of Court, brought in its bill of costs to be taxed, and same was taxed by the taxing officer. The taxation was however set aside by the Master in Chambers, and from the order so setting it aside the present appeal is brought.

Two contentions are raised on behalf of the plaintiff. First, that the Imperial Elevator & Lumber Co., Ltd., which was made a party because it held a mechanics' lien registered against the property in question, is not a "defendant" within the meaning of the rules. The contrary was, however, decided in *Holland Canada Mortgage Co., Ltd.*, v. *Dulmadge*, [1921] 2 W.W.R. 322. The second point raised is that as the mechanics' lien in question was paid off and discharged, the defendant the Imperial Elevator & Lumber Co., Ltd., is not entitled to its costs. The Master in Chambers came to the conclusion from the material filed before him that the company had discharged its lien prior to the discontinuance by the plaintiff, and held that the company should have made provision for its costs of the action at the time of giving the said discharge. Both parties however agree that the Master in Chambers was under a misapprehension as to the facts, and the fact is that the action was discontinued before the lien was discharged at all. The Imperial Elevator & Lumber Co., Ltd., at the time of giving the discharge of the mechanics' lien, was fully protected as to its costs by the provisions of R. 237, which provides as follows:—

"Any defendant may enter judgment for the costs of the action, if it is wholly discontinued against him, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued, in case such respective costs are not paid within four days after taxation."

I can see no reason why the appellant herein is not entitled to the benefit of said rule. The appeal is therefore allowed, but by consent of the parties there will be no order as to costs.

Appeal allowed.

WOLFE v. S.S. "CLEARPOOL."

Exchequer Court of Canada, Quebec Admiralty District, Maclennan, D.L.J.A. October 6, 1920.

COURTS (§III—196) — EXCHEQUER COURT — JURISDICTION — COLONIAL COURTS OF ADMIRALTY ACT, 1890, (IMP.) CH. 27—ADMIRALTY ACT, 1891 (DOM.) CH. 29—RIGHT TO ENTERTAIN ACTION FOR BREACH OF CONTRACT.

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The Exchequer Court derives its admiralty jurisdiction from the Colonial Courts of Admiralty Act 1890. (53-54 Vict. ch. 27, Imperial), and the Admiralty Act 1891 (54-55 Vict. ch. 29, Canada) and these statutes give it no jurisdiction to entertain an action *in rem*, on a claim for breach of a stevedore's contract, between them and the owners of the vessel.

ACTION *in rem* by stevedores, to recover damages for breach of their contract to load the ship defendant. Dismissed for want of jurisdiction.

A. Chouinard, for plaintiffs.

Lucien Beauregard, for defendant.

The facts and circumstances of the case are set out in the reasons for judgment.

MACLENNAN, D.L.J.A.:—This is an action *in rem* on a claim by the plaintiffs for breach of a stevedore's contract between them and the owners of the S.S. "Clearpool" the plaintiffs alleging that the captain of this ship, on its arrival in the port of Montreal, on or about July 13, 1920, refused to allow them to load the vessel in accordance with their contract, whereupon they arrested the ship on a claim for $1,700 damages arising out of the breach of said contract. The ship has been released upon a bond and the defendant now moves for the dismissal of the action and all proceedings had therein upon the ground that this Court has no jurisdiction in an action of this kind.

The Exchequer Court derives its admiralty jurisdiction from two statutes, the Colonial Courts of Admiralty Act, 1890 (53-54 Viet., ch. 27, Imperial), and the Admiralty Act, 1891 (54-55 Viet., ch. 29, Canada.) From these statutes it is clear that the jurisdiction of the Exchequer Court, as a Court of Admiralty, is no greater than the admiralty jurisdiction of the High Court in England. The expression "admiralty jurisdiction of the High Court" does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court or may be conferred by statute giving new admiralty jurisdiction; *Bow McLachlan & Co.* v. *The Ship Camosun*, [1909] A.C. 597, 79 L.J. (P.C.) 17.

The Admiralty Court has never exercised a general jurisdiction over claims for damages. Its jurisdiction was originally confined within well defined limits which have been extended by the Admiralty Court Act, 1840 ch. 65, (Imp.) and the Admiralty Court Act, 1861 ch. 10, (Imp.) Under sec. 4 of the latter Act the Admiralty Court was given jurisdiction over any claim for the building, equipping or repairing of any ship if, at the time of the institution of the cause, the ship or the proceeds thereof are under arrest of the Court, but no provision was made

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in the statute giving jurisdiction to the Court to enforce a claim for damages for breach of a building contract, whether there was an arrest or not, and the Privy Council held in the *Camosun* case, that the Court did not have jurisdiction in such a claim. By the Admiralty Court Act, 1840, the Admiralty Court was given jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of any ship, whenever such ship was under arrest by process issued from the Court of Admiralty or the proceeds of any ship having been so arrested have been brought into and are in the registry of the Court, and by the Act of 1861 the Court was given jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1911, ch. 41, whether the ship or the proceeds thereof were under arrest of said Court or not. The *Camosun* case was an action on a mortgage in favour of the builders registered under the provisions of the Merchant Shipping Act, and it was held in that case that the Admiralty Court had no jurisdiction to enforce a claim for damages by the owners for breach of the contract for building the ship either as a counterclaim or as a set-off against the amount due under the mortgage whether the claim was against the ship or against the builders.

By the Merchant Shipping (Stevedores and Trimmers) Act, 1911, ch. 41, claims for work done in respect of stowing and discharging on board or from any ship, the owners of which do not reside in the United Kingdom may be enforced as claims for necessaries in all Courts having Admiralty jurisdiction. This statute contains no provision for the enforcing of a claim founded on a breach of a contract in respect of stowing or discharging.

The plaintiffs' claim is clearly one for breach of a contract in respect of stowing and the principles which were applied by the Privy Council in the *Camosun* case on a claim for breach of contract for the building of a ship are applicable, in my opinion, to a claim for breach of a stevedore's contract.

In *Cook* v. *SS. "Manauence"* (1898), 6 Can. Ex. 193, McColl, C.J., in the B.C. Admiralty District of this Court, in an action for an alleged breach of contract to carry plaintiff from Liverpool to St. Michaels and thence to the Yukon gold fields, where proceedings were taken against the ship and a warrant of arrest was obtained, held that, even if the breach alleged were established, the plaintiff was not entitled to a lien on the ship and the action was dismissed.

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In the case of *The Montrosa*, [1917] P. 1, 86 L.J. (Adm.) 33, an action *in rem* for breach of a charter party originally brought in the City of London Court under the provisions of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and transferred to the High Court by the order of the latter, Sir Samuel Evans said at p. 6:—

"This Court could not have entertained the action if it had been originally brought in this Court, because it has not been entrusted with powers like those conferred on county courts by the Act of 1869 already referred to. Why that is so I do not know. Those interested in shipping have urged the extension of the powers of this Court to enable it to decide causes arising out of agreements made in relation to the use or hire of a ship, and also in relation to the sale and purchase of ships. It seems to me to be fitting that this should be done; but that is a matter for the Legislature. But if the City of London Court had jurisdiction to entertain the action, this Court by transferring the action to itself obtained jurisdiction to hear and determine it, notwithstanding that it could not have been instituted here originally."

I have examined the cases cited at the hearing and many others, but I have been unable to discover any case in which it was held that the Admiralty Court has jurisdiction to enforce a claim for the alleged breach of a contract between a stevedore and the owner of the ship. The owner is not a party to this action and, in my opinion, this Court has no jurisdiction to hear a claim of this kind whether against the ship or against the owner and the matter should be left to be settled in a Court having jurisdiction to entertain the claim.

For these reasons the plaintiffs' action must be dismissed with costs.

Judgment accordingly.

DOMINION BANK v. DOODY.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. February 24, 1922.

NEW TRIAL (§ II—5)—ERRORS OF COURT—CASE CALLED OUT OF TURN AND TRIED AGAINST PROTEST—CASE SET DOWN FOR TRIAL BY JURY TRIED BY JUDGE WITHOUT JURY—DISCRETION OF TRIAL JUDGE TO REFUSE TO POSTPONE TRIAL.

It is entirely for the trial Judge to decide the merits of an application to postpone a trial, and it is discretionary with him to postpone it or refuse to do so.

It is ground for a new trial that a case is called on out of its turn on the docket and tried against the protest of one of the parties.

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Grimmer, J.

Where an order for directions has fixed the mode of trial by a Judge and jury and such order has not been rescinded, it is not within the power of the trial Judge to order the case to be tried and to try it without a jury.

[*Fairweather* v. *Foster* (1918), 42 D.L.R. 723, 46 N.B.R. 46, applied.]

APPEAL by defendant from verdict entered for plaintiff under an order of Chandler, J., at York Nisi Prius Sittings. New trial ordered.

W. P. Jones, K.C., for appellant.

W. H. Harrison, for respondent.

The judgment of the Court was delivered by

GRIMMER, J.:—This is an appeal from a judgment entered by order of Chandler, J., at the York Circuit in September last.

The grounds are that a postponement of the trial should have been allowed: that there was no power or jurisdiction in the Court to try the case without a jury, and that there was no power or jurisdiction to try the cause out of its turn.

In my opinion it was discretionary with the trial Judge to postpone or to refuse to postpone the trial, on the application to put it off, upon the ground of the absence of a necessary and material witness, it being for him entirely to decide the merits of the application upon the evidence before him, and that discretion under the circumstances in this case should not be interfered with.

As to the second ground it appears that a summons for directions in the case was taken out in the usual way by the solicitor of the plaintiff, in which the mode of trial was stated to be by "Judge and common jury," and in due course an order was made by the Chief Justice of the King's Bench Division, after hearing the solicitors on both sides of the case, by which it was directed that the mode of trial was to be "with Judge and common jury, special jury on notice by plaintiff with notice of trial, or by defendant within four days." Thus it seems the application for the trial by jury was made by the plaintiff's solicitor, was apparently acquiesced in by the solicitor for the defendant, and the order was finally made as above. It is alleged in the factum of the appellant, and not denied in the respondent's factum, though the record is silent in this respect, that upon the opening of the Court at which the case was tried, counsel for the defendant finding the case was entered upon the non-jury docket, objected to the entry. The trial Judge, however, upon the docket being called, and no jury cases being ready for trial, upon the motion of counsel for the plaintiff proceeded to hear this matter as a non-jury case, and gave judgment therein in the

absence of the defendant, for the amount of the plaintiff's claim.

The order for directions having fixed the mode of trial by a Judge and jury, and that order never having been rescinded, under the decision of this Court in *Fairweather* v. *Foster* (1918), 42 D.L.R. 723, 46 N.B.R. 46, it clearly was not within the power of the trial Judge to order the case to be tried, and to try it without a jury.

That case was the reverse of the present, an order having been made by a Judge for trial without a jury. The trial Judge directed the jury to be empanelled and so tried the case. It was held on appeal it was unreasonable to suppose that R. 5 of O. 36 of the Judicature Act, which provides a method of obtaining a jury and the provisions of which were relied upon by the plaintiff in this case, for proceeding to trial without a jury (notwithstanding he took out the order for trial by Judge and jury, and obtained a change of venue from Victoria County to York County, on the ground that an indifferent jury could not be obtained in the former county) was intended to authorise any party to entirely disregard or ignore the order of a Judge directing trial without a jury, while the same remains unrescinded and in force.

The reasoning in that case applied to the facts in this case, is conclusive in establishing that the trial Judge was in error in proceeding to hear the matter without a jury, the order for trial by jury being still in force, and there must be a new trial. I further wish to say that in my opinion it was the duty of the plaintiff's solicitor who had taken out the summons, and afterwards obtained the order for directions, to have followed the order in giving notice of trial, and also to have notified the sheriff to summon a jury to hear the cause and the defendant would be right in expecting to have or find this done, nor can he now be prejudiced through the plaintiff's neglect, so long as the Judge's order for trial by jury stands unrescinded and in force.

As to the third point it has already been disposed of by a judgment of this Court in the case of *Milligan* v. *Crocket* (1903), 36 N.B.R. 351, the head note there being:—

"It is a ground for a new trial that a case is called on out of its turn on the docket and tried against the protest of the one of the parties."

It appears that case was entered fourth on the trial docket of jury cases at the St. John Circuit in June, 1903. Two or three cases preceding this were called and for some reason were not ready for trial and were not disposed of, yet when the case was

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called the jury was empanelled in the absence of the defendant, his attorney or counsel, and the case was tried against the protest of the defendant's counsel. The Court held that the rule was clear that until previous cases had been disposed of either by trial or by being called and struck off the docket a case lower down could not be tried against the wish of the other party, and if it is so tried that is a ground for a new trial. The rule was made absolute for a new trial in that case.

The facts of this case are that the case was entered upon the non-jury docket, to which counsel for the defendant objected on the ground that it should have been upon the jury docket. However, upon the docket being taken up and called over it was found that there were no jury cases ready for trial, and although no disposition was made of any of them, when this case was reached on the non-jury docket it was tried and judgment given in the absence of the defendant who was not present or represented at the time of the trial and had no opportunity of making any further objection or taking any part therein.

It seems therefore very clear that under the authority of that case there must also be a new trial.

In view, however, of what I believe to be the merits of the case, and the whole subject matter, I think the order for a new trial should go without costs.

Order for new trial without costs.

Judgment accordingly.

LA BANQUE d'HOCHELAGA v. GIROUX AND GIROUX.

Montreal Court of Review, Archibald, A.C.J., Demers and Hackett, JJ. May 14, 1921.

EXECUTION (§ II—25)—SEIZURE UNDER—IMMOVABLE—GIFT INTER VIVOS—SPECIAL CLAUSE IN DEED—CONSTRUCTION—MORTGAGE—OPPOSITION TO ANNUL—QUEBEC PRACTICE.

The plaintiff seized certain immovables under a judgment of January 30, 1918, for $22,700.

The defendant made an opposition to annul the seizure, his principal ground being that he acquired the property by gift *inter vivos* dated March 10, 1910, made to him by L. Galipault, his father-in-law, containing a declaration that the property was given him by way of ailment and should be unseizable against the donee.

The plaintiff contested this opposition and set up, against the clause in the deed of gift invoked by the opposant, another clause in the same deed couched in the following terms:—"But this exemption from seizure shall not prevent the donee from selling and hypothecating the said emplacement or from disposing of it as he may see fit." On April 12, 1916, the defendant gave to the plaintiff a hypothec on the property in question, and on other property as well to secure advances made on notes of a total value of $119,454.43. The plaintiff claims the right to have the property sold in realisation of its hypothec. However, it filed a *retraxit* reducing defendant's claim to $20,500, in order to limit its seizure to the notes covered by the hypothec.

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The opposant met this defence with the allegation that he signed the hypothec in error, being unaware at the time that the property seized was amongst those covered by the hypothec, and he persists in the pretention that, notwithstanding the plaintiff's hypothec, the seizure was none the less illegal.

The Superior Court, Allard, J., dismissed the opposition on October 7, 1919. This judgment is confirmed in review.

APPEAL from the judgment of Allard, J. Affirmed.

Geoffrion, Geoffrion & Prud'homme, for plaintiff.

Gauthier & Beauregard, for opposant.

J. L. Perron, K.C., counsel.

ARCHIBALD, ACTING C.J.:—The appellant cites several cases which have been decided in our Court and I may observe that the circumstances of each one of these cases is very fairly set up in the factum of the respondent.

With regard to the effect of the clause of *insaisissabilité* has a ground for preventing the sale of the property upon the plaintiff's judgment. This *insaisissabilité* depends entirely not upon any question of law, but upon the general principle that a man who gives a property, may give it subject to such conditions as he thinks fit. It is then an *insaisissabilité* which depends entirely upon the will of a donor. That being the case, it is necessary only to interpret the expression of a donor's will as contained in his deed. At first, I should remark that the clause contains no suggestion that the gift had in view an alimentary pension for the donee, and then it is expressed:—

"This *insaisissabilité* shall not prevent the donee from selling or of hypothecating the said property, or of disposing of it in any way profitable to him."

This clause must be interpreted as a whole. It is plain that it would not prevent the donee from selling the property to his creditors in payment of his debts. It would not prevent him from hypothecating it to his creditors for the payment of his debts, even if that hypothec should contain explicitly, as I think by law it always does contain implicitly the promise that in the event of the debt not being paid, the property may be sold in satisfaction of the hypothec.

It strikes me that this idea of a latent hypothec which appears in one or two of the authorities is more or less fantastic. I do not know at all upon what principle of law such a thing could be founded.

In this instance, the donee had the right to sell. Supposing he did sell what would prevent the donor from taking his hypothecary action. It is clear that the vendee could have no defence to make. That consideration disposes of the fantaisie of a latent hypothec. But some meaning must be given to the clause

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by which it is provided that the property shall be *insaisissable*. It seems to me exceedingly easy. It is *insaisissable* unless the donee consents either directly or indirectly to waive his right. But a donee who holds an *insaisissable* property and who has the right to mortgage it or sell it or dispose of it as he like thus waives the *insaisissable* character when he mortgages the property or expressly consents to allow the property to be sold in payment of his debts. I have no doubt that the Judge in the Court below was right in interpreting this clause as he did in his judgment.

With regard to the question of the illegality of the seizure because it was made for more than the amount which was secured by the hypothec, our jurisprudence leaves very little to be said in favour of the contention of the appellant with regard to that.

With regard to the costs of the opposition, I think the opposant would have had his right to costs, if he had withdrawn his opposition when the *retrait* was filed. But too opposant had not made as one of the grounds of his opposition the fact that the judgment was more than covered by the hypothec so that if opposant desired to have raised that ground he would have subsequently been obliged to move to amend his opposition. It results then that opposant suffered no costs by reason of the inclusion in the seizure of the $2,000 additional nor was the amount of costs which were adjudged against him greater by $1 than they would have been if the seizure had been issued at the beginning for only $20,500.

With regard to the question of the illegality of the mortgage under the Banking Act 1913 (Can.), ch. 9, it seems to me that the appellant misapprehended. A bank has a full right to take a mortgage for further security of a claim which it has against a debtor. It has not the right to loan money upon a mortgage and if it did, the mortgage would be null and void. A bank which is accommodating a client may have a considerable amount advanced and that client may demand further advances. Surely when the bank takes hypothecary securities for the advances already made and subsequently makes further business advances upon securities which the bank can take, which perhaps it might not have been willing to do if the old indebtedness had not been further secured, cannot be said to make the new advances upon the hypothecary security given for the old. If that were the case it would be a very embarrassing thing in banking business.

On the whole, as far as I am able to judge, without seeing the record, I would come to the conclusion that the judgment ought to be maintained.

HACKETT, J.:—The sum of $20,500 was and is secured by the

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mortgage given in this cause. The balance of the claim of $22,500 was not covered by the mortgage which defendant-opposant had given to plaintiff, and plaintiff had the right to make the *retraxit* he had in the record in this cause. His right is not disputed and no exception is taken, to wit, in the opposition filed of record in this cause.

It is true defendant-opposant attempted to have the *retraxit* rejected from the record. Defendant-opposant claims that he was in error when he signed the mortgage in question and that he did not intend to hypothecate the property at issue in this cause. His own evidence is flatly contradicted by Guimont who negotiated the mortgage for the bank. The letter which he produces, signed by defendant-opposant of date March 21, together with the fact that a man having the business defendant-opposant was carrying on shew that he was not likely to sign notes and mortgages of that amount without reading them or having them read and knowing and understanding their purport and contents.

I am of the opinion from the evidence adduced that defendant was perfectly cognisant of the matter at the time and there was no error on his part at the time he signed the mortgage in question.

Can the defendant-opposant avail himself in this action of the clause of *insaisissabilité* in the donation referred to. Articles 1016 and 2058 C.C.

Thus we have the statement, what a hypothec means and how it ranks and the law states clearly that the property can be sold for the hypothec. By his donation deed, defendant-opposant was given the right to sell and mortgage the property in question. He mortgaged the same. He had full right so to do, by the donation deed through which he became proprietor, and the third paragraph of art. 599 C. P., cannot avail him nor has it any application in this cause.

Defendant-opposant claims that this property was deeded to *à titre d'aliment*. There is no preference in the deed of donation to *à titre d'aliment* but to state that the deed of donation permitted him to hypothecate or mortgage. I cannot find the authorities quoted by the opposant have any application. Defendant was given by the donor the right to mortgage and availing himself of that permission he did mortgage the property in question, and the law above cited states that the property shall be holden for the amount of the mortgage.

Another ground which appears for the first time and is not mentioned in the pleadings in this cause is that the hypothec *per se* was never valid because it was made in contravention

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of the Bank Act and that banks are forbidden to loan upon mortgages. There is absolutely no proof of this; and in fact the letters and exhibits and list of notes guaranteed by mortgage contradict these assertions. From the law and the evidence the judgment rendered by the Court of the first instance, is in my judgment absolutely right and I am to confirm.

Appeal dismissed.

FAUCHER v. ST. LOUIS HOTEL CO.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 29, 1922.

APPEAL (§IIA—35)—JURISDICTION OF SUPREME COURT OF CANADA TO HEAR—INTERLOCUTORY JUDGMENT—SUPREME COURT ACT R.S.C. 1906, CH. 139, SEC. 2—"FINAL JUDGMENT"—MEANING OF.

There is no appeal to the Supreme Court of Canada from a judgment of the Court of Appeal (Que.) affirming a judgment of the Superior Court refusing an interlocutory judgment, there having been no determination of any substantive right in controversy in the action within the meaning of "final judgment" in sec. 2 clauses (e) and (i) of the Supreme Court Act, R.S.C. 1906, ch. 139.

MOTION by defendant to quash an appeal to the Supreme Court of Canada, on the ground that the judgment appealed from is not a final judgment within the meaning of sec. 2 of the Supreme Court Act R.S.C., 1906, ch. 139. Motion granted.

A. C. Hill, for appellant.

St. Laurent, K.C., and *Alleyn Taschereau*, K.C., *contra*.

DAVIES, C.J. and IDINGTON, J. agreed to grant the motion.

DUFF, J.:—The judgment appealed from in its essence determines only that the plaintiff was not entitled to an interlocutory injunction in the circumstances. There has been no determination of any substantive right in whole or in part in controversy in the action: a condition which is necessary to bring the judgment within the definition of "final judgment" to be found in clauses (e) and (i) of sec. 2 of the Supreme Court Act R.S.C. 1906, ch. 139, relied upon by the appellant.

ANGLIN, J.:—The plaintiff seeks to appeal from the judgment of the Court of Appeal affirming a judgment of the Superior Court refusing an interlocutory injunction. The defendant moves to quash the appeal on the ground, *inter alia*, that the judgment appealed from is not a "final judgment," within the meaning of that term as used in the Supreme Court Act. In my opinion, this objection to our jurisdiction is well taken.

All that has been "determined" is that, for certain reasons, a case was not made which entitled the plaintiff to the remedy of an interlocutory injunction. It is urged that amongst the

reasons assigned there is at least one which involves an adverse determination of the cause of action itself. But, as I apprehend the practice of the Courts of the Province of Quebec, any reasons affecting the merits of the cause of action which may have influenced the Court in passing upon this interlocutory application are open for reconsideration at the trial of the action. Notwithstanding that the application for an interlocutory injunction under Quebec procedure is an independent proceeding by way of petition, and, possibly, may be made before and without the issue of a writ in the action to which it is incidental, (*Allard* v. *Cloutier* (1919), 29 Que. K.B. 565), the disposition of it, in my opinion, cannot be said to involve a "determination" of any "substantive right" of the plaintiff, within the definition of "final judgment" in clause (e) of sec. 2 of the Supreme Court Act.

BRODEUR, J.:—The respondent, La Compagnie du St. Louis moves to quash the appeal for lack of jurisdiction.

The judgment *a quo* was rendered on a petition for an interlocutory injunction. The first order was issued on March 26, 1921 by Malouin, J. but this order was declared null and of no effect on an exception to the form by Lemieux, C.J. on April 4, 1921, (23 Que. P.R. 100) because the execution of the order was not accompanied or followed by a writ of summons.

The Honourable Chief Justice based his decision on the judgment of the Court of King's Bench in the case of *Allard* v. *Cloutier, supra.* In this case of *Allard* v. *Cloutier,* the Court of Appeal, in order to put an end to differences of opinion which had manifested themselves on the question of the procedure to be followed on injunctions asked for at the same time as the issuance of the writ of summons, had declared that a petition for an interlocutory injunction might be presented before the writ was issued and that, if the Judge refused to grant it at that time, an appeal might be taken from his decision before the writ was issued.

The appellants, Mr. St. Laurent tells us however, endeavoured to observe the rules laid down by the Court of Appeal. They gave notice, on April 19, 1921, that a petition for an interlocutory order of injunction would be presented to a Judge of the Superior Court. Letellier, J. after hearing the parties, dismissed the petition on April 26, 1921. An appeal was taken from this last decision to the Court of King's Bench, which confirmed the decision of Letellier, J. and this judgment of the Court of King's Bench is now brought before this Court.

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We have to decide if we have jurisdiction to hear this case. It is a question, as can be seen, of a petition for an interlocutory injunction to be issued with the writ of summons.

These petitions, says art. 957 C.C.P., may be granted whenever it appears: (1.) that the plaintiff is entitled to the relief demanded, and that such relief consists in whole or in part in restraining the commission or continuance of any act or operation; (2) when the commission of an operation would produce irreparable injury.

Petitions granted for the first reason often prejudice the trial, for they may adjudicate upon the plaintiff's right itself. But decisions made on these petitions may be reversed by the final judgment. In the present case Letellier, J. only exercised a discretionary power: by virtue of sec. 38 of the Supreme Court Act there is no appeal from decisions in which the Judge exercised discretionary power. It is true that the Judge in drawing up his judgment inserted in it certain reasons which might prejudice some of the points at issue, but it is only an interlocutory judgment; and it is known that interlocutory judgments do not bind the Court which finally decides the case, and that they are susceptible to revision by the final judgment, after proof and the parties have been heard.

For these reasons the appeal should be quashed and the respondent's motion should be granted with costs.

MIGNAULT, J.:—I concur in the judgment quashing the appeal for lack of competence on the part of this Court. However, I do not wish to say that no appeal would lie to this Court in any case from a judgment refusing an interlocutory injunction, for the refusal of such an injunction may sometimes be so prejudicial to the party who asked for it that one might say that the judgment came within the category of judgments which the Supreme Court considers as final. The case before us is not one of this nature and a final judgment could easily remedy any inconvenience which the refusal of the interlocutory injunction might cause to the plaintiff, supposing that there is really any serious prejudice.

Motion granted.

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Quebec Circuit Court, Archambault, J. March 18, 1922.

ACCORD AND SATISFACTION (§ I—4)—CHEQUE IN FULL PAYMENT.

Acceptance of a cheque given in full payment implies acceptance of the condition on which it is given and operates as a discharge of the debt, regardless of an endorsement thereon by the payee of his receiving it as part payment.

Robinson, for plaintiff; *L. Fitch*, for defendant.

ARCHAMBAULT, J.:—The plaintiff sues defendant for the sum of $45 as the balance of a debt of $95 for salary under a contract of lease and hire of services, as follows:—

"For services rendered months of November and December, 1920, and January 1921 at $20 ..... $60

Extra time, preparing data for arbitration, November 3, 1920, 3 hrs.; November 4, 1920, 4 hrs.; closing books for December, 31, 1920; January 3, 1921, 4 hrs.; January 5, 1921, 3 hrs.; 14 hrs. at $2.50 ..... $35

Total $95

By cheque on account $50

$45"

The defendants pleaded that the plaintiff, who was an accountant, had leased his services in the capacity of auditor of their books for $20 a month; that during the months of November and December they suspended operations on account of and pending an arbitration between them, and that at that time the plaintiff's work consisted in furnishing certain information to the arbitrators, for which he is not entitled to additional salary, the work having taken the place of his regular employment which ceased for that period, but that he had, nevertheless, received his salary; that he did nothing at all in December, and that the auditing and closing of the books in January constituted his work for December, for which he received $20.

And the defendants also pleaded that on April 4, 1921, they paid plaintiff a sum of $50 covering his salary for November and January, plus $10 for his alleged extra work, which they did not acknowledge to owe him, but which they paid by way of transaction in order to free themselves, and that defendant accepted this sum of $50, and by so doing gave them a discharge in full for everything owing him.

The evidence shows that the parties differed as to the extent of their respective obligations and that after a dispute over the telephone concerning a settlement for $50, the defendants sent the plaintiff a cheque for $50, marked "paid in full to date"; that the defendant indorsed this cheque and wrote above his signature the words, "received as part payment against

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account and not accepted as full payment," and cashed it. The cheque was dated April 4, 1921, and was paid to the plaintiff on the 7th of that month.

On the 12th of the same month the plaintiff, through his attorneys, wrote a letter to the defendants demanding payment of a balance of salary amounting to $45, and on March 4 following took action against them for that amount.

This action raised the following question, which has been answered by the Courts many times, but in different ways: "Does the cashing of a cheque bearing a statement to the effect that it is given in full of account, constitute a release from all indebtedness, or in other words, does the cashing of a cheque, purporting to be paid on condition that it is accepted in full payment of the debt, imply acceptance of the condition?"

The plaintiff answers; "Not necessarily; that is merely a question of fact which must be answered independently in each particular case." That amounts to alleging that the creditor can, in his discretion, accept the sum offered in full, without giving the discharge, accept the cheque purporting to be paid, on condition that a full discharge is given without accepting the condition;—and enforce his claim for the balance.

The plaintiff claims that this opinion is supported by theory and by consistent jurisprudence, both English and Canadian.

He cites: Watson on the Law Relating to Cheques, 1902 ed., p. 119; Maclaren, Bills, Notes and Cheques, 1916, 5th ed., pp. 369, 370, 371; Chalmers Bills of Exchange, 8th ed., pp. 358, 359, 360; *Day* v. *McLea* (1889), 22 Q.B.D. 610; *Ackroyd* v. *Smithies* (1885), 54 L.T. 130; *La Compagnie Paquet* v. *Paquin* (1910), 39 Que. S.C. 58; *Royal Trust Co.* v. *White* (1916), 50 Que. S.C. 277.

English jurisprudence, in so far as it is expressed in *Day* v. *McLea*, favours the plaintiff's contention. As to theory as expressed by Watson, he reproduces the decision in *Day* v. *McLea* on which it is founded.

But as regards Canadian theory, the defendants' citations from Maclaren show anything but unanimity and consistent jurisprudence. At p. 369 he says, "The law both in England and Canada is in a very unsatisfactory condition," and that precedes a commentary on *Day* v. *McLea*. This shews that the author has already reached the conclusion that the last mentioned judgment has not put an end to the controversy. And after reproducing, p. 370, the decisions in *Mason* v. *Johnston*, (1893), 20 A.R. (Ont.) 412 and *McPherson* v. *Copeland* (1908), 1 S.L.R. 519, which followed *Day* v. *McLea*, *supra*, the author says quite clearly, p. 371, that he is of a different opinion. He

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says: "The *Day* case has been sometimes interpreted as laying it down as law that where a debtor has sent a cheque payable to the order of his creditor on the express condition that, if accepted, it must be taken in full of the claim, the creditor might endorse the cheque, and get it cashed, and then sue for the balance and recover, if he could prove for a larger amount. This shocks the moral sense, especially if the creditor should cash the cheque before the debtor has an opportunity to countermand its payment should he so desire. At the most, it should be left fairly to the jury to say whether it is not a fair case for the application of the adage that actions may speak louder than words."

Chalmers, Bills of Exchange, 8th ed., p. 359, states a distinction which is to be made in applying the principle laid down in *Day* v. *McLea*, which has the effect of modifying its application to a considerable extent. He says:—

"Where there is a disputed liability, it may be compromised by the payment of a lesser sum than that claimed, but the general rule of law is that where a liquidated sum is due, it cannot be discharged by the payment of a smaller amount, for there is no consideration for the creditor's promise to forego the balance."

This rule no longer applies in every case where there is a disputed liability, a litigious right. Now, there is a disputed right in the present case and it must, therefore, be said that Chalmers, cited by the plaintiff, militates against him.

The plaintiff is no more fortunate when he refers to the judgment of the Court of Review in *La Compagnie Paquet* v. *Paquin*, 39 Que. S.C. 58. It is true that the Judge reproduces the opinion in *Day* v *McLea*, but, on reading the notes of Lemieux, J, who expressed the opinion of the Court, we see that this Judge is substantially inexact. He says, at p. 59:—

"It may be said at once that this Court, since the hearing, has entirely approved of the stand taken by defendant Paquin as regards the interpretation to be given to the acceptance of a cheque indicating that payment of a debt is made subject to conditions which are stated on the cheque itself, and we have no intention of derogating from the generally accepted rule, which is applied every day and is so useful in commercial and business practice generally, namely, that a cheque bearing a statement to the effect that it is a final payment or a payment of the balance of a debt, or some condition attached to such payment, binds the party who accepts it and the cheque is equivalent to a discharge of the debtor. The difficulty is to determine if this rule is to be followed in the present case," and at p. 63, "The situation briefly is as follows: a formal refusal

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on the part of Paquet either before or after receiving the cheque, to settle Paquin's debt on a basis of 50 cents on the dollar, unless all the creditors should receive a similar amount; payment by Paquin of more than 50 cents to certain creditors, in violation of this condition; silence on the part of Lacroix, amounting to a ratification of Paquet's refusal to accept the composition offered, and amounting also to a ratification of their declaration that the amount of the cheque was to be imputed on account of their claim; formal promise on the part of Paquin after receiving a statement showing a payment of $222 on account by the cheque to pay the balance due to the Paquet Co.; and, finally, Paquin's silence for more than a year, which constitutes in the circumstances a tacit but specific admission of such debt."

This judgment thus covers fully the rule that he who accepts a cheque purporting to be given in full of account, gives a discharge for his claim.

The Court of Review, Sir M. Tait, Guerin and Bruneau, JJ., rendered a judgment which agrees with the foregoing in all respects in the case of *Briand* v. *Malo*, 18 November, 1911. It is not reported. The case was as follows:—

The debtor, Malo, received from Briand, his creditor, a lawyer's letter demanding payment of a note for $150. He called upon the attorneys on May 23, paid $50 on account, but in doing so asked for the time until June 17 in order to pay the balance, which request was granted. The creditor objected to this delay, whereupon, the attorneys wrote the debtor saying that they were not authorized to grant it, and that he would have to pay the balance at once. When this demand was not answered, suit was taken. The Court of Review, reversing the judgment of first instance, held that since the sum of $50 was only paid on condition of a term being granted, the plaintiff, in accepting the payment made, accepted the condition; and that he could not benefit by that part of the bargain which was advantageous for him and at the same time repudiate that part which was advantageous to the debtor.

As against the two foregoing judgments, or rather in modification of the same, there is a judgment of the Superior Court, Martineau, J., in the case of the *Royal Trust* v. *White*, 50 Que. S.C. 277 at 280, which reads:—

"The acceptance of such a cheque may imply, but does not necessarily imply in itself, acquiescence on the part of the plaintiff in the defendant's pretentions. The circumstances of each case must be considered. In the present case it is evident that the plaintiff's employees did not notice the condition and that

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if they had, they would have sent back the cheque. See on this point the authorities cited by the plaintiff; *Day* v *McLea supra; Mason* v. *Johnston, supra; Nathan* v. *Ogdens, Ltd.* (1905), 93 L.T. 553; 94 L.T. 126; *La Compagnie Paquet* v. *Paquin, supra.*

Hence we see that the Judge regards the matter in somewhat the same way as Chalmers, cited above.

I am also of the opinion that in the latter case the condition was not accepted, because the cheque was taken with the condition in error, but it seems to me that the effect of the error is to vitiate the bargain entirely and not merely in so far as it implied acceptance of the condition. Hence, these employees of the plaintiff, who, it is said, would have returned the cheque if they had noticed the condition marked thereon, should have returned the amount received as soon as the mistake was discovered and, since they did not do so within a reasonable delay, they are presumed to have accepted the condition. As in the case of Briand and Malo, it may be said: You cannot accept the advantageous part of an offer made and reject what is advantageous to the person making the offer.

This question is not, as the plaintiff declares, a question of "bills of exchange," in which English authorities acquire weight from the fact that our Bills of Exchange Act is founded on English law. It is a simple question of civil law which must be solved according to the rules governing contracts made by the consent of the parties. The fact that an offer is made in the form of a cheque does not make the legal situation any different from what it would be if the offer were made in another form, for example, if cash were sent through the mail accompanied by a writing in the following terms, "In settlement of all that I owe." There is an implied condition, which it is not lawful for the creditor to disregard. The condition is part of the proposal made, and it and the payment make but one entity, so that if the creditor accepts the sum offered, he thereby accepts the condition of discharge with it.

When the plaintiff consented to accept the sum which the cheque represented he, impliedly, accepted the condition; and the words preceding his signature on the back of the cheque. "Received as part payment against account and not accepted as full payment," are of no effect.

It is also to be noted that *Day* v. *McLea* has not been followed in the United States. Maclaren on Bills, Notes and Cheques, p 371.

The action is dismissed with costs.

Action dismissed.

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SMITH v. McCUTCHEON.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Metcalfe, JJ.A. January 6, 1922.

CONTRACTS (§ IIB—185)—BUILDING CONTRACT—CONSTRUCTION—MATERIAL TO BE SUPPLIED BY CONTRACTOR—RIGHT TO CLAIM PERCENTAGE ON MATERIAL SUPPLIED BY OWNER—RIGHT OF CONTRACTOR TO INTEREST PAID ON NOTES MADE BY THIRD PARTIES GIVEN BY OWNER AND DISCOUNTED BY BANK.

A building contract provided *inter alia* that the contractors "shall and will provide all the materials and perform all the work for the sum of cost plus 10% and that the sum to be paid by the owner to the contractor for said work and materials shall be the cost plus 10%; the Court held that the contractors were entitled to recover 10% on the cost of certain brick which was in fact supplied by the owner. Held also that the contractors were not liable to the owner for the amount of a note made by a third party which he had given in payment which had been discounted at the bank and which had become outlawed, and that the contractors were entitled to recover from the owner the amount of interest they had had to pay to the bank which had discounted the notes, there being deducible from the circumstances an implied contract that the owner should pay such interest.

APPEAL by plaintiffs from the trial judgment in an action to recover the balance alleged to be due on a building contract. Reversed.

W. H. Trueman, K.C., and *C. B. Philp*, for plaintiffs, appellants.

T. A. Hunt, K.C., and *H. E. Swift*, for defendant, respondent.

PERDUE, C.J.M. and CAMERON, J.A., concurred with FULLERTON, J.A., on all items, except the cost of the brick, and in respect to that item they concurred with DENNISTOUN, J.A.

FULLERTON, J.A.—The controversy between the parties to this action concerns the balance due the plaintiffs on a building contract. The main facts are not the subject of serious dispute. By a contract in writing, dated April 22, 1913, on the form known as the uniform contract, the plaintiffs agreed to build a house for the defendant "for the sum of cost plus 10%" to be paid in fortnightly instalments as the works progressed to the amount of 80% of the amount of the work done and materials supplied on the ground and the final payment within 20 days after the contractor had substantially fulfilled the contract. The plans and specifications were prepared by one J. N. Semmens, an architect, and the contract contemplates his employment as agent of the owner during construction, but in order to save expense his services were dispensed with before the work started.

On April 22, 1913, the work was started. On May 27, the plaintiffs gave to the defendant an estimate for labour on the house up to May 23, 1913, amounting to $765.38, and on August

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1, another estimate for labour and materials amounting to $5,981.26.

The defendant from the very beginning failed to make payment in accordance with the terms of the contract and up to August 1, 1913, had only paid in all a sum of $1,300.

The plaintiffs, being unable to get payment from the defendant, on or about August 1, 1913, ceased work. In February, 1914, the defendant mortgaged the property and out of the proceeds of the loan certain moneys were paid to the plaintiffs who thereupon proceeded with the work and completed it on June 30, 1914.

In their statement of claim the plaintiffs claim a balance of $2,674.22, together with interest at 8% per annum, calculated with fortnightly rests to the date of completion and interest from said date at 8% per annum. The cost of material and labour is not in dispute. These together amounted to $14,946.92. The plaintiffs in addition to the 10% on $14,946.92 claim 10% on certain brick which the defendant himself supplied and which were used in the construction of the house. The value of the brick was $1,548.50. Whether or not the plaintiffs are entitled to recover in respect of this item depends on the proper construction of the agreement.

Art. 1 of the agreement provides that the plaintiffs "shall and will provide all the materials and perform all the work for the sum of cost plus 10%."

Art. IX.: "It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials mentioned in Article 1 shall be cost plus 10%."

I construe these provisions to mean that the plaintiffs are to be paid 10% on the materials they actually provide, and I, therefore, disallow this claim.

Before dealing with the claim of the plaintiffs for interest, which is really the main question in dispute between the parties, I will deal with the credits to which the defendant claims to be entitled.

It is admitted that the defendant paid the plaintiffs in cash the sum of $10,938.15. The defendant also sold the plaintiffs a quantity of brick the price of which was to be applied as payment on the contract. There is a conflict of evidence between the parties as to the prices to be charged for the brick. The trial Judge has accepted the defendant's testimony on this point and there is absolutely nothing in the evidence which can justify us in saying that he is wrong.

The trial Judge has allowed the defendant credit for the

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sum of $184.05 trade discounts. There is no evidence to support the finding and this item will be disallowed.

The defendant claimed a credit of $126.40 for the price of a car of brick which the plaintiff Kirkpatrick on the trial stated were of very poor quality and only realised when sold $60. Kirkpatrick said that freight and cartage "ate up the $60." He gave no particulars of the transaction. The trial Judge allowed the defendant $40 credit, and I think this item should stand.

The two remaining items of credit in dispute are the Egan and Kelly notes.

In September, 1913, the defendant being unable to pay the plaintiffs, gave them a promissory note signed by one Egan for the sum of $777. This note was discounted by the plaintiffs and renewed several times. Nothing was ever paid on it by Egan and plaintiffs eventually paid the amount and took it out of the bank. The note remained in the plaintiffs' possession up to the time of the trial although the defendant admits he knew in the year 1918 that it had not been paid. The Judge allowed the defendant credit for the amount of the note. In his reasons for judgment he says:—

"I think, upon the whole, I ought to hold the plaintiffs responsible for the Egan note. They dealt with it as their own; kept renewing it without consulting the defendant. They failed to keep him informed as to its status, and finally allowed it to become barred by the statute, so that the debt it represents is now lost to the defendant. If they were unwilling to take the responsibility of suing upon it, to keep it current as a debt, they should have returned it to the defendant in time to have enabled him to sue and preserve his legal rights. As they failed to do this, and seemingly dealt with the paper as their own property, I don't think any injustice will be done in charging them with it, and I accordingly do so."

Now there is no pretense that the plaintiffs accepted this note as payment on account. Defendant had no money but claimed that certain parties, among others Egan, owed him moneys. He procured from Egan the note in question and gave it to the plaintiffs on the understanding that anything that might be paid on it should be credited to the defendant. I am unable to find any principle upon which the plaintiffs can be held liable for the amount of this note.

The Kelly note for $140 was taken under the same circumstances and upon the same understanding as the Egan note. The last renewal is dated April 3, 1917, for $36.25. The trial Judge says of this note:—

"This cannot represent the true balance unpaid and owing. I have no means of ascertaining what this balance is. As the matter stands the existing security represents only $36.25, and if this is turned over to the defendant there will be still a loss of about $35 to him as he only received credit for $68.90 of the original debt of $140. Justice, I think, will be done by crediting the defendant with $35 and directing that the plaintiffs turn over the note to the defendant."

While the plaintiffs' account shows only a credit of $68.90 on the Kelly note, their statement of credits which was furnished to the defendant shows a credit of $83. Neither counsel was able to explain the discrepancy and I would, therefore, allow this credit to stand.

This disposes of all matters in dispute except the plaintiffs' claim for interest. By the terms of the agreement the defendant was to pay the plaintiffs in fortnightly instalments as the works progressed, such instalments to represent 80% of the amount of the work done and materials supplied on the ground and the final payment was to be made within 20 days after the plaintiffs had substantially fulfilled their contract. The defendant wholly failed to carry out this term of his agreement. The defendant had no money and in order to raise money to carry on the work the plaintiffs from time to time discounted in their own bank notes made by defendant. As these notes matured defendant would occasionally make small payments and the notes would be renewed. As only a certain amount of defendant's paper would be accepted by the bank the defendant from time to time signed promissory notes in the name of the Whitemouth Brick Works, of which he appears to have been manager, and also had his wife sign notes in favour of the plaintiffs which were dealt with in the same way. Upon all this paper the plaintiffs paid 7 and 8% to the bank and also paid interest on an overdraft which they were obliged to procure to raise sufficient moneys to pay for materials and labour. In some instances, when defendant had funds he would pay interest on the notes and something on principal, while in other cases the plaintiffs would have to make the payment to secure renewals. Defendant was well aware of the fact that the plaintiffs had to pay interest on the various notes to the bank and that the plaintiffs had procured from the bank an overdraft for the very purpose of raising money to carry on the works. Had the defendant made the payments he agreed to make, there would have been no necessity of borrowing from banks and incurring the interest charges in question. The plaintiffs say that defendant expressly agreed to pay interest on the various notes, but whether he did so or

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not I think the facts in evidence show that the defendant impliedly agreed to pay the interest on the various notes as well as on the overdraft.

The trial Judge refused to allow the plaintiffs interest upon the ground, as I understand his judgment, that the facts did not bring the case within 1833 (Imp.) ch. 42, sec. 28. He points out in his reasons for judgment that there is no debt or sum certain payable by some written instrument at a certain time nor any demand in writing as required by the statute. With great respect it appears to me that the statute here has no application. The statute does not touch the case of an agreement to pay interest which I hold must be implied from the facts in evidence here. I think the plaintiffs are entitled to recover the amount of interest they have actually paid in connection with the notes as well as on the overdraft which they were obliged to secure from the bank in order to raise money to carry out the contract, and I think this interest should be calculated up to the date of the entry of judgment.

No evidence of any value was offered at the trial as to the amount of this interest and if the parties cannot agree it will be referred to the Master. The plaintiffs will be entitled to judgment for $1,568.28; being the amount found by the trial Judge, $607.23, plus trade discount, $184.05, and Egan note $777, also for the amount of interest when ascertained together with the costs of the action and of a reference to the Master if such becomes necessary. The plaintiffs will also have the costs of this appeal.

DENNISTOUN, J.A.:—I have had the privilege of reading the reasons for judgment of Fullerton, J.A., and agree with his disposition of this appeal, except in respect to the item of $154.85 being 10% of the cost of brick which was supplied by the defendant in lieu of cash.

Art. 1 of the agreement provides that the plaintiffs "shall and will provide all the materials and perform all the work for the sum of cost plus 10%."

Art. IX. says that:—"It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials mentioned in art. 1 shall be cost plus 10%."

In my view, these articles fix the basis of remuneration irrespective of the source from which the materials were to be obtained. When the plaintiffs obtained $1,548.50 worth of brick from the defendant they were entitled to charge 10% on their cost when built into the house. It was for the defendant's accommodation that the plaintiffs took brick instead of cash, which

had been promised, and the services of the plaintiffs were just as onerous and as fully given in placing such brick in the building as if it had been obtained from a stranger.

I would, therefore, allow the plaintiffs $154.85 in respect to this item.

The trial Judge has charged the full amount of the Egan note against the plaintiffs, apparently upon the ground that, having received it for collection, they allowed it to become statute-barred. Even assuming that there was a duty cast upon the plaintiffs to protect the defendant's rights against the operation of the statute the measure of damages for the breach of that duty would not be the face value of the note. There is evidence that the note had no value, that the defendant was unable to collect anything upon it, and that he gave it to the plaintiffs to see if the latter could do any better with it than he could. It does not appear that the defendant has sustained any loss whatsoever by reason of the operation of the Statute of Limitations and the plaintiffs' failure to protect the note should not be penalised as has been done by the judgment appealed from.

With regard to interest, I agree that the plaintiffs should be reimbursed the interest which they were compelled to pay the bank in order to raise funds by notes and overdraft by reason of the defendant's breach of covenant to furnish cash under the terms of the written contract. There is an implied contract to pay such interest clearly deducible from the circumstances of the case. I incline to the view that there was an express contract to do so, but in deference to the finding of the trial Judge will base my judgment on the existence of an implied contract.

"Interest is allowed by law only where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. . . But where a person has paid money for another under an indemnity express or implied, he is entitled to interest because he is not fully indemnified unless he is put in the same position pecuniarily as if he had not paid the money." Leake on Contracts, ed. 6, pp. 805, 806, *Ex parte Bishop; Re Fox* (1880), 15 Ch. D. 400, 50 L.J. (Ch.)18.

Where parties have acquiesced in a course of dealing, in which interest was exacted, they will be assumed to have contracted to pay it." Mayne on Damages, ed. 7, p. 167, *Re Anglesey; Willmott* v. *Gardner*, [1901] 2 Ch. 548, 70 L.J. (Ch.) 810.

In the present case, instead of giving the plaintiffs cash in accordance with his written contract, the defendant gave the

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plaintiffs a number of promissory notes made by various parties and many renewals thereof, with the intent that the plaintiffs should procure advances from a bank upon the security of such notes. The plaintiffs did procure cash from the bank but were obliged to pay interest at the rate of 7 and 8% for the loans. I infer a contract to indemnify the plaintiffs against the defendant's failure to supply cash for the work as it progressed, and such indemnity involves reimbursement for the sums paid by the plaintiffs for interest quite as much as for principal.

I agree there should be a reference if necessary to ascertain the amount of such interest.

The plaintiffs will have judgment for $1,723.13, made up as follows:—judgment in King's Bench, $607.23, trade discount disallowed, $184.05, Egan note, $777.00, 10% on $1,548.50, $154.85: $1,723.13.

To this sum interest will be added when ascertained. The plaintiffs will have the costs of this appeal.

METCALFE, J.A., concurred in the result.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Maclaren, Hodgins, JJ.A., Middleton, J., Ferguson, J.A., and Orde, J. December 30, 1921.

INSURANCE (§IIIF—146)—PROMISSORY NOTE GIVEN FOR PREMIUM—UNPAID ON PRESENTATION—PROVISIONS OF POLICY—ALLEGED CANCELLATION—DEATH—ACTION—INSURANCE ACT, R.S.O. 1914, CH. 183 SEC. 159.

When a promissory note is given in payment of an insurance premium and is not paid on presentation the rights of the parties irrespective of any contract to the contrary are governed by sec. 159 of the Insurance Act, and according to the statute the company must, after default, elect to avoid, and unless this is properly done, the policy remains in force.

[Review of the authorities.]

APPEAL by plaintiff from the trial judgment in an action by the administrator of an estate, to recover from the defendants the amount of a policy of insurance on the life of the deceased, issued by the defendants.

The judgment appealed from is as follows:—

"KELLY, J.:—By a policy of life assurance number 110220 bearing date the 22nd August, 1919, the defendants insured the life of Arthur E. McNeil in the sum of $1,000, for an annual premium of $36.15, to be paid in advance at the defendant's head office in Toronto on the delivery of the policy, and thereafter on the 20th August in every year until 20 full years' premiums should be paid or until the earlier death of the insured.

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The insured died on the 20th February, 1920, and on the 25th March, 1920, letters of administration of his estate were granted by the Surrogate Court of the County of Huron to his brother, the plaintiff, Charles McNeil, who, on the 20th August, 1920, commenced this action to recover from the defendants $1,000 and interest thereon from the 12th May, 1920, the date on which, the plaintiff alleges, he furnished the defendants with due and sufficient notice and proof of the death of the insured.

The defendants resist payment on the ground that the insured did not pay the premium required in consideration for the issuance of the policy; and they set up non-compliance by the insured with the terms and conditions of the contract.

In the insured's application for insurance of the 7th August, 1919, it is stated that the policy to be issued shall not be in force until actual payment of the first premium due thereon and its acceptance by an authorised agent of the company and the delivery of the company's official receipt during the applicant's lifetime and good health; and also that, if a note, cheque, draft, or other obligation be given for the first or any subsequent premium or any part thereof, and the same be not paid at maturity, the policy shall, subject to its terms and privileges, be null and void, but such obligation must nevertheless be paid. The policy which followed was issued subject to certain provisions, privileges, and agreements, including the following:—

"(a) Under no circumstances shall this policy be held to be in force until actual payment of the whole premium thereon to an authorised agent of the company, and its acceptance by him, and until the delivery to the applicant, when in the same condition of health as stated in the application for his policy, of the official receipt, signed by the managing director, actuary, and secretary or assistant-secretary.

"(b) Payment of premiums to agents will not be valid unless receipts are given, signed by one of the said executive officers. When receipts are sent to agents for delivery, such agents shall countersign and date the same *only on the day of the actual* payment of premium, and as evidence of its then payment to them. All premiums are due and payable at the head office in Toronto. For the convenience of the insured, payment of a premium, *when not overdue,* may be made to an agent, but only upon production of the receipt above specified.

"(c) One month, not less than 30 days, will be allowed for payment of each renewal premium on this policy after the same has become payable, during which time the policy will continue in force.

"(d) If a note, cheque, draft, or other obligation, given for

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the first or any subsequent premium, or any part thereof, or any renewal of any such note or other obligation or part thereof, be not paid when due, this policy, subject to the automatic non-forfeiture provision hereof, will thereupon cease to be in force, without any notice or act on the part of the company.

"(e) If, in the event of default in the premium payments, the original policy shall not have been surrendered to the company and cancelled, the policy may be reinstated at any time, upon receipt at the head-office of evidence of insurability satisfactory to the company and of arrears with compound interest at a rate not exceeding 6 per cent. per annum."

"(k) No provision of the contract can be changed, waived, or modified, nor can any permit be granted, except by written agreement, signed by the president or a vice-president, and the managing director, actuary, secretary or assistant-secretary of the company."

At the trial the plaintiff produced the defendants' receipt of the 4th September, 1919, for $36.15 for the first premium, "subject to all the provisions of the said policy and those on the back hereof hereby incorporated herein." On the back of the receipt it is stated that premiums are due at the company's head-office at the date named in the policy, but authorised persons may receive such premiums on the production of the company's receipt therefor signed by the president or secretary; that no payment of a premium made, except in exchange for such receipt, will be recognised by the company as valid payment; and that agents of the company have no authority to waive any of the conditions of the policy or to accept payment of premiums except as provided for in the terms of the policy. This receipt was found amongst the insured's papers after his death.

The premium represented by this receipt was not paid in cash, but by the assured's promissory note due on the 7th November, 1919, which was delivered on or about the 8th September, 1919, to Oettinger, the defendants' district manager at London, who took McNeil's application for the insurance, and who at the time of the delivery of the note delivered to the insured the policy and the premium receipt.

Before maturity of the note, notice was sent to the insured reminding him of approaching maturity and that on the terms of the policy contract it was essential that remittance be received not later than the date of maturity. There was no reply to this notice.

On the 12th November, 1919, Oettinger told the insured that the policy was not in force, and that he did not know if the

defendants would accept a promissory note unless something were paid on account. Nothing was then paid.

On the 18th November, Oettinger sent to insured a new note for $36.30, bearing interest at 6 per cent. per annum and maturing on the 20th January, 1920. The insured signed this note and returned it to Oettinger, who sent it on to the defendants for approval. Approval was refused, and then Oettinger communicated by telephone with the insured and told him some cash would be necessary; this was not complied with.

On the 16th December, Oettinger went to the insured's residence near Goderich, and again informed him that the policy was not in force, and left with him the defendants' form No. 23—an application for reinstatement of policy—which the insured promised to sign, and a blank form of promissory note for him to complete and sign in the event of his paying anything on account of the premium. Neither the application nor the note was signed, but Oettinger in the same month sent to the defendants' head-office $10 of his own money. There does not seem to have been any bargain that this should be done.

After the due date of the note of the 18th November, the insured sent to Oettinger another note dated the 20th January, 1920, for $26.65, with interest at 6 per cent. per annum and maturing on the 22nd February, 1920; this Oettinger forwarded to the defendants' head-office, but the defendants refused to accept it and returned it to Oettingsr on the 10th February. Between the 20th January and the 30th January, the insured telephoned to Oettinger that he would send some money; but he did not keep this promise. On the 30th January, Oettinger wrote the insured, and, referring to their 'phone conversation, said he was still waiting for his cheque for $36.65, and that should the insured not be able to pay the amount at the present time "we will be pleased to renew your note for you but would ask you to kindly let me know what you intend to do in the matter." The insured replied to Oettinger (on the 4th February), "I am sorry but money did not come as I expected it to, so will have to ask you to extend time for another month." This communication of Oettinger was of his own accord, without the knowledge or consent of the defendants, and was not afterwards approved or affirmed.

The defendants' attitude is shewn by the letter of the 10th February (already referred to) from their actuary to Oettinger, as follows:—

"Re Policy No. 110220.

"We are returning herewith note No. 511 due on the 26th of February, 1920, unaccepted. It will be necessary to have a

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short medical examination properly completed before we can give the matter of reinstatement our further consideration.

"Kindly collect the equivalent to term rate insurance from the 20th of August to the 22nd of February, 1920, when making application."

On receiving this, Oettinger went to Goderich and on the 12th February made ineffectual attempts to communicate by telephone with the insured, and, failing in this, his evidence is that he then wrote the insured a letter, a copy of which he produced at the trial, and on the same afternoon or evening posted it at Goderich. The plaintiff says that this letter was not found amongst the deceased's papers, and evidence was submitted intended to shew that it did not reach him, but which is not conclusive, there being a possibility of his having received it. It contained notice of the head-office's refusal to accept his note and requiring him to be medically examined before reinstatement could be made, and that payment of at least $15 on account was required, etc. Much importance has been attached to whether the insured did receive this letter; but I do not think the merits of the defendants' case depend on whether the letter reached the insured, however much it may be corroborative or explanatory of the defendants' attitude throughout.

The insured's attention was expressly drawn by the application and the policy to the consequences of non-payment at maturity of the premium note—that the policy became void. He was warned before the first note matured of the necessity of prompt payment. Over and over again he was told, after dishonour of the first note, that the policy was not in force. He had previously held a policy of this same company in respect of which the question of reinstatement had arisen, and he was familiar with the requisites for reinstatement. His contract expressly provided that no provision of it could be changed, waived, or modified, except by written agreement signed by the president or a vice-president, and the managing director, actuary, secretary or assistant-secretary of the company. No such written agreement was obtained, and the importance sought to be attached by the plaintiff to Oettinger's letter of the 30th January—Oettinger not holding any of these positions or offices—is without weight. Oettinger had no authority or power to bind the defendants to accept notes or otherwise waive the plain terms of the contract; and, with the knowledge the insured undoubtedly had or should have had of the necessity of contracting directly with or obtaining the consent, confirmation or approval of the defendants, he could not reasonably have assumed

that any negotiations with Oettinger could possibly be binding until so adopted or confirmed.

It is well-established by the evidence that the policy lapsed on the 7th November, 1919, and that, though conditions on which it could be revived were distinct, and the insured's knowledge of these undoubted, the requisite conditions to that end were not complied with, and the policy was not revived and was not in force at the death of the insured. Decisions are not necessary on which to form that conclusion, but cases in our Courts are not wanting to support the defence. In *Foxwell* v. *Policy Holders Mutual Life Insurance Co.* (1918), 42 O.L.R. 347, 43 D.L.R. 720, it was declared that the policy there in issue had lapsed and that the onus was on the plaintiff to shew that it was revived; and that she was confronted with abundance of notice of the conditions upon which it alone could be revived. In the present case the plaintiff is in the same situation and is confronted with the same difficulty.

If importance is attached to any demand made after maturity of the first premium note for payment thereon, it is explainable by reference to the terms of the application—expressly made part of the policy—that the obligation on the note for payment continues notwithstanding the lapse of the policy for non-payment of the note at maturity. Where a condition in a policy of life insurance provided that if any premium, or note, etc., given therefor, was not paid when due the policy should be void, it was held that where a note given for such premium was partly paid when due and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void; and also that a demand for payment after maturity of the renewal was not a waiver of the breach of the condition as to keep the policy in force: *McGeachie* v. *North American Life Assurance Co.* (1894), 23 Can. S.C.R. 148, affirming the decision of the Court of Appeal (1893), 20 A.R. 187. See also *Manufacturers' Life Insurance Co.* v. *Gordon* (1893), 20 A.R. 309.

In dismissing the action, it is with some hesitation I award costs against the plaintiff. The defendants, in retaining the notes which they refused to accept for the premium, fell into an objectionable practice sometimes followed elsewhere. On refusing the notes, it was their duty—and the good faith which should prevail in such cases so required—to return them; the reason given by the defendants' secretary is not a justification for retaining them. The plaintiff came into the transaction as the legal personal representative of the insured, and without the knowledge possessed by the insured of what had taken place between the latter and the defendants, and, in a desire to per-

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form his duty as administrator, he may have innocently attached to these notes more importance than the circumstances really warranted. It is possible that this may have been a factor in bringing about the action. The defendants might well consider the advisability of not exacting costs."

Charles Garrow, K.C., for appellant.

John A. Paterson, K.C., for respondents.

The judgment of the Court was read by

FERGUSON, J.A.:—Appeal by the plaintiff from a judgment of Kelly, J., dismissing the plaintiff's claim to recover on a life insurance policy. The plaintiff sues as administrator of the estate of the insured.

In his reasons for judgment the learned trial Judge did not mention the Insurance Act, R.S.O. 1914, ch. 183, and apparently determined the rights of the parties by reference only to the words of the policy. The appellant contends that the provisions of the policy relied upon by the company are inconsistent with and are overridden by sec. 159 of the Insurance Act, which provides:—

"(1) Where the contract of insurance has been delivered it shall be as binding on the insurer as if the premium had been paid, although it has not in fact been paid, and although delivered by an officer or agent of the insurer who had not authority to deliver it.

"(2) The insurer may sue for the unpaid premium and may deduct the same from the amount for which he may become liable under the policy or contract of insurance.

"(3) This section shall have effect notwithstanding any agreement, condition or stipulation to the contrary.

"(4) Where the premium is paid by a cheque or a promissory note, and the cheque is not paid on presentation or the promissory note at maturity the contract shall at the option of the insurer be void."

[The learned Judge then set out the provisions of the policy and application relied upon by the respondents, which are also set out in the judgment of KELLY, J., supra.]

It is admitted that the policy was delivered; that the company accepted a promissory note as payment of the first premium; and, with the policy, delivered a receipt for the premium which reads:—

"North American Life Assurance Company.
Head Office, Toronto, Ont.

"First premium $36.15. "Sum insured $1,000.

"Received this 4th day of September, 1919, thirty-six.... 15/00 dollars, for the first premium on policy No. N.110220 on

the life of Arthur E. McNeil, subject to all the provisions of the said policy, and those on the back hereof, hereby incorporated herein.

"This policy is not valid or operative unless this receipt is countersigned by the agent of the company, on the actual date of payment within 30 days of the issue of the policy, the life insured being then as stated in the application for the policy.

"L. Goldman,

"President and Managing Director.

"August Oettinger, Agent at London."

The promissory note fell due on the 8th November, and was not paid. Subsequently, about the 18th November, the deceased gave to the district manager of the defendant company a renewal note, which fell due on the 20th January. This note was not paid at maturity, but on or about the 4th February the deceased gave to the district manager a renewal note dated the 20th January, and due the 22nd February. The insured died during the currency of this note, that is, on the 20th February.

Relying on provision (d) of the policy, the learned trial Judge held that default terminated the policy without any notice or act on the part of the company, and that the policy could not again be made effective unless reinstated as provided by provision (e), or unless these provisions were waived, changed, or modified in manner provided for by provision (k).

The appellant contends that the acceptance by the company of the promissory note, and the delivery of the official receipt and policy, estopped the defendant company from asserting that the premium, quâ premium, had not been paid, and prevented the company from setting up and relying upon the provisions of the contract referring to default in payment of that premium, such as provisions (b), (e), and (k), and limited the rights and remedies of the company for non-payment of the note to such as are given by subsec. 4 of sec. 159; that, according to the true intent, meaning, and effect of subsec. 4, the policy did not on default terminate, but remained in force until such time as the company exercised the option to terminate, and that the company did not, after the default, elect one way or the other, or, if it did so elect, did not communicate its election to the insured; but, on the contrary, the company, by receiving and accepting renewal notes, elected to waive the default and extend the time for payment so as to prevent themselves from again electing until after the renewal notes fell due.

To establish the acceptance of renewal notes and waiver by the company, the appellant relied upon transactions and dealings between the insured and the company's district manager:

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the respondents contend and the learned trial Judge held that, if the district manager did accept the notes, he had not authority to waive the effect of the default stipulated for by provision (d), holding that that provision could only be changed, waived, or altered by the officers named in provision (k).

The respondents contend that, even if the district manager had authority to waive the effect of the default, what he did, did not in the circumstances amount to a waiver, in that the evidence establishes that he accepted the notes on the condition that the insured would apply for reinstatement and be reinstated, and that if the company were bound to elect to terminate the policy, they did so elect in that the district manager notified the insured that the policy was void or terminated, and could not be reinstated except in manner provided for by the policy, and they rely on the verbal testimony of the manager, and a letter dated the 12th February. The appellant says that this letter was not received by the insured, and the oral statement of the district manager did not amount to notice of an election to terminate, but was really only an expression by the district manager of his opinion as to the effect of the terms of the policy; and that, if such oral notice should be interpreted as a communication of an election by the company, in any event the district manager's evidence is so inconsistent with the letter of the district manager to the insured, dated the 30th January, that it should not be accepted as reliable or as sufficient evidence of the facts sought to be established against the deceased person, within the meaning of sec. 12 of the Evidence Act, R.S.O. 1914, ch. 76.

I am of opinion that the rights of the parties are governed by sec. 159 of the Insurance Act, and that by reason of both the provisions of this section and the delivery of the official receipt, it must be held that the first premium, quâ premium, was paid, and that the company's rights on default in payment of the note are limited to such rights as are given by subsec. 4 of sec. 159.

That brings me to the question: What is the meaning and effect of subsec. 4 Does it mean that the contract of insurance shall continue in force after default until such time as the company by some act or notice terminates it, or that the policy is void and terminated unless and until the company by some act elects to continue it by waiving the benefit of the provision?

The appellant contends for the first proposition, the respondent for the second, and the respondent relies on *McGeachie* v. *North American Life Assurance Co.*, 20 A.R. 187, 23 Can. S.C.R. 148; *Manufacturers' Life Insurance Co.* v. *Gordon*, 20 A.R. 309; *Frank* v. *Sun Life Assurance Co. of Canada* (1893),

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20 A.R. 564, 23 Can. S.C.R. 152; *London and Lancashire Life Assurance Co.* v. *Fleming*, [1897] A.C. 499.

Those cases seem to me to establish that, where notes are given and accepted in payment of a premium, and the policy, the note, or the application stipulates that on default in payment of the note the policy shall be forfeited, terminated, or voided, the policy stands forfeited, terminated, or void until and unless the company waives the forfeiture. I think these cases were determined on the principle that the words used in the contract mean what they say, and that consequently on default the contract is forfeited, terminated, or void, according to the words of the document, but that, notwithstanding the primary meaning of the words, the person in default cannot set up or rely on his own wrong or default so as to secure himself an advantage by avoiding the contract. On the other hand, if the default or other happening on which a forfeiture occurs is not the result of a wrong or a breach of contract, for which the party in default is responsible, both parties may take advantage of the stipulation, but either party, who is not in default, may elect to waive or forego any advantage that accrues to him by the stipulation. See *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France*, [1919] A.C. 1, and *In re Meyrick's Settlement*, [1921] 1 Ch. 311.

In the reasons for judgment in support of the decisions cited and referred to, one or more of the learned Judges expressed the opinion that it made no difference whether the provision was interpreted to mean that the contract was void or voidable, but I do not think that is the real meaning and effect of the decisions.

I have read and considered the opinions and the conclusions in the several authorities cited by counsel, and those I have referred to, and particularly the rule of interpretation laid down by Lord Wrenbury in the *New Zealand* case, where he says (p. 15):—

"The rule is that in a contract 'void' is to be read 'voidable,' if the result of reading it as 'void' would be to enable a party to avail himself of his own wrong or defeat his contract. It may be stated either in the form that if one party is in default it is 'void as against him,' or that if one party is in default it is 'voidable at the option of the other party.' The two amount to the same thing. But the contract is not 'void' in favour of or 'voidable at the option of' the party in default. He cannot say that it is void, and has no option of avoiding it in his own wrong. Here the contract is, in my opinion, voidable at the option of

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either party provided always that he is not seeking to avoid it in his own wrong."

I am not satisfied that the learned law Lords have determined or intended to determine that, if the contract read "shall be voidable or void at the option of one party," instead of "void or forfeited," the contract would terminate before or unless or until the party having the option did elect to avoid.

The appellant contends that sec. 159 was enacted to change the law laid down by the cases relied upon by the respondents, and to require the company to elect. I do not think we can speculate as to the reason for enacting sec. 159; but, after anxious consideration of the authorities and the wording of the Act, I am of the opinion that, according to the true intent and meaning of the Act, the company must, after default, elect to avoid, and that unless and until such election is made and communicated, the policy remains in force: *Roberts* v. *Davey* (1833), 4 B. & Ad. 664; May on Insurance, 4th ed., p. 725, para. 342; and the question remains: Did these defendants elect and communicate their election to the insured? It seems clear that the company and its officers were all of the opinion that the rights of the parties were governed by the stipulations in the contract, and that it was not necessary to make an election; that therefore their mind was not directed to making an election; that they did not mean to make an election; and that they did not in fact do so; and, consequently, did not authorise their district manager to communicate an election: that the oral communications of the district manager to the insured, if made, should not be considered as establishing more than that he advised the insured as to the meaning and effect of the stipulations in the policy.

For these reasons I am of opinion that the policy was not void at the date of the death of the insured, but was in full force and effect. If I be wrong in this, and it was necessary for the plaintiff to shew that the company waived the benefit of subsec. 4 of sec. 159, I am of the opinion that this has been established. It appears to me that a waiver of the benefits conferred by subsec. 4 cannot be said to be a waiver of a provision of the contract within the meaning of proviso (k) of the policy, and that the delivery of the policy and the receipt estopped the company from setting up or relying upon provisoes (b) and (e) for the purpose of establishing notice of a limit to the ostensible authority of the district manager.

This brings me to the questions: Had the district manager actual or ostensible authority to receive payment of notes taken by the company in lieu of cash, or to extend the time for pay-

ment thereof, and thus waive default, and did he do so? The evidence is that the district manager, having been entrusted with the possession of the original note, asked for and received the renewal note of the 18th November, and sent it to the head-office, but they returned it to him with a letter reading:—

"November 27th, 1919.

"A. Oettinger, Esq., District Manager, London, Ont.

"Dear Sir:—

Re Policy 110220, *McNeil.*

"We return herewith note given in connection with the above mentioned policy. Before accepting this note, it will be necessary for us to have the equivalent cash of insurance.

"Yours truly,

"W. B. Taylor, Secretary."

After receiving that letter, Oettinger sent to the head-office the equivalent cost of insurance, and the company retained it. It is not clear that he also returned the renewal note, but it is clear that, about the time the renewal note fell due, Oettinger sent or gave to the insured a form of renewal note, but the insured did not sign it promptly, whereupon Oettinger wrote him the following letter:—

"London, Ont., January 30th, 1920.

"Arthur E. McNeil, Esq.,

"R.R. No. 5, Goderich, Ontario.

"Dear Sir:—

Re Policy No. N110220.

"Referring to your 'phone conversation I would say that I am still waiting for your cheque for $36.65. Should you not be able to pay this amount at the present time we will be pleased to renew your note for you, but would ask you to kindly let me know what you intend to do in the matter.

"Yours truly,

"August Oettinger,

"AO/KM. "District Manager.

The reply is endorsed on the manager's letter, and reads:—

"Goderich, Feb. 4th, 1920.

"Dear Sir:—

"I am sorry but money did not come as I expected it to, so will have to ask you to extend it for another month, thanking you for your kindness.

"Yours truly,

"A. McNeil."

With that reply, or about the same time, the district manager received the last renewal note dated back to the 20th January, to agree with the due date of the former note.

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It will be noticed that the letter requesting payment offers to take a renewal note unconditionally, but the agent endeavoured to shew that the acceptance of the note was to be conditional on the insured applying for reinstatement, and submitting to a medical examination, and he endeavours to make out this condition by verbal testimony, and by a letter of the 12th February. I do not think that the evidence establishes that this letter was ever received by the insured, and I do not think that the uncorroborated testimony of the district manager, seeking to contradict or to vary his letter of the 30th January, should be received as sufficient to make out the condition as against the deceased or his estate; and, in rejecting that evidence as insufficient, I think I am justified by the spirit if not by the letter of sec. 12 of the Evidence Act; but, even if the oral testimony of Oettinger does not require corroboration because he is not a party to the litigation, I do not think that it establishes the accepting of either of the renewal notes conditionally. Oettinger had control and possession of and delivered up the original note in exchange for the renewal note dated the 18th November. That, I think, was an unconditional extension of the time for payment. His testimony is that it was not until some time in December, and after the receipt by him of the secretary's letter of the 27th November that he asked for anything additional. It seems to me that the time had then passed for attaching a condition to the acceptance of the note of the 18th November, or for claiming that the original note which had been delivered to the insured was unpaid. See *Ætna Life Insurance Co.* v. *Sanford* (1901), 98 Ill. App. 376, affirmed (1902), 197 Ill. 310, 200 Ill. 126. Then, does the evidence establish that the second renewal dated the 20th January, was received and accepted by Oettinger conditionally, or does the evidence go farther than to establish that prior to that date Oettinger had expressed the opinion that the policy was void, and could not be reinstated except in manner provided for by the policy, and that his letter of the 30th January was an offer to accept a renewal note unconditionally? According to the testimony, the insured thought the policy was in force, and the note had been accepted; and I think the evidence is that, so far as he was entitled to do so, Oettinger intended to accept the renewal note of the 20th January unconditionally. Even in the letter of the 12th February, which Oettinger says he wrote, and which was not, I think, received by the insured, Oettinger does not say that he received the note subject to a condition. He merely notifies or advises the insured that the head-office will not accept it. He says: "I have received notice from the head-office that your note has

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not been accepted," etc., which is an entirely different thing from saying, "I did not accept your note," or "I accepted it conditionally."

As to the effect of such a notice or advice as Oettinger deposes to, and the subsequent acceptance of a payment, see *Davenport* v. *The Queen* (1877), 3 App. Cas. 115, at p. 132.

The question remains: What was the ostensible authority of the district manager? The title "district manager" conveys to my mind the impression that the person so designated is the manager of the company's affairs in reference to its transactions in the district over which he is manager. The company entrusted him with the original note and with the renewals, and, when a dispute arose, the general manager wrote the district manager for the notes and correspondence.

In the absence of express notice or contract limiting Oettinger's authority as district manager, I think it should be found that a person designated and held out by the company as being their district manager, when entrusted with a note in reference to a policy taken in the district over which he is manager, had at least ostensible authority to deal with that note by receiving payment or renewing it: *Moffatt* v. *Reliance Mutual Life Assurance Society* (1881), 45 U.C.R. 561.

I would allow the appeal.

Appeal allowed.

WHITNEY-MORTON Co. v. SHORT.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. June 6, 1922.

SALE (§ IB—5)—SALE OF GOODS ACT—"MERCANTILE AGENT"—GARAGE—HOLDING FOR REPAIRS—TITLE.

Holding possession of a truck for the purpose of storage and repairs pending a sale under seizure is not possession as a "mercantile agent" for purposes of sale within the meaning of sec. 69 of the Sale of Goods Act (R.S.B.C. 1911, ch. 203), so as to pass title thereto to a purchaser from the person thus in possession.

APPEAL by the plaintiff from the judgment of Murphy, J. in an action for wrongful detention. Affirmed.

J. E. Jeremy, for appellant.

G. E. Housser, for respondent.

MACDONALD, C.J.A.:—The case was tried on a statement of facts agreed upon by counsel. This statement shews that the Giant Motor Truck Co., on January 28, 1921, sold the truck in question to one McMullin by a conditional sale agreement, and on the same day assigned this agreement to the defendant. The assignment was endorsed on the agreement, and the agreement was thereafter registered according to law.

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McMullin made default in payment of instalments and the truck was re-possessed by the defendant, who left it with the Giant company, "pending sale under seizure and for the purpose of having certain repairs made thereto," but without express authority to sell it. The Giant company nevertheless sold the truck to one, Delho, 10 days thereafter, *viz.*, on May 27, and gave in their own name a conditional sale agreement to Delho, who took possession of the truck and on August 10 the Giant company assigned the Delho agreement to the plaintiffs who registered it on August 30. Delho having made default, returned the truck to the Giant company on August 15, and on the 26th the defendant took possession of it under the agreement and assignment thereof of January 28, and removed it to the garage of the Maple Leaf Co. The plaintiffs then attempted to get possession from the Maple Leaf Co., claiming under the second agreement above recited, but failed, and they then brought this action for wrongful detention.

The question is, is the defendant entitled to the truck under the agreement of January 28, or on the contrary, are the plaintiffs entitled to it under the agreement between the Giant company and Delho of May 27 assigned to the plaintiffs on August 10? The decision of the appeal hinges on the construction to be placed upon sec. 69 of the Sale of Goods Act, R.S.B.C. 1911, ch. 203, as applied to the facts of this case. The facts as stated are peculiar in some respects. The Sale of Goods Act, sec. 32, gives the purchaser 20 days from the date of the vendor's re-taking within which to redeem. This truck was re-sold by the Giant company 10 days after the date of re-taking, in violation apparently of McMullin's right. Delho, who had statutory notice of the title must be taken to have been aware of McMullin's rights in the premises. Then again, a fire occurred on August 13, while the truck was still in Delho's possession, causing injury to it, but the insurance moneys were paid to the defendant upon proof of loss made by McMullin. Again the case shews that after the sale to Delho, namely, on June 22, the Giant company paid a considerable sum of money to the defendant as a payment by McMullin on the purchase price. I cannot help but think that if the facts had been ascertained by evidence at the trial, some explanation of these circumstances would have been offered, but I have to deal with the case as I find it. The following passage from Benjamin on Sales, 1920, 6th ed., deals succinctly with the point argued before us, namely, whether sec. 69 as it stands today is to be construed differently to the similar section in the English Factors Act, as it stood prior to the year 1889, (amended and consolidated 1889 (Imp.), ch. 45). Prior to the

last mentioned date, the section made use of the word "entrusted," that word was eliminated in 1889 and the section of the English Act of that year is similar to our sec. 69. I quote from Benjamin, at p. 43:—

"The 'Factors Acts' of 1825 and 1842 provided that the agent or 'person' should be *'entrusted'* with the possession of the goods or documents of title. But notwithstanding the changed wording [in the section as amended in 1889] it is conceived that these cases mentioned, [*City Bank* v. *Barrow* (1880), 5 App. Cas. 664, 43 L.T. 393; *Cole* v *N. W. Bank*, L.R. 10 C.P. 354, 44 L.J. (C.P.) 233, 32 L.T. 733] under the earlier Acts are still law, which decided that a mercantile agent who, *in some other capacity* was entrusted with goods, was not entrusted with them as a mercantile agent and could not in consequence pass a good title to a third person. In other words, sec. 2 (1) of the Act of 1889 should be read as if it ran: 'Where a mercantile agent is, with the consent of the owner, in possession, *as a mercantile agent* of goods, etc'."

Now, the admission of facts states that the truck was left with the Giant company *pending a sale under seizure and for repairs*. The notice served on McMullin dated May 17, when defendants repossessed themselves of the truck, tells him that if the price be not paid within 20 days, the truck will be sold. It was sold within 10 days by the Giant company and without the instructions or knowledge of the defendants, shewing that it was at the time of the sale, at all events, not in the possession of the Giant company as mercantile agents but for storage and repairs.

The appeal should therefore be dismissed.

MARTIN, J.A.:—I agree that this appeal should be dismissed.

MCPHILLIPS, J.A.:—In my opinion, Murphy, J. arrived at the right conclusion.

Firstly, the appellant must be held to be held to be affected by and conclusively bound by the provisions of the Sale of Goods Act, R.S.B.C. 1911 ch. 203, and in particular the provisions governing conditional sales, secs. 27 to 36 inclusive. The appellant is in the position of having statutory notice that the truck in question was sold and held under a conditional sale agreement, and upon the facts as stated, there was not, at the time the purchase was made, the right to effect a sale of the truck, and the appellant, as a matter of legal sequence, could not, upon this point alone, obtain a good title—that a search was not made in the office of the County Court, and the appellant was not aware of the true facts, cannot avail him in this appeal.

Secondly, if the matter were still open and this was not an

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insuperable objection, the appellant cannot succeed, because the truck was not placed with the mercantile agent within the purview of sec. 69 of the Sale of Goods Act. I would refer to what Channell, J., said at p. 527, in *Oppenheimer* v *Attenborough & Son*, [1907] 1 K.B. 510, affirmed [1908] 1 K.B. 221; 77 L.J. (K.B.) 209—when referring to the change in the Imperial Act; and we have the like statute law:—

"It seems to me that the words of the present Act, 'where a mercantile agent is, with the consent of the owner, in possession of goods,' means precisely the same as the former words as to entrusting, with the exception that the present Act brings in the statutory definition of a mercantile agent which previously was only a matter of the decision of the Courts."

Now, here there was no entrusting of the truck at all for sale, it was there for repairs, never was entrusted for sale, and the place of business was not only one where sales were carried on, but where repairs were made; it was true the repairs had been effected, but, surely, if one had his motor car for repairs in an establishment where motor cars are also for sale, could it be for a moment contended that nevertheless one's motor car could be sold and the owner lose his car? This would be a monstrous happening, and the statute law cannot be applied to work such a manifest injustice. The statute law is not so intractable as to necessitate any such injustice being worked, and I would refer to what Lord Shaw of Dunfermline, in *Att'y-Gen'l of Nigeria* v. *Holt & Co. et al*, [1915] A.C. 599 at 617 84 L.J. (P.C.) 98 said:—

"The law must adapt itself to the conditions of modern society and trade. . . ."

This was not a case within the language of Lord Alverstone, C.J. in the *Oppenheimer* case, [1908] 1 K.B. 221, 77 L.J. (K.B.) 209 at p. 213.

"I cannot think that it was intended to exclude from the protection of the Factors Act the case of a mercantile agent who, having got possession of goods with the consent of the owner *for the purpose of selling them*, tells a lie to the pledgee when he gives them in pledge."

Here, the truck was not in the possession of the mercantile agent for the purpose of selling it at all, the possession was in quite another capacity, *i.e.*, for repairs, and there was continuance of possession after the repairs had been made; and as we have seen, there was not, at the time, the right to sell, owing to there still being necessary steps to take under the conditional sale agreement to admit of a sale being made. The stated case in its terms does not admit of it being said that this was a case

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of a mercantile agent being in possession of goods for sale and held in the ordinary course of business of a mercantile agent for sale. Then, it is manifest that the law remains as repeatedly expounded, that a sale made by a mercantile agent cannot be supported if the goods were entrusted to the mercantile agent as they were here, not for sale, but entrusted to the mercantile agent in another capacity, *i.e.*, for repairs. (See *City Bank* v. *Barrow, supra; Cole* v. *N. W. Bank, supra; Biggs* v. *Evans*, [1894] 1 Q.B. 88; Benjamin on Sale, 1920, 6th ed. at pp. 41-43; Chalmers Sale of Goods, 1920, 8th ed., at pp. 148, 150, 151.)

It follows that, in my opinion, the appeal in the present case should be dismissed.

Appeal dismissed.

SHUTER v. PATTEN.

Ontario Supreme Court, Hodgins, J.A. December 29, 1921.

SPECIFIC PERFORMANCE (§IE—35)—SALE OF HOUSE—OBJECTION TO TITLE—POSSESSION BY PURCHASER—OFFER BY VENDOR TO ADJUST—REFUSAL—ACTION FOR SPECIFIC PERFORMANCE.

When it appears that a purchaser of property has taken possession, though objecting to title, and has refused a reasonable offer of adjustment by the vendor, specific performance will be granted upon terms or on non-compliance within a limited time possession will be given to the vendor and occupation rent must be paid.

ACTION by vendors of land to recover from the purchaser possession of the land and a house thereon, or, in the alternative, to compel completion of the purchase. Counterclaim by the defendant for specific performance of the agreement for sale and purchase, or, in the alternative, for the return of the sale-deposit and for damages for expenditures made by the defendant and costs and expenses incurred.

Peter White, K.C., for the plaintiffs.

Norman Sommerville, for the defendant.

HODGINS, J.A.:—Action by vendors against purchaser to recover possession of houses and premises No. 1111 Davenport road, in the city of Toronto, or, in the alternative, for completion of the purchase thereof.

The agreement is dated the 7th June, 1920, the purchase-money being $5,000, of which $200 was to be (and was) paid as a deposit; $800 in cash on completion of sale; a first mortgage of $1,750 to be assumed, and a second mortgage given for the remainder of the purchase-money.

Provision was made in the agreement as follows:—

"If within that time" (i.e. 10 days) "she shall furnish the vendor in writing with any valid objection to the title which the vendor shall be unable or unwilling to remove, and which

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the purchaser will not waive, this agreement shall be null and void, and the deposit of money returned to the purchaser without interest."

The title was examined within the 10 days, requisitions were made and answered, a draft deed and a draft mortgage were submitted and approved, and everything was ready for completion before the 1st day of July, the stipulated date. The deed contained the names of the two plaintiffs as grantors and the names of their respective wives to bar dower. The transaction was not closed on the 1st of July owing to the fact that difficulty was experienced in getting Rose Shuter, wife of one of the plaintiffs, to sign the deed barring her dower, and she never did sign.

The cause of the delay was not known to Mr. Richards, solicitor for the defendant, prior to the 1st July, 1920, nor till the 5th August, 1920. The fact was that a definite refusal by Rose Shuter appears to have been somewhat unexpected, as I am satisfied that Mr. Lockhart Gordon, solicitor for the plaintiffs, was, and his clients were, before the contract was signed and for some time afterwards, under the impression that, notwithstanding the objection Rose Shuter was making, she would ultimately do as she had done on previous occasions, and complete her bar of dower.

Correspondence arose which lasted until December, 1920. A proposal was made on behalf of the plaintiffs to deposit the sum of $271 with a trust company, and in that way to give security against any possible claim for dower. This offer was refused, however, and failing an agreement, notice was given requiring the defendant to vacate the premises.

It appears that some time during July, 1920, and without the knowledge of the plaintiffs or their solicitor, the defendant, having to move out of the property she was then occupying, and assuming that everything would be all right, went into possession of the premises and made improvements in the way of decoration, painting, etc., to the value of about $190. On the evidence I cannot find that either of the plaintiffs or the plaintiffs' solicitor knew of or encouraged the taking possession, although when they became aware of it they continued to treat with her own solocitor regarding the dower, in the hope that an adjustment would be made, during which time they never insisted nor did their solicitor, that the title in this respect had been waived by the taking of possession. The defendant has remained in the house since July, 1920—nearly 18 months—and has paid nothing. It was argued on behalf of the plaintiffs that the contract had been properly terminated by notice, and

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that the provision in the contract which I have quoted in itself warranted their action, and that the defendant should pay occupation rent at the rate of $50 a month.

I am relieved of the necessity of deciding whether or not the contract was formally terminated because of the pleadings in the action. In para. 8 of the statement of claim it is stated that the plaintiffs have always been ready and willing and still are ready and willing to carry out the sale to the defendant, and in the statement of defence the same desire is shewn, and the offer is made to carry out the contract on being tendered a conveyance free from dower. If I had to decide it, the facts seem to resemble somewhat, in this aspect, those of *Merrett* v. *Schuster*, [1920] 2 Ch. 240. The case to my mind resolves itself into a question of the terms on which specific performance should be granted, and the defendant's counsel expressed his client's willingness to carry out the contract if allowed compensation.

A wife's inchoate right of dower is something in the nature of an incumbrance, and that the vendor is bound to remove it is a proposition which admits of no doubt. This was laid down at an early date in this Province. See *Van Norman* v. *Beaupré* (1856), 5 Gr. 590, where the decree was made for specific performance with compensation to be determined on ascertaining the present value of the incumbrance. It falls within the rules laid down as to compensation in *Rutherford* v. *Acton-Adams*, [1915] A.C. 866.

It appears from the evidence that no direct request was made by either of the plaintiffs to Rose Shuter to sign the deed, but no doubt that was done by their solicitor. The defendant called Rose Shuter as a witness, and she expressed her willingness to release her dower for the sum of $100. Her readiness to accept this amount and to bar her dower does not appear to have been communicated to the plaintiffs or their solicitor until the 1st December, 1921, long after the action had been begun in January, 1921. The plaintiffs took the position that the contract had been already terminated, this suit being then pending.

At no time did the defendant express her willingness to take such title as the plaintiffs could give, with an abatement to be fixed by the Court, nor was she ever at any time ready to accept the proposition made on the 8th September, 1920, to deposit $271, to be held by a trust company for Rose Shuter, in the event of her husband predeceasing her.

Upon the best consideration I can give to the matter, I think the proper judgment is for specific performance with compensation, which I fix at the sum of $100.

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I feel, however, that in the circumstances and but for the offer made in the pleadings by the plaintiffs, it would be difficult to grant specific performance, and I shall therefore only do so on terms. Those terms are that the purchaser must pay interest from the date she took possession upon the mortgages and at the rate of 7 per cent. upon the amount of purchase-money (less $100) unpaid, that being the rate which the plaintiffs could have obtained on the cash-payment if made, and she must complete the sale within two weeks from the date of this judgment. She must also, I think, pay the general costs of the action and counterclaim. My reasons for imposing these terms on the defendant are as follows:—

1. She refused an apparently reasonable offer to deposit a sufficient amount of money with a trust company to secure the defendant against this dower-claim, and made no offer to take the title with compensation to be fixed by the Court—see *per* Middleton, J., in *Bowes* v. *Vaux* (1918), 43 O.L.R. 521, at p. 526.

2. She took possession without the knowledge of the plaintiffs, and is only saved from being confronted with an apparent waiver of title by the forbearance of the plaintiffs' solicitor.

3. She has, under all circumstances, retained possession for an unreasonable time—some 18 months—without making any payment, and has insisted upon being paid an expenditure for which she has no legal claim.

In *Nicloson* v. *Wordsworth* (1818), 2 Swan. 365, it is said: "If a purchaser take possession under a contract and afterwards rejects the title, he must relinquish the possession." See also *King* v. *King* (1833), 1 My. & K. 442; *Rankin* v. *Sterling* (1902), 3 O.L.R. 646; *McNiven* v. *Pigott* (1915), 33 O.L.R. 335, 22 D.L.R. 147.

Judgment will, therefore, be entered declaring that the contract should be specifically performed on the terms I have mentioned. The judgment will contain a direction that unless those terms are carried out within the time limited there will be judgment against the defendant for possession and for occupation rent, which I fix at $45 per month from the time when possession was taken, with costs of action and counterclaim.

It is to be regretted that neither party applied under the Vendors and Purchasers Act, under which the only real difficulty could have been cleared up and the rights of the parties adjusted without the delay which has occurred in this case. See *Thompson* v. *Ringer* (1881), 44 L.T.R. 507; *McNiven* v. *Pigott* (1914), 31 O.L.R. 365, at pp. 374-5-6, 19 D.L.R. 846.

CAIN v. COPELAND.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

BOUNDARIES (§ IIA — 8) — MOUND — DESCRIPTION OF LAND — DOMINION LAND ACTS—EVIDENCE.

In ascertaining the boundaries of adjoining acreages, evidence of a mound as shown in the original plan of survey controls the description contained in the instrument of title, by virtue of the provisions of the Dominion Land Act, 1879, ch. 31, and the Dominion Lands Surveys Acts, 1908, ch. 70.

APPEAL from the judgment of Taylor, J. (1922), 66 D.L.R. 806, 15 S.L.R. 135. Reversed.

E. B. Jonah, for appellant.

H. E. Sampson, K.C., for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—The plaintiff and the defendant are adjoining land-owners, the plaintiff owning the south-west quarter and the defendant the south-east quarter of sect. 18, in tp. 17 and r. 16, west of the second meridian. The object of this litigation is to establish the boundary line running north and south between these two quarter sections. These lands were surveyed originally by a Dominion land surveyor in the year 1883, under the provisions of the Dominion Lands Act, 1879, ch. 31. The patents issued to the original grantees of these quarter sections describe each of them as containing 160 acres more or less, and the certificates of title subsequently issued are to the same effect. It must be borne in mind, however, that these statements of acreage contained in the patents and certificates are to be taken as subject to the provisions of the Act itself, which read originally as follows:

"107. All boundary lines of townships, sections or legal subdivisions, towns or villages, and all boundary lines of blocks, gores and commons, all section lines and governing points, all limits of lots surveyed, and all mounds, posts or monuments, run and marked, erected, placed or planted at the angles of any townships, towns, villages, sections or other legal subdivisions, blocks, gores, commons and lots or parcels of land, under the authority of this Act or of any order of the Governor in Council, shall be the true and unalterable boundaries of such townships, towns and villages, sections or other legal subdivisions, blocks, gores, commons and lots or parcels of land respectively, whether the same upon admeasurement be or be not found to contain the exact area or dimensions mentioned or expressed in any patent, grant or other instrument in respect of any such township, town, village, section or other legal subdivision, block, gore, common, lot or parcel of land.

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108. Every township, section or other legal subdivision, town, village, block, gore, common, lot or parcel of land, shall consist of the whole width included between the several mounds, posts, monuments or boundaries respectively, so erected, marked, placed, or planted as aforesaid, at the several angles thereof, and no more or less,—any quantity or measure expressed in the original grant or patent thereof notwithstanding.

109. Every patent, grant or instrument purporting to be for any aliquot part of any section, or other legal subdivision, block, gore, common, lot or parcel of land, shall be construed to be a grant of such aliquot part of the quantity the same may contain on the ground, whether such quantity be more or less than that expressed in such patent, grant or instrument."

The Act of 1879 was superseded by repealing legislation, and finally a new Dominion Lands Surveys Act, 1908 (Can.), ch. 21, was enacted. Sections 56, 58, and 60 to 67, inclusive, deal with the subject of plans, re-surveys, original boundary lines and the re-establishment of lost corners. These sections are adopted for the purpose of matters belonging to the jurisdiction of the Province by sec. 26, R.S.S. 1920, ch. 70, which was enacted originally in 1912-13 (Sask.), ch. 23. Section 64, thus enacted by the Dominion and adopted by the Province, provides as follows:—

"64. Any letters patent, grant or instrument purporting to convey any right or interest in any aliquot part of any section, or other authorized subdivision, block, gore, common, lot or parcel of land, shall be construed to affect such aliquot part of of the quantity it contains on the ground, whether such quantity is more or less than that expressed in such letters patent, grant or instrument."

It is apparent, therefore, that in order to ascertain the acreage of those quarter sections, recourse must be, in the first instance, not to the statements contained in the patents or certificates, but to the "several mounds, posts, monuments, or boundaries, erected, marked, placed or planted" in the survey, and evidence of which can be found upon the ground.

The defendant claims to be able to locate the proper boundary line between his quarter and that of the plaintiff by a certain mound which, he alleges, existed at one time, according to the rules governing surveys, at a point on the southerly limit of the road allowance between this sect. 18 and sect. 7, immediately south of it in the same township. In my opinion, the whole question to be determined here is whether or not the existence and location of this mound can be established, because, if it can, I do not think that the defendant's rights are affected by anything contained in the legislation above referred to, or in any

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of the plans filed with the Registrar of Land Titles from time to time under the provisions of the Dominion Lands Act. Upon this point I differ, with deference, from the opinion expressed by the trial Judge, (66 D.L.R. 806, 15 S.L.R. 135), who seems, in fact, to base his judgment not upon the reliability of the evidence before him, but upon the assumption that the defendant was debarred by law from adducing evidence of a mound to control the description contained in the instruments. As this conclusion is, in my opinion, wrong in law, it is necessary to ascertain from the evidence whether the portion of the mound in question, which is shown in the original plan of survey, can be ascertained. In the short statement which the trial Judge makes in his judgment regarding the facts, he expresses doubt as to the value of the evidence given by the witness Covey, whose testimony is of great importance if reliable. I must say, however, that I have looked carefully into the circumstances which seem to have created this doubt in the mind of the trial Judge and I do not think they justify the conclusion that Covey's evidence, which has strong corroboration, should be discredited. Covey, who owns the south half of sect. 7, testifies that in 1905 this mound was plainly visible in the spot now contended for by the defendant, and he states that he plowed a furrow, by reference to this mound, to establish the boundary between the south-east and south-west quarters of sect. 7, and this furrow is still visible.

The whole of the evidence convinces me that this mound was erected at the point alleged by the defendant, and in reference to which his fence was built, and that it remained visible until the plaintiff, who is the owner of the north-west quarter of sect. 7, destroyed it by moving his buildings to their present site and opening up a road from the road allowance to his buildings, leaving a stone where a stake had been to mark the spot.

I think that the true boundaries of the south-east quarter of sect. 18 can be established as the law requires according to the marks left by the survey, and that the fence erected by the defendant does not encroach upon the plaintiff's land, as contended by him.

In my opinion the appeal should be allowed with costs.

Appeal allowed.

REX v. BENDER.

Ontario Supreme Court, Masten, J. December 30, 1921.

INTOXICATONG LIQUORS (§IIIH—90)—SEIZURE OF LIQUOR—ORDER OF CONFISCATION—PROPER SERVICE OF NOTICE—ONT. TEMPERANCE ACT, SEC. 70.

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The service of a summons under sec. 70, sub-sec. 4 of the Ontario Temperance Act may properly be made upon the tenant of the property where the liquor is found the property being occupied by him, and he being beneficially interested in it.
[See Annotation, 61 D.L.R. 177.]

APPLICATION to quash an order dated October 21, 1921, made by Police Magistrate Weir, for the City of Kitchener, forfeiting to His Majesty certain intoxicating liquor claimed by the applicant, on the ground that the said magistrate had no jurisdiction to make the order.

G. M. Garvey, for the applicant.

F. P. Brennan, for the magistrate.

MASTEN, J.:—The objection as to want of jurisdiction is based on the ground that no notice such as is required by sec. 70 of the Ontario Temperance Act was served prior to the making of the order.

The depositions taken before the magistrate shew that the liquor in question was found in the garage at the home of Ezra Karcher, 10 Homewood avenue, in Kitchener, on the 26th July, 1921, and that the summons pursuant to which the order in question was made was served on one J. B. Dennis, who is sworn to be the owner of the premises where the liquor was found. Counsel for the applicant sought leave to file affidavits shewing that Dennis was not the owner at the time the summons was served but was a tenant.

Without determining the question whether evidence can be given in such a case to controvert what is shewn by the record, I am of opinion that, whether Dennis is the owner of the legal estate in the premises or is a tenant, he comes within the scope of sub-sec. 4 of sec. 70 of the Ontario Temperance Act. That subsection provides as follows:—

"(4) It shall be sufficient service of the summons if the same is delivered to the shipper, consignee or owner, or be left with some grown-up person at the express office, railway station or other place in which the liquor is found or to the owner of the lands on which the same is found."

It was said by the Divisional Court per Armour, C.J., in the case of *York* v. *Township of Osgoode* (1893), 24 O.R. 12, at p. 25:—

"The term 'owner' has no definite legal meaning, and has been construed differently in different Acts of Parliament in which it has been used, and has been so construed to meet the intention of the legislature as gathered from the particular Act in which the term has been used.

"In Stroud's Judicial Dictionary it is said that 'the owner

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of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct of it:' and numerous cases are referred to as shewing the meaning attached to the term under various Acts of Parliament. See particularly *Lewis* v. *Arnold* (1875), L.R. 10 Q.B. 245; *Woodard* v. *Billericay Highway Board* (1879), 11 Ch. D. 214.

"There are several cases in our own Courts where the meaning of the term has been discussed, as in *Conway* v. *Canadian Pacific Railway Co.* (1885), 7 O.R. 673; *Hopkins* v. *Provincial Insurance Co.* (1868), 18 U.C.C.P. 74; *Lyon* v. *Stadacona Insurance Co.* (1879), 44 U.C.R. 472.

"The defendant George Comrie was at least a tenant at will, and as such was an owner affected or interested within the meaning of the Act, and was making himself liable as such for the proportion of the work he might be awarded to perform."

Having regard to the general object and scope of the Ontario Temperance Act, namely, to prohibit and prevent the sale of liquor, and having regard to the other subsections of sec. 70, I am of opinion that, whether Dennis was the owner of the legal estate or was only a tenant, he was at the time of the service of the summons "a person in whom (with his . . . assent) the property was for the time being beneficially vested, and who had the occupation, or control, or usufruct of it."

The application is therefore refused with costs.

Application refused.

ROYAL BANK OF CANADA v. BAXTER & Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. June 6, 1922.

COSTS (§ I—3)—AMENDMENT—TERMS—POWERS OF JUDGE—REVIEW ON APPEAL.

A Judge granting leave to amend a statement of claim to include an alternative claim may do so upon terms that the applicant pay the costs thereof; such order will not ordinarily be disturbed on appeal.

APPEAL by the defendant from the judgment of Morrison, J. Affirmed.

E. C. Mayers and *J. S. Jamieson*, for appellant.

C. H. Tupper, K.C., and *Alfred Bull*, for resopndent.

MACDONALD, C.J.A.:—I would dismiss the appeal. The whole trouble was brought about by the ill temper of the captain of the ship. Had he allowed his common sense to assert itself, there would have been no dispute upon any of the points urged in argument.

There was a further ground of appeal taken on the question of the costs in the Court below. The plaintiff pleaded in his

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reply to the statement of defence, matters which ought to have been in the statement of claim, that is to say, an alternative claim. Defendant moved to strike this out and succeeded. Plaintiff at the same time moved to amend his statement of claim by including this alternative claim in it and succeeded. The Judge in Chambers reserved the costs of these motions and of the amendment. The order allowing the amendment contained these words:—"And it is further ordered that the costs of this application and of the amendments, be reserved to be dealt with by the Judge on the trial of this action."

By the judgment of the Court the costs so reserved were disposed of in the following words:—

"The costs of defendant's application for summons dated December 30, 1921, and of the plaintiff's application for summons, dated December 31, 1921, and of the amendments allowed by the order of January 4, 1922, made on the plaintiff's said application, shall be the defendant's costs in the cause."

It will, therefore, be seen that the Judge disposed of the only costs referred to him in favour of the defendant. It is claimed in the appeal that he ought to have given the defendant the costs of the action up to the date of said amendment, but these were not reserved to him.

The cases to which we were referred are mostly cases where the application to amend came up as of first instance, and where the Court or Judge had to exercise discretion where none had been exercised in the Court below. It seems clear upon these cases that the Court or the Judge before whom the application comes may grant the amendment on terms, that is to say, he can put it to the applicant to take the amendment on the terms imposed or to go without it. Terms have often been imposed as a condition to leave to amend, that the applicant should pay the costs of the action up to the time of the amendment. Bramwell, L.J., said in *Tildesley* v. *Harper* (1878), 10 Ch. D. 393, at p. 396, 48 L.J. (Ch.) 495, 39 L.T. 552, 27 W.R. 249:—

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise."

And this was approved in *Steward* v *North Metropolitan Tramways Co.* (1886), 16 Q.B.D. 556, 55 L.J. (Q.B.) 157, 54 L.T. 35, 34 W.R. 316, 50 J.P. 324.

The Court is not to penalize the applicant for the amendment, but to make such orders as to costs or otherwise as will put him in the position he would have occupied if the matter had been

pleaded at the proper time. The plaintiff could have pleaded the claim set up in the amendment in his statement of claim, and there is nothing in the material before us to show that the payment of the costs of the application to amend, and of the amendment, was not full compensation for his omission to do so.

In this view, it becomes unnecessary to decide whether the order as to costs was appealable or not, or what are the powers of a Judge over part of the costs of an action, having regard to the statute which provides that costs of the action shall follow the event, unless otherwise ordered for good cause.

MARTIN, J.A.:—While I have some doubt about this case, it is not sufficient to cause me to dissent from the opinion of my brothers that the appeal should be dismissed, and in view of the restricted form of the order referring the disposition of the costs of amendment to the trial Judge, his direction as to costs should not be interfered with.

GALLIHER, J.A.:—I agree with the conclusions of the trial Judge.

As to the question of costs of the interlocutory motions that were referred to the trial Judge at the hearing, it seems to me that under the terms of the order of reference, he could not dispose of the costs otherwise than he did.

If I understood Mr. Mayers aright, his argument on clause 14 of his notice of appeal, was directed to the costs reserved for the trial Judge and if so, those were prescribed by the terms of the order of reference.

The appeal should be dismissed.

MCPHILLIPS, J.A.:—I cannot say that it is not without some hesitancy that I arrived at the conclusion that the appeal should be dismissed, however, the course of conduct of the agent for the appellant would appear to have been such that it is impossible to give effect to the able argument of the counsel for the appellant.

At the outset, it may be admitted that there was non-compliance with some of the terms of the written contracts, but it would appear, according to the finding of the trial Judge, that a new contract, not in writing, was entered into, and following that, the poles were provided and piled upon the bank of the river and the agent of the appellant would appear to have accepted them. A difficulty arose when the delivery of the poles was being made, three hundred having at that time been placed aboard the ship—that is a lien was claimed thereon, and the sheriff appeared on the scene to enforce the lien. Then was the time for the appellant to have elected to treat the contract at an

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end, as counsel for respondents admit at this Bar, that, although what is relied upon is the verbal contract, it was in the same terms as the written contract. However, that course was not adopted, the agent for the appellant treated the contract as being still open for further performance, and it would appear that the agent for the appellent took part in the endeavour to have the lien released, an application being made to the bank which was in the end successful. But the agent for the appellant apparently would seem, at the conclusion of things, and when the lien stood released, to have acted in a most extraordinary manner, out of pure caprice. He then attempted to disaffirm the contract, and the poles already loaded upon the ship were thrown into the stream. This conduct cannot be viewed with approval, and in view of the fact that the trial Judge had opportunities this Court has not—*i.e.*, to see the witnesses and observe their demeanor, it is not a case which admits of the decision of the trial Judge being reversed, (See *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, 67 L.J. (Ch.) 402, 78 L.T. 540.) It is true that the poles were required to be marked to comply with the law, but the marking was being carried out as the poles were being delivered at the ship's side, so that no objection upon that ground is tenable. There would appear to have been evidence before the trial Judge which would admit of his holding as he did, that the poles were appropriated to the contract, and that the property therein passed to the appellant. Further, upon the facts, it would appear that there was evidence which admitted of the trial Judge holding that the poles were at the buyer's risk in that the property therein stood transferred to the buyer. (See secs. 24, 26, Sale of Goods Act, R.S.B.C., 1911, ch. 203.) Now, in the present case, there was readiness and willingness to deliver the poles which had already been accepted by the appellant, and in fact some of the poles were alongside the ship, the appel- and the balance of the poles were alongside the ship, the appellant, as we have seen, having previously examined them and accepted them, and upon the facts, there was evidence upon which the Judge could proceed and decide that the appellant wrongfully refused to take delivery.

During the argument I was somewhat impressed with the view that the action was wrongly conceived, and that if there was a right of action at all, that it could only be for damages for breach of a contract in refusing to take delivery. However, I have been constrained to hold that there was evidence entitling the trial Judge to hold as he did, and having held that the property in the poles had passed to the buyer, *i.e.*, the appellant, an

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action was admissible for the price. Secs. 63 and 64 of the Sale of Goods Act, R.S.B.C., 1911, ch. 203, read as follows:—

"63. (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

64. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept."

It is evident that the sellers, the respondents, had a choice of remedies and have chosen to sue for the price of the poles. The contract was, in its nature, severable and where the buyer, the appellant, as it has been held in this case, accepted the poles, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and cannot be a ground for refusing the poles and treating the contract as repudiated, there being no term of the contract express or implied, to that effect, this would go to the question of the non-giving of the bill of sale and the other provisions relied upon by counsel for the appellant. (See sec. 19 (3) Sale of Goods Act.)

Further, sec. 79 of the Sale of Goods Act reads as follows:—

"79. Where, any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract."

The course of dealing between the parties in the present case seems to me to have obviated anything further being done, the poles were being delivered and all would have ended well had

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the agent for the appellant not acted in the unwarranted and precipitate way in which he did. It is regrettable that the appellant should, under the circumstances, be called upon to pay for poles which were in the end not received, and many of which would appear to be now irretrievably lost, but all that can be said about that is, that the appellant must be answerable for the conduct of the agent who seems to have proceeded in a manner utterly unmindful of the interests of his principal, and it is trite law that the principal must be held answerable for the conduct of the agent; and to the agent, the principal must look in the present case for relief, the liability therefor would not appear to be chargeable to the respondents.

Upon the whole case, I am unable to come to the conclusion that the Judge was clearly wrong in the decision he arrived at, and being of that opinion, it follows that the appeal should stand dismissed.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

Re FAIRWEATHERS Ltd.

Ontario Supreme Court in Bankruptcy, Orde, J. December 29, 1921.

BANKRUPTCY (§IV—36)—PAYMENT OF INSURANCE PREMIUMS BY BROKER —MONEYS DUE FROM COMPANY—ASSIGNMENT—CANCELLATION OF POLICIES—REBATE TO AGENT—APPLICABLE ON HIS CLAIM FOR PAYMENT OF PREMIUMS.

An insurance broker, having paid insurance premiums, and charged the insured in his books, may on cancellation of the policies after assignment of the insured, rightly apply rebates of premiums on his account against the assignor.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

MOTION by claimant, for a direction to the trustee in bankruptcy to allow a claim made in the bankruptcy proceedings.

The claimant in person.

R. S. Cassels, K.C., for the trustee.

ORDE, J.:—The claimant is an insurance broker in Montreal, through whom the insolvent company had effected their fire insurance. It had been the practice for Alloway to place this insurance with different insurers, he paying the premiums, and debiting Fairweathers in his books with the payments. In some cases Fairweathers gave him promissory notes or accepted drafts for the premiums so paid, and in others the item was left in Alloway's books as an open account until paid.

Shortly before the assignment, which was made by Fairweathers on the 3rd August, 1921, they were indebted to Alloway upon accepted drafts for premiums paid by him on their behalf in the sum of $1,028.35.

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RE FAIRWEATHERS LIMITED.

Orde, J.

Prior to the making of the assignment, either on the 3rd August, 1921, or a day or two earlier, Fairweathers arranged with Alloway to cancel the insurance policies upon which he had paid the premiums which were represented by the unpaid drafts, and to have the amounts allowed by way of rebate for the unearned premiums paid by the insurance companies to Alloway. The policies were accordingly cancelled, and the rebates, amounting in all to $732.98, were paid to Alloway and were applied by him in reduction of Fairweathers' indebtedness to him.

Immediately after the making of the assignment, the trustee effected new insurance through Alloway, the premiums thereon amounting to $1,275, but the trustee refused to pay Alloway more than $542.02, claiming that the $732.98 which Alloway had received from the insurance companies by way of rebate was an asset of the insolvent estate and ought either to be paid over to the trustee or to be applied in part payment of the $1,275 payable in respect of the new insurance, and that Alloway was not entitled to apply the rebate in part payment, or by way of set-off, against his claim of $1,028.35.

There are many English decisions upon the question of set-off by insurance brokers, but they are difficult to apply in this case, because the provisions of the English Bankruptcy Act as to set-off are much wider than those of sec. 28 of our Bankruptcy Act. Our Act merely preserves the existing "law of set-off" and makes it applicable to all claims against the estate and to actions by the trustee for the recovery of debts due to the insolvent. But sec. 31 of the English Act of 1914 gives a right of set-off where there have been "mutual dealings" between the insolvent and the claimant in many cases where it would not otherwise be allowed. See Williams on Bankruptcy, 12th ed., pp. 160 et seq.

Subsection 1 of sec. 28 of our Act follows sec. 31 of the Ontario Assignments and Preferences Act, R.S.O. 1914, ch. 134, and sec. 107 of the Dominion Insolvent Act of 1875. Section 71 of the Dominion Winding-Up Act, though worded differently, is in substance the same.

In the present case the trustee raises no question as to the good faith of the transaction, though it is apparent that an arrangement such as this on the eve of the assignment must have had as one of its objects, at least, the intention of protecting the insurance broker in respect of the premiums which he had paid for the insured. But it would clearly have been a hardship and wholly inequitable that the broker who had "carried," as the insurance phrase is, the insured by paying the premiums for him, should not be able to recoup himself and the estate from

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the very premiums themselves when refunded by the insurers. If he cannot do so, then the insolvents profit to that extent from the transaction.

An insurance broker occupies in many cases a somewhat peculiar position. He is frequently the agent both of the insurer and of the insured, and this relationship gives rise to particular rights and liabilities on the part of the broker. The practice of "carrying" the insured in some cases places him in a position analogous to that of the insurer himself. And it would seem to be wholly just and equitable that moneys properly coming back into his hands from the insurers in respect of unearned premiums upon cancelled policies should be retained by him. They have in fact come back into the hands of the only person who made the payments, and are in a sense earmarked as his money.

If, as in the present case, all element of fraud is eliminated, I see no reason why the agent, having lawfully received the rebates from the insurers, should not be entitled to set them off against the moneys owing by the insured to him, and I accordingly hold that the claimant is entitled to be paid by the trustee the sum of $732.98 which the trustee has retained in his hands, the same to be set off by the claimant and applied upon his claim against the insolvent estate.

The trustee will get his costs of this motion out of the estate.

Judgment accordingly.

Re LYNESS ESTATE.

Manitoba King's Bench, Mathers, C.J.K.B., March 18, 1922.

DESCENT AND DISTRIBUTION (§ IA—4)—DEVOLUTION OF ESTATES ACT, R.S.M. 1913, CH. 54, SECS. 4, 9 AND 12—CONSTRUCTION—DEATH OF INTESTATE—SHARES OF WIDOW AND CHILDREN UNDER ACT—DEATH OF ONE OF CHILDREN UNDER AGE AND UNMARRIED—RIGHT OF OTHER CHILDREN TO INHERIT SHARE.

Under the Devolution of Estates Act, R.S.M. 1913, ch. 54, secs. 4, 9 and 12, if an intestate dies leaving a widow and children, the widow takes one-third and the children two-thirds of the estate; if subsequently to the death of the parent, one of the children dies under age and unmarried, the share of such child goes to the other children, the mother having no interest in the share of such child.

APPLICATION by the administrator of an estate to determine the respective interests which the widow and the sole surviving child of the intestate take in the estate.

E. K. Williams, for Mrs. Featherstone.

J. W. E. Armstrong, for minor child.

R. Harrison, for trustee.

MATHERS, C.J.K.B.:—At the time of the intestate's death he

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RE LYNESS ESTATE.

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left a widow Isabella Lyness, now Isabella Featherstone, and two children Naomi and Joseph Robert, both under age. Subsequent to the death of her father Naomi died under age and unmarried. The mother, Mrs. Featherstone, now claims that she is entitled to one-half of the share of her late husband's estate which came to Naomi on her father's death, while on behalf of Joseph Robert the sole surviving child it is claimed that he is entitled to the whole of Naomi's share. The question to which an answer is sought is, which of these claims should be allowed?

The answer depends upon the construction to be placed on secs. 4, 9 and 12 of The Devolution of Estates Act, R.S.M., 1913, ch. 54. It is not doubted that sec. 4 gave one-third of the estate to the widow and the remaining two-thirds to the children in equal shares. If there had been only one child, such child would have taken the two-thirds share. Had Naomi predeceased her father, her brother would under this section have taken two-thirds and his mother one-third.

Section 9 is the complement of sec. 4. The latter relates to the case of a child dying before the intestate and the former applies where one or more of several children die after the intestate, under age and unmarried. Under both sections, the surviving child or children or their issue take the share of the deceased child.

By the operation of sec. 4 one-third of the intestate's estate went to Naomi. She having died under age and unmarried, all the estate that came to her from her father goes, by sec. 9, to her brother Joseph Robert, he being the only other child.

By sec. 4 the principle is adopted of allotting the estate of an intestate, one-third to the widow and two-thirds to the offspring, whether one or more than one. The same principle is maintained by sec. 9 and so long as there are left any children or their issue, the share coming to the widow is not increased beyond one-third.

But it is argued that sec. 12 conflicts with sec. 9. It enacts that if an intestate have no widow or child or children or lineal descendant of any child or children or father, his estate shall go to his mother, brothers or sisters, in equal shares. This provision it is said fits the case of Naomi and hence the widow and Joseph Robert, the surviving child, share Naomi's estate equally.

No doubt sec. 12 does appear to conflict with sec. 9, but I must assume that the Legislature did not intend that there should be any inconsistency; and if it is possible to construe these sections so as to give effect to both, it is the duty of the Court to do so; Maxwell on Statutes, 6th ed., 280, 296. All inconsistency disappears if sec. 9 is construed as applying to the particular

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circumstances dealt with by it; that is to say, to the case of one of several children surviving a parent who had died intestate dying during minority without having been married, and if sec. 12 is construed as applying to the general case of a child dying intestate, whether under or over age, without leaving a widow or child or children or lineal descendant of any child or children or father. Section 9 does not include the case of a child dying after having attained his majority, nor does it purport to provide for the disposition of any estate of a minor child which did not come to such child upon his or her deceased parent's intestacy. Such cases do, however, come within the scope of sec. 12.

There appears to be ample authority for construing sec. 9 as an exception to the general rule enacted in sec. 12. Maxwell on Statutes, 6th, ed., at 301, says:—"Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention is considered an exception to the general one."

The author refers to the case of *De Winton* v. *Brecon* (1858), 26 Beav. 533, 53 E.R. 1004, 28 L.J. (Ch.) 598, where Romilly, M.R., held that one section of an Act which authorized a corporation to sell a particular piece of land should be treated as an exception to a later section which prohibited the corporation from selling any land.

In my opinion, therefore, the mother takes no interest in the share which came to Naomi on her father's intestacy, but all her interest descends to her brother, not from her but from her father's intestacy.

Costs of all parties to be paid out of the estate.

Order accordingly.

***DULMAGE v. BANKERS FINANCIAL CORP'N.**

Ontario Supreme Court, Orde, J. December 29, 1921.

SALE (§IC—15)—CONDITIONAL SALE—MOTOR CAR—SOLD TO DEALER—REGISTRATION OF LIEN—SALE OF CAR BY DEALER—SEIZURE OF CAR—RIGHTS OF PURCHASER.

The compliance with the terms of the Conditional Sales Act R.S.O. 1914 ch. 136 as regards registration of a lien agreement will protect the vendor unless the article is proved to have been delivered for the purpose of resale in the ordinary course of business within the meaning of sub-secs. 3 & 4 of sec. 3 of the Act. [See Annotation, 58 D.L.R. 188.]

ACTION to recover damages for the alleged wrongful conversion by the defendants of a motor car.

R.R. Hall, K.C., and *F. L. Ward*, for plaintiff.

C. W. Plaxton and *G. G. Plaxton*, for defendants.

*Affirmed by the Appellate Division of the Supreme Court of Ontario, February 27, 1922: to be published later.

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ORDE, J.:—The action is brought to recover damages for the alleged wrongful conversion by the defendants of a motor car. The car in question had been sold by the Colaway Motors, Limited, to the firm of Mahood & Havery, dealers in motor cars at Peterborough, under a conditional sale agreement. The vendors assigned the benefit of the agreement to the defendants, and the agreement was duly registered in accordance with the requirements of the Conditional Sales Act, R.S.O. 1914, ch. 136. The car was afterwards purchased by the plaintiff from Mahood & Havery, but was later seized by the defendants.

No question arises as to the regularity of the conditional sale agreement, but it is contended by the plaintiff that, under subsec. 4 of sec. 3 of the Conditional Sales Act, a purchaser of a car from Mahood & Havery could acquire a title thereto in spite of the agreement and its registration.

Subsections 1 and 2 of sec. 3 require the vendor under a conditional sale agreement to reduce the agreement to writing and to register it in order to protect himself against bonâ fide purchasers or mortgagees for value without notice. If the vendor complies with these provisions, his title to the goods cannot be affected by any act of the conditional purchaser, except as provided in subsecs. 3 and 4, which are as follows:—

"(3) Where the delivery is made to a trader or other person for the purpose of resale by him in the course of business, such provision shall also, as against his creditors, be invalid and he shall be deemed the owner of the goods unless the provisions of this Act have been complied with.

"(4) Where such trader or other person resells the goods in the ordinary course of his business, the property in and ownership of such goods shall pass to the purchaser notwithstanding that the provisions of this Act have been complied with."

By subsec. 3, the protection which subsecs. 1 and 2 afford to purchasers and mortgagees is extended to creditors in the cases indicated. It has no bearing upon the question involved in this action, but a reference to it is necessitated by the language of subsec. 4, the words "such trader or other person" there used evidently referring to "a trader or other person" to whom goods have been delivered "for the purpose of resale by him in the course of business."

The plaintiff says that Mahood & Havery were traders or persons engaged in the business of buying and selling motor cars, and that the car in question was delivered to them by Colaway Motors, Limited, for the purpose of resale by them in the course of such business, and that consequently the plaintiff,

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when he purchased the car from them, acquired a good title against the original vendors and those claiming under them, notwithstanding the registered agreement, by virtue of subsec. 4.

Colaway Motors Limited from time to time sold cars to Mahood & Havery for the purpose of resale, under a form of conditional sale agreement which they called a "wholesale contract form." Under this form of agreement, the car was kept in the warehouse of the dealers, Mahood & Harvey, until sold to a retail purchaser, and the price ultimately payable by Mahood & Havery to the Colaway Motors Limited depended upon the list-prices in force at the time of such resale. But the car in question here was not sold under any such agreement, but under the form of retail agreement used for conditional sale to an ordinary retail purchaser. The car was not kept by Mahood & Havery in their warehouse at Peterborough until sold, as was done with the other cars, but was used by them for the purposes of their business, but chiefly for the purpose of demonstrating the particular make of car to prospective purchasers. The agreement was made on the 4th April, 1921, the purchase-price being $2,497.81, on which $832.60 was paid in cash, and the balance, amounting to $1,665.21, was to be paid in 10 monthly instalments of $166.52 each, the first to be paid on the 4th May, 1921. Three of these instalments were paid. The contract contained an express covenant by the purchasers that they would not sell, assign, transfer, or make over their rights in the car without the previous written consent of the vendors or their assigns.

During the months of July and August, 1921, Mahood & Havery were going behind, and they finally became bankrupt about the 20th August. About the 9th July, they gave instructions to one Percy E. Dulmage, who was employed by them as a salesman, to try to sell the demonstrating car. Dulmage thereupon drove the car from Peterborough down into Prince Edward county, and after some negotiations sold the car to the plaintiff, a distant cousin of his own. The price was $1,800, Dulmage taking in exchange a Ford car at a valuation of $300, in cash $100, a cheque for $1,200, and a note for $200. On the 12th August, an agent or bailiff of the defendants claimed the car from the plaintiff, and, after some inquiry as to the existence of the defendants' agreement, he allowed the defendants to take possession.

It is argued by counsel for the plaintiff that, notwithstanding the form of the conditional sale agreement and the covenant not to sell, the car was in fact delivered by the vendors to Mahood

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& Havery for the purpose of resale in the course of business, because used cars and demonstrating cars are usually and as a matter of business sold by dealers in motor cars. It is further urged that the description of Mahood & Havery on the back of the contract as "Gray-Dort and Columbia dealers" together with the reference in the description of the car to the list-price as $2,795, while the net price to Mahood & Havery, exclusive of service charges, was $2,295, indicates that Mahood & Havery were to sell the car at a profit of $500. I am unable to see how the description of Mahood & Havery as dealers can affect the matter. They were in fact dealers in motor cars, and, if their calling or business were to be given at all, that was the only way of giving it correctly.

The explanation of the $2,795 is that that was the list-price of the car as a new car, but that the car had been damaged and that the sale-price to Mahood & Havery was therefore reduced. Apart from this, it would not be unusual for the vendor to sell a car to a dealer even for his own use at a reduced price. The "$2,795" appears in a schedule which sets forth the description of the car, including its type, model, year of manufacture, colour, number of cylinders, etc. The contract itself makes no reference to this sum as constituting in any way a factor in the transaction, and its mention must have been merely for the purpose of more fully identifying the make and size of the car. It does not affect the character of the agreement. I cannot interpret the agreement as in any way justifying, as between the vendors and Mahood & Havery, a resale by the latter. The car was not, in my judgment, delivered by the conditional vendors to Mahood & Havery for the purpose of resale in the course of business within the meaning of subsecs. 3 and 4 of sec. 3 of the Act.

Holding this view, it seems unnecessary for me to do more than touch upon the other questions which were argued. Mr. Hall strenuously urged that the words "for the purpose of resale by them in the course of business" must be confined in their application to the words "other persons," and that a delivery to a "trader" for any purpose comes within the scope of the two subsections. Apart from the fact that this construction is a strained one, it would lead to this ridiculous result, that a delivery of a piano, for example, to a "trader" in motor cars would enable the motor car dealer to resell and give a good title to the piano in spite of a registered agreement.

It was natural that a good deal should be said about the hardship to a purchaser of a motor car from a dealer in cars if he is to be put upon inquiry before purchasing in order to be sure

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of his title. But is the conditional vendor under such circumstances to be placed in any lower position than any other person who entrusts an article to one who happens to deal in the same class of goods? The hardship would be the same if the owner of a repair-shop, who also dealt in motor cars, chose to sell a car left for repair. A jeweller with whom I leave my watch to be repaired can give no title to it to another, though he deals in watches. It is really the common question as to which of two innocent persons shall suffer for another's wrong. The owners of the car did all they could under the law to protect their ownership; and, unless some statutory provision comes to the relief of the plaintiff, the maxim caveat emptor applies to his purchase from one who could give no title.

There was some ground for the contention of the defendants that the purchase was not, under all the circumstances, made by the plaintiff in good faith. That he had no notice of the defect in Mahood & Havery's title is, I think, clear. There was no evidence that he acted in bad faith, and the circumstances under which the sale was made, while they might have aroused the suspicions of an unusually astute person, were not such as of themselves to put the plaintiff upon inquiry, or to cause him to suspect that anything was wrong.

The action will be dismissed with costs.

Action dismissed.

CHEVALIER v. PENSER.

Quebec Court of Review, Archibald, A.C.J., Demers and Weir, JJ. April 23, 1921.

SALE (§ IB—9)—OF GOODS — DELIVERY — INSPECTION — PAYMENT BY CHEQUE—DISHONOUR OF CHEQUE—LIABILITY OF PURCHASERS.

A contract for the sale and delivery of dead hogs is complete when the purchasers receive them at the place agreed upon, put them in their shop, open them, weigh them, hang them in their refrigerator and pay for them by means of a cheque, and upon the cheque being dishonoured such purchasers are liable for the amount of the cheque and protest charges.

APPEAL by defendant from the judgment of the Quebec Superior Court, in an action for the amount of a cheque given in payment for goods delivered, and protest charges thereon. Affirmed.

The judgment of the Superior Court of March 19, 1920, Tellier, is confirmed.

On May 26, 1919, the plaintiff sold a dozen dead hogs to the defendants, f.o.b. Ste. Elizabeth, at 27 cents per lb. On June 3 following, 11 of these carcasses were weighed and paid for by

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a cheque for $493, at a place agreed upon. The cheque was dishonoured and went to protest. The plaintiff sues for the amount of the cheque plus $3.06 protest charges.

The defendants plead that they made payment late in the afternoon on the plaintiff's assurance that the meat was in good condition, that on the following day they discovered that it was not fit for consumption. That, in fact, the greater part of it was condemned and confiscated by the inspector. The defendants offered to pay $33.67, the value of the good meat.

J. A. Piette, for plaintiff; *Weinfield* and *Sperber,* for defendants.

The Superior Court maintained the action on the following grounds:—

Considering that the sale alleged by the plaintiff in his declaration has been proved, that, in accordance with the agreement, the hogs sold were to be delivered at the Canadian Northern station at Ste. Elizabeth, the plaintiff being obliged to consign them to the defendant's address in Montreal, the latter being bound to pay the freight, as appears by the memorandum given to the plaintiff at the time of the sale, which memorandum was written on the back of the defendant's business card in the following terms:—"27 cents lb. net—10 or 12—for hogs—F.O.B. Ste. Elizabeth";

That the eleven hogs sold were delivered in good condition at the Canadian Northern station at Ste. Elizabeth, the plaintiff having so far fulfilled his obligations;

However, that the sale was not yet complete, nor the risk transferred to the purchasers, since the weighing had not yet taken place (C.C. 1474);

That the transportation from Ste. Elizabeth to Montreal appears to have been made under favourable conditions;

That defendants received the hogs at Montreal; that they put them in their shop, opened them, hung them, one by one, in their refrigerator, weighed, accepted and paid for them by means of a cheque;

That it was at that moment, namely when the carcasses were weighed and accepted, that the plaintiff should have objected to the quality of the meat if there was any ground for objection;

That the defendants became owners of the goods and assumed the risk, saving the case of latent defects or fraud, by the mere fact of weighing and accepting them;

That, if it is true that the hogs were not at that time as fresh

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as could have been desired—which is not probable—that fact was, according to the proof, easy to detect and was not a latent defect;

That no proof has been made of fraud or fraudulent intention on the part of the plaintiff;

That there is nothing suspicious in the fact that the plaintiff felt obliged to follow the goods to Montreal so as to be present at the weighing and secure payment without delay, which was rather the act of a prudent and well-advised man, the more so as he had been warned against the defendants in the interval between the sale and the delivery;

Therefore, that plaintiff is not interested in what happened to his hogs after they were weighed and accepted by the defendant, even if it were those identical hogs which the meat inspector of Bonsecours market confiscated on the following day;

That the cheque given by the defendants to the plaintiff in payment for the said hogs was not honoured and is still due as well as the costs of protest;

For these reasons: dismisses the defendant's plea and condemns the latter jointly and severally to pay to the plaintiff the said sum of $496.06 with interest from the date of the action and costs.

Appeal dismissed.

HOODLESS v. LONG.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 27, 1921.

SALE (§IC—19)—AGREEMENT TO PURCHASE PIANO—PAYMENT BY INSTALMENTS—REMOVAL OF PIANO—SEIZURE BY OWNER—CONVERSION.

The seller of a piano under a conditional sale is not liable for conversion, when he seizes the instrument, as he believes according to the terms of the agreement, but under certain circumstances he may be held liable for damages.

APPEAL by defendant from a County Court judgment in an action brought for the conversion of a piano. Varied.

The facts of the case are stated in the judgment.

E. F. Raney, for appellant.

T. J. Agar, K.C., for respondent.

The judgment of the Court was read by

MEREDITH, C.J.O.:—The appellant made a conditional sale of a piano to the plaintiff, the respondent, on the 15th May, 1919. The terms of the sale are embodied in an agreement signed by

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the respondent and bearing that date, which states that the respondent had rented and received on hire (with an agreement to purchase) the piano, for which he agreed to pa $45 in cash and the balance of $555 in monthly instalments of $10 each, commencing on the 15th June, until the whole price should be paid "with interest at 7 per cent. per annum on the unpaid balance after 4 years from date of sale."

The agreement also provides:—

That until the whole purchase-money shall be paid the piano shall remain the property of the appellant, but shall be at the respondent's risk.

That, in case of default for one month in making any of the payments, or if the piano is removed from 881 Lansdowne avenue, without the consent in writing of the appellant . . . the whole balance of the purchase-money shall, at the option of the appellant, become due, and he may . . . resume possession of the piano and re-sell it.

That, if possession is resumed, the respondent shall remain liable for the whole purchase-money, but shall be entitled to credit for the proceeds of the sale after deducting expenses.

That if, for any reason, the appellant should consider himself insecure, he may declare the agreement or any promissory notes or other securities "due and payable even before maturity of same."

The respondent appears to have made all the monthly payments down to and including the payment for January, 1921, the last payment having been on the 15th of that month.

The respondent's residence is referred to in the notes of evidence as 881 Ramsden avenue, though called 881 Lansdowne avenue in the agreement. In December, 1919, the respondent moved to 735 St. Clarens avenue, taking the piano. It was moved to the new residence by the appellant, who was paid $5 for moving it. According to the respondent's testimony, he asked if it was necessary to get a written consent to the removal and was told that it was not. In August, 1920, the respondent went to Pennsylvania. While there he continued making his payments. Before leaving, the respondent removed the piano to the warerooms of the Broderick Furniture Company to be stored; and, according to his testimony, he got the appellant's consent to his doing this, and the appellant told him that he might sell his equity in the piano to anybody, if he sent the buyer to him and got it "transferred over." According to the testimony of Mr. Broderick, when the piano was left with his company, the respondent said: "If anybody wanted to buy

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it (and he could get his money out of it), to ring up Mr. Long and tell him about it and let them put the sale through."

On the 14th September, 1920, the appellant took the piano from Broderick's warehouse and removed it to his own premises.

It is admitted that at that time there was no default in paying the monthly instalment to warrant the appellant's taking possession of it, but in his statement of defence the appellant sets up that he was justified in taking it, because the removal of the piano to the Broderick premises was for the purpose of sale there and was made without his knowledge or consent. By the judgment of the County Court the plaintiff (respondent) was awarded $175 and his costs of the action. Upon the argument, counsel for the appellant endeavoured to support his case by contending that he was entitled to remove the piano, because he considered himself insecure. It is unnecessary to consider how far that contention could be supported if it had been set up in the appellant's pleading; not having been so set up, it is not open to the appellant, especially in view of the defence justifying the removal because of the removal of the piano to the Broderick premises.

The appellant, in my opinion, failed to prove any justification for taking the piano out of the possession of the respondent. He is clearly estopped by what occurred between him and the respondent from setting up the absence of a consent in writing to the removal, and indeed he does not set up the want of a written consent, but alleges, as I have mentioned, that the removal was for the purpose of sale and without his knowledge and consent.

It follows that the respondent is entitled to recover, but there remains to be dealt with the question as to the measure of his damages.

In the statement of defence, para. 9, it is pleaded that, "subsequently, namely, on the 14th February, 1921, the defendant's solicitors again offered to the plaintiff's solicitors to allow the plaintiff to repossess the said piano under the terms of the original agreement."

If what the appellant did amounted to a conversion of the piano—an aspect of the case I will deal with later on—it is to be regretted that the appellant did not, as soon as he was served with the writ of summons, apply to stay proceedings in the action on his returning the possession of the piano to the respondent, when no doubt an order to stay would have been made on proper terms as to costs and compensation to the

respondent of any loss he had sustained by being deprived of the possession of the piano.

The old practice which enabled this to be done was not abrogated by the Rules, but still obtains; see *Griffiths* v. *Grand Trunk R.W. Co.* (1907), 9 O.W.R. 875, 882.*

I come now to the question as to whether there was any conversion of the piano. I am of opinion that there was not. As I have said, there was no right to take possession, and for that wrong the appellant is liable, but it does not follow that he is liable in trover. What he did was in assertion of a supposed right under the agreement, and he has never treated the agreement as at an end or done anything that amounted to a repudiation of it entitling the respondent to rescind.

Both parties treated the agreement as still on foot until just before the action was begun, when a demand was made on the appellant for the return of the piano; the respondent did this by paying several of the monthly instalments and charges for storage after the appellant had taken possession of the piano; and the appellant has never done anything except in pursuance of his supposed rights under the agreement.

The measure of the respondent's damages is the loss he has sustained by being deprived of the possession of the piano; for some of the time that was no loss, but a benefit, because it saved him paying storage charges. There is little material for determining what his loss is; but, in my view, if his damages are assessed at $50, he will have no cause to complain.

I have had some doubts as to how the costs of the litigation should be dealt with, but have reached the conclusion that the respondent should have his costs, fixed at $50, and that there should be no costs of the appeal to either party.

Judgment below varied.

**Griffiths* v. *Grand Trunk R.W. Co.* was decided by a Divisional Court of the High Court of Justice (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) on the 30th April, 1907. The action was for damages for detention and conversion of certain "dump-cars" used in construction work. The defendants appealed from the judgment at the trial, by which the plaintiff was awarded $7,200 damages. RIDDELL, J., who read the judgment of the Court, said that there was ample evidence of conversion, and the trial Judge was right in holding that the defendants were liable as for a conversion. "We were told on the argument," the learned Judge said, "that the practice of defendants coming into Court after a conversion and applying for a stay had been abrogated. . . . None of us had ever heard of the abrogation of this useful practice, and no case was cited, nor have I found one so deciding. On the contrary, it seems to me that the effect of sec. 128 of the Ontario Judicature Act, R.S.O. 1897, ch. 51, is to continue that practice. . . . It would be absurd to suppose that such a power could be taken away from the Court except by express enactment."

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MERCHANT'S BANK OF CANADA v. ANGERS.

Supreme Court of Canada, Mignault, J. November 11, 1921.

BANKRUPTCY (§ I—6)—APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM COURT OF KING'S BENCH (QUE.)—BANKRUPTCY ACT, 1919 (DOM.), CH. 36, SECS. 74 (3), 35, 63—CONSTRUCTION—NO QUESTION OF PUBLIC INTEREST INVOLVED—INTERLOCUTORY JUDGMENT—PRACTICE AND PROCEDURE UNDER THE ACT.

Under the Bankruptcy Act, 1919 (Dom.), ch. 36, Courts exercise their jurisdiction according to their ordinary procedure (sec. 63) and special leave to appeal from the Quebec Court of King's Bench will not be granted by the Supreme Court of Canada, under sec. 74, sub-sec. 3 of the Act, where the whole question if leave were granted would be whether an appeal to the Court of King's Bench was properly brought, there being no question of public interest involved and the case being one in which the Court would not be called upon to construe any section of the Act.

[See Annotations 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

MOTION for special leave to appeal under sec. 74 (3) of the Bankruptcy Act, 1919 (Dom.) ch. 36, from a judgment of the Quebec Court of King's Bench, Appeal Side, dismissing an appeal from the judgment of Loranger, J., which granted respondent's petition to take certain proceedings in the name of the trustee.

The facts are fully set out in the judgment of Mignault, J., following:

Aimé Geoffrion, K.C., and *A. R. Holden*, K.C., for the motion.

E. R. Angers, contra.

MIGNAULT, J.:—The petitioner-appellant, the Merchants Bank of Canada, has applied to me under sec. 74 (3), of the Bankruptcy Act, 1919 (Can.), ch. 36, for special leave to appeal from a judgment of the Court of King's Bench, Appeal Side (Quebec), of October 25, 1921, whereby its appeal was rejected, on the respondent's motion for the following reasons:—

Considering that leave to appeal granted by the Court of Bankruptcy does not prejudice future litigation and does not in any way prevent the appellant from maintaining all the grounds of his claim and doing what it could to oppose the respondent;

Considering that a judgment granting such permission is not subject to the control of the Court of Appeal;

To explain the circumstances under which this judgment was rendered, I may say that the respondent, in July last, presented to a Judge sitting in bankruptcy a petition under sec. 35 of the Bankruptcy Act, praying that he be authorized to take proceedings in the name of the trustee, but at his own expense and risk, to revendicate certain securities which he had furnished to the bankrupt as a margin on certain stock transactions made by him, but which he alleged the bankrupt had fraudulently transferred to the appellant.

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It appears that in April last an arrangement of the nature of a transaction (art. 1918 C.C.) had been entered into between the trustee, duly authorized by the inspectors and the appellant, whereby the latter was allowed to keep the securities it held for a large claim against the bankrupt, on condition that it would not assert its claim against the estate, this arrangement, between the parties thereto, to have the authority of a final judgment.

The respondent's petition coming before Panneton, Judge in bankruptcy, was referred to Loranger, J. The present appellant, although it does not appear to have been served with a copy of the petition, appeared by counsel before the Judge, and producing the above-mentioned arrangement opposed the granting of the petition.

The Judge, however, on the ground that sec. 35 of the Bankruptcy Act does not distinguish between a justifiable or an arbitrary refusal of the trustee to institute proceedings, and that however serious the reasons for refusing the authorization might be, these reasons would have their full effect in a plea to the merits, granted the authorization, subject to the present respondent furnishing security to the amount of $300.

The petitioner-appellant appealed from this judgment to the Court of King's Bench, but its appeal was dismissed for the reasons above stated, and it now applies for special leave to appeal from the judgment of the Court of King's Bench to the Supreme Court of Canada.

The parties came before me by their counsel on November 9 and the matter was fully argued.

The petitioner-appellant alleged that this appeal involves matters of public interest and important questions of law with reference to the proper construction of the Bankruptcy Act, and that the said questions of law are applicable to the whole Dominion.

Mr. Geoffrion, K.C., for the appellant, argued that it was very important that sec. 35 of the Bankruptcy Act be construed by this Court. This section reads as follows:—

"If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the bankrupt's or authorized assignor's estate, and the trustee, under the direction of the creditors or inspectors, refuses or neglects to take such proceedings after being duly required to do so, the creditor may, as of right, obtain from the Court an order authorizing him to take proceedings in the name of the trustee, but at his own expense and risk upon such terms and conditions as to indemnity to the trustee as the court may prescribe, and

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thereupon any benefit derived from the proceedings shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same; but, if, before such order is granted, the trustee shall, with the approval of the inspectors, signify to the Court his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceedings, if instituted within such time, shall belong to the estate."

Mr. Geoffrion, however, admitted that the only right of which he was deprived by the judgment rendered under sec. 35—the effect of which was to subrogate the respondent in the rights of the bankrupt's estate with respect to the proceedings which he was authorized to institute in the name of the trustee was what he termed the right not to be sued in view of the arrangement or transaction above mentioned. I am not convinced that this is any substantial right, for it is obvious that if the transaction has the effect of a final judgment against the bankrupt's estate, the present appellant can set it up by plea and get its full benefit.

Moreover, this Court would not be called upon to construe sec. 35 if special leave to appeal were granted. The judgment of the Court of King's Bench did not construe it, but dismissed the appeal on the ground that Loranger, J's., judgment was a mere preparatory judgment and one not subject to the control of the Court of King's Bench, and that the preliminary leave to institute proceedings in the name of the trustee did not decide in any way as to the merits of these proceedings, and did not prevent the appellant from availing itself of any defence in law and fact which it might have against the demand of the respondent.

But Mr. Geoffrion argued that it would be very important to determine whether the Court of King's Bench should not have entered into the merits of the appeal, and whether it had not jurisdiction to review the judgment granting authorization to institute proceedings in the name of the trustee.

The point, however, really involves the question whether such a preparatory judgment is appealable and, if appealable, whether under the Quebec Code of Civil Procedure the appeal should have been brought as appeals must be from interlocutory judgments, that is to say, upon leave obtained. Under the Bankruptcy Act, Courts exercise their jurisdiction according to their ordinary procedure (sec. 63), and the whole question, were special leave granted, would probably be whether the appeal to the Court of King's Bench was properly brought. There would,

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therefore, be to my mind no question of public interest justifying the grant of special leave to appeal to this Court merely in order to determine whether the Court of King's Bench had jurisdiction to hear the appellant's appeal, or whether the appeal was properly before that Court, in view of the provisions of the Quebec law as to interlocutory appeals (arts. 46, 1211 *et seq.* C.C.P.)

What is certain is that the construction of sec. 35 of the Bankruptcy Act could not be passed on by this Court if special leave to appeal were granted, nor can I see that any question as to the proper construction of sec. 74 would be involved in an appeal to this Court. The issue would be, as I have said, whether such a judgment is appealable and whether or not the appellant should have followed the rules governing appeals from interlocutory judgments, and this being a question of practice and procedure, I cannot think that this Court would interfere with the decision of the Court below.

On the whole, my opinion is that I would not be justified in granting special leave to appeal (for a reference to decisions governing the grant of special leave see my judgment in *Riley* v. *Curtis's & Harvey, Ltd.* (1919), 50 D.L.R. 281, 59 Can. S.C.R. 206), and the appellant's petition is dismissed with costs.

Motion dismissed.

McKAY v. TURGEON.

Quebec Superior Court in Bankruptcy, Panneton, J. June 5, 1922.

BANKRUPTCY (§ IV—36)—CERTIFICATE OF SHARES LEFT WITH BANKRUPT—AGREEMENT TO SELL AT CERTAIN FIGURE—TRANSFER BY BANKRUPT—LOSS OF IDENTITY—PETITION TO RECOVER OTHER CERTIFICATE IN TRUSTEE'S POSSESSION.

In order to obtain delivery of a stock certificate alleged to have been delivered to an insolvent with instructions to sell when the market reached a certain price, a petitioner must identify the certificate which he asks to be returned with the certificate left with the insolvent, and where the certificate in the trustee's possession has not, in any way, been identified as relating to the petitioner's shares, the petition will be refused.

[See Annotations 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

PETITION for an order that an authorized trustee be ordered to deliver a certain certificate of shares which he has in his possession to petitioner. Petition refused.

Brown, Montgomery and *McMichael*, for petitioner.

Weinfield, Sperber and *Levine*, for trustee.

PANNETON, J.:—Petitioner alleges that on October 3, 1921, he

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deposited with the debtors, certificate No. "D" 2917, covering 25 shares of Toronto Railway, which belongs to him with instructions to sell them when the market reaches $75 per share, and he demands that the trustee be ordered to deliver to him a certificate of 25 shares of Toronto Railway Co., which the trustee has in his possession, ever since but not the same certificate as the one as he may deliver to him.

The trustee contests said petition denying that the certificate of the 25 shares of the Toronto Railway, which he has in his possession, are the shares of the said petitioner.

On February 13, 1922, the debtors transferred certificate to their own name in the books of the Toronto Railway Co., and exchanged that certificate for a new one bearing No. "D" 4390.

On the same day they transferred this last certificate No. "D" 4390 to La Banque Provinciale as security for their account due to the bank and in due course La Banque Provinciale, on March 10, sold the said shares and transferred said certificate to one Looney.

The trustee Turgeon has in his possession a certificate of 25 shares of the said Toronto Railway Co., in the name of the debtors bearing a number different from the others above mentioned, the origin of this certificate is not shown.

Considering that the trustee has not in his possession the said certificate No. "D" 2917, that the shares covered by that certificate were appropriated to themselves by the debtors who exchanged them for a new certificate with new number, which new certificate he transferred as above mentioned to La Banque Provinciale, which new certificate La Banque Provinciale sold to a third party, as above mentioned; that the certificate of 25 shares of the Toronto Railway Co., which the trustee has in his possession, has not in any way been identified as relating to plaintiff's shares mentioned in certificate "D" 2917; that said trustee has proved the allegations of his contestation and that petitioner has not proved that he is entitled to obtain possession of the said certificate of shares which the trustee has not in his possession.

The Court dismisses said petition with costs.

Petition dismissed.

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Exchequer Court of Canada, The President of the Court. December 16, 1920.

WAR MEASURES ACT (§ I—1)—CONSTRUCTION—APPROPRIATION OF PLANT—MEANING OF SEC. 7—CONTRACT—FORMAL DOCUMENT—RIGHTS OF PARTIES.

The Crown cannot be said to have "appropriated" the plant of a company within the meaning of sec. 7 of the War Measures Act, 1914, ch. 2 (Imp.), where during the whole time that the order for the Government was being filled, the company carried on its own business in addition to that of the Government and had full control of its plant and equipment, and the proposal to manufacture being accepted by the party to whom it is sent, such acceptance, stating that it will be followed by a formal contract, and where the formal contract is intended to embody the agreement, the contractual relations of the parties will be based on the terms so agreed upon, regard being taken of the intention of the parties.

REFERENCE by the Minister of Justice of a claim of the plaintiff, to recover the price of rails furnished to various railways, to wit: the Canadian Pacific R., Co., the Grand Trunk R., Co., the Toronto, Hamilton and Buffalo R., Co., etc., during the war, upon the order of the Crown for which it was liable.

Informations were also exhibited by the Crown, claiming from the railways for whom said rails had been ordered, the price thereof.

By consent of counsel for all parties, inasmuch as the said railways were interested in the result of this action, counsel for the said railways attended the trial and were permitted to cross-examine the witnesses and were heard in argument. No judgment was given against them, counsel for the Crown declaring they were not asking for judgment against the railways and that the question, as between the Crown and Railways, would be left over for future direction.

Wallace Nesbitt, K.C., *E. M. MacDonald*, K.C., *Hector McInnes*, K.C., *J. Stewart*, and *E. F. Newcombe*, for plaintiff.

F. E. Meredith, K.C., and *A. Holden*, K.C., for the Crown.

J. A. Soule, for the Toronto, Hamilton, and Buffalo R., Co.

W. C. Chisholm, K.C., for the Grand Trunk R., Co.

THE PRESIDENT OF THE EXCHEQUER COURT:—The trial of this case commenced at Ottawa on September 17, 1920. The only witness called on behalf of the plaintiffs was Charles Symonds Cameron. He is the controller and the secretary-treasurer of the Dominion Iron and Steel Co., and also a director of the company.

After proceeding for a considerable length of time with the cross-examination of Cameron, it appeared that a mass of papers required for the cross-examination were not in Ottawa, and it was subsequently arranged that the continuation of the cross-examination should be taken at Sydney. At the re-

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quest of all the parties, the Registrar of the Court went to Sydney, and several days were occupied in the continuance of his cross-examination, and then adjourned to Montreal, and then to Ottawa where the trial was continued before me on October 25, 1920, and Mr. Cameron's cross-examination was concluded. The trial was then continued and lasted nearly 5 days. The argument took place on a subsequent day, and lasted for nearly 5 days. A great mass of evidence and exhibits have cumbered the record. Had counsel for the defendant examined Cameron for discovery prior to the trial, a great deal of time would have been saved, and a mass of irrelevant evidence eliminated from the case. The examination of Cameron at Sydney was practically, to a great extent, an examination for discovery.

In justice to the counsel who conducted the case, it is apparent that Cameron was not over anxious to facilitate the getting at the facts. It looked to me as if he were rather enjoying the tilt of wits with the counsel who was cross-examining him.

However, the case came to an end. Since the close of the argument I have read over carefully all the evidence and arguments, and such of the exhibits as in my opinion required consideration.

On March 13, 1918, the company had a contract with the Imperial Munitions Board for the rolling of shell steel for munition purposes. The order in council reads as follows:—

"P.C. 629. Report of the committee of the Privy Council, approved by His Excellency the Governor General on March 15, 1918.

The committee of the Privy Council have had before them a report, dated March 13, 1918, from the Minister of Railways and Canals, representing that it is essential that rails for renewals be obtained immediately for the various railways in Canada, if the railways are to continue operation to their full capacity for war purposes during the next year.

The Minister further represents that every source of supply outside of Canada has been investigated without success.

Further, that the Imperial Munitions Board, realizing the absolute necessity of the railways obtaining rails, have agreed to release the Dominion Steel Co., Ltd., from its contract with the Imperial Munitions Board from April 1, so as to permit of the rail plant running to fullest capacity until at least one hundred thousand tons (100,000) of rails have been rolled, as said rails are urgently needed for war conditions.

Further, that the Minister of Railways and Canals took up with the Dominion Steel Co., the question of rolling said rails and he has received the following letter:—

In accordance with your request of this date, I beg to submit the following proposal covering your requirements of steel rails:

Material: Basic open hearth steel rails, of the Canadian Pacific Railway's Co.'s section weighing 85 pounds per lineal yard, first quality.

Quantity: One hundred thousand (100,000) gross tons of 2,240 pounds.

Specification: The rails covered by this proposal to be manufactured in accordance with the specification which governed the production of steel rails by the Dominion Iron and Steel Co., for the Canadian Government Railways, during 1917.

Lengths: The standard length of rail to be thirty-three (33) feet. The purchaser to accept not less than ten per cent. (10%) of the contract tonnage in shorter lengths, down to and including twenty-four (24) feet, should the seller elect to supply the same.

Inspection: Testing, inspection and acceptance of the rails to be carried out at Sydney, N.S.

Shipment: The rolling of the rails covered by this proposal shall be undertaken to commence on or about April 1, 1918, and shipments shall begin as soon as practicable thereafter, in carload lots. The rate of rolling to be the capacity of the Dominion Iron and Steel Co.'s rail mill. It is estimated that it will be possible to produce approximately 10,000 tons during the month of April, 1918.

No. 2 rails: The purchaser shall accept not less than five per cent. (5%) in second quality rails, in lengths down to and including twenty-four (24) feet, should the seller elect to supply the same.

Price: No. 1 quality, seventy dollars ($70.00). No. 2, sixty-eight dollars ($68.00). Both prices per gross ton of 2,240 pounds, free on board cars, Sydney, Nova Scotia.

Terms: Net cash on thirty days from date of shipment.

The above proposal is made subject to acceptance within a reasonable period, and will in the event of the same meeting with your approval be followed by a formal contract."

And to which the following reply has been sent:—

I am in receipt of your letter of the 12th instant, covering your offer for the rolling of 100,000 tons of steel rails, and in reply, beg to say that your offer to manufacture is quite acceptable, the price will be submitted to council. You will hear from me in due course.

Please make the necessary arrangements to proceed with the rolling as of April 1.

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Mark Workman, Esq.,
President, Dominion Steel Corporation, Limited,
Montreal, P.Q.

"Further, that since the Dominion Steel Co., received reply to their letter they ask that before agreeing to commence the manufacture of said rails, the price quoted be assured to them.

The Minister recommends that authority be granted under the War Measures Act, 1914, for an order to be issued to the Dominion Steel Co., Ltd., for the rolling by the Dominion Iron and Steel Co., of at least one hundred thousand tons of steel rails, rolling to commence on April 1, 1918, to specifications to be approved by the Minister of Railways and Canals, and at a price to be determined on the recommendation of the said Minister, approved by your Excellency in Council, after an investigation of the company's costs by experts appointed by the Minister of Railways and Canals.

The committee concur in the foregoing recommendation to submit the same for approval.

RODOLPHE BOUDREAU,
Clerk of the Privy Council."

It will be noticed that by this order in council it was provided that the price to be paid for the rails was to be approved by the Minister of Railways and Canals, and at a price to be determined on the recommendation of the said Minister, approved by His Excellency in Council, after an investigation of the company's costs by experts appointed by the Minister of Railways and Canals.

Under the order of March 15, 1918, the company proceeded to roll the rails, and the 99,000 tons of steel rails number one, were delivered to the various railways, and in addition thereto some 17,000 tons of second class rails were also delivered, it having been agreed, first, that 5% of second class rails should be accepted out of the 99,000 tons of rails, subsequently modified by an agreement that the 5% of second class rails should be in addition to the 99,000 tons of first class rails,—and by a latter arrangement, an additional number of tons of second class rails were also to be taken over.

Instead of the Minister fixing the price, a subsequent Order in Council, dated on February 26, 1919, was passed, under which the Minister, apparently with the assent of some of the railways, made the reference to the Exchequer Court to fix the price.

The Dominion Iron and Steel Co., presented their claim, and it is material to consider this claim. The Minister of Justice referred the claim as presented by a direction, which reads, as follows:—

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"Under the powers conferred by sec. 7 of the War Measures Act, 1914, or otherwise existing in this behalf, I hereby refer to the Exchequer Court of Canada the annexed claim of the Dominion Iron and Steel Co., Ltd., for compensation for appropriation by His Majesty, 100,000 tons of rails.

Dated at Ottawa this 30th day of October, 1919.

CHARLES J. DOHERTY,
Minister of Justice.

To the Registrar of the Exchequer Court of Canada,
Ottawa."

This reference states that under the powers conferred by sec. 7 of the War Measures Act, 1914, ch. 2, (Imp.) *or otherwise existing in that behalf*. No doubt seeing this reference to section 7 of the War Measures Act, counsel were astute enough to amend the nature of the claim and to attempt to obtain compensation under sec. 7 of the War Measures Act, ch. 2, 5 Geo. V, assented to on August 22, 1914.

The claim put forward at the trial by Mr. Nesbitt, K.C., senior counsel for the steel company, was shortly, as follows: He proved certain contracts with the Imperial Munitions Board under which shell steel was to be delivered at the contract price of about $80 per ton, and his contention was that they should receive the same price per ton for the rails in order that the steel company might obtain compensation under sec. 7 for the loss of their contract with the Imperial Munitions Board.

I suggested that if the case had to be decided under sec. 7, it would be necessary for the steel company to prove the loss which they had sustained. It might appear that instead of the steel company suffering by reason of having as they claimed a loss from their contract, they might have been saved from loss. Had the cost of the shell steel contract been greater than the $80 a ton, there would be no ground even on the contention of the steel company for compensation under sec. 7, for the reason that it might have been beneficial to get rid of a losing contract.

Mr. Nesbitt, however, took a different view stating he had fully considered the question and was prepared to take his stand on his case.

Counsel for the Crown or the railways did not suggest that the action should be dismissed for lack of proof, and the case was proceeded with, and the question now is of no importance, as counsel for the Crown proved conclusively the case of the steel company, if it stood to be decided on the basis of compensation and the profit which they would have made from the shell contract had it been carried out.

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After a full consideration of the case, I am of opinion that the steel company cannot avail themselves of the provisions of sec. 7 of the War Measures Act. The reference of the Minister of Justice in which he states: "Under the powers conferred by sec. 7 of the War Measures Act, 1914," is evidently a mistake, and cannot vary the rights of the parties as provided by the Order in Council of March 15, 1918. Under sec. 6, the Governor-in-Council shall have power to do and authorize such act and things, etc., and that the powers of the Governor-in-Council shall extend to all matters coming within the class of subjects hereinafter enumerated. Sub-section "f" includes appropriation.

In no sense can it be held under the facts of this case, that the premises of the steel company were appropriated by His Majesty.

Mr. Meredith referred me to an authority in the United States Supreme Court, which has an important bearing on the case before me. *United States* v *Russell* (1871), 13 Wall. Rep. 623. It was an appeal from the Court of Claims. In that case two steamers were requisitioned on the part of the United States for the services of the United States. On July 4, 1864, an Act had been passed, which reads "That the jurisdiction of the said Court (Court of Claims) shall not extend to or include any claim against the United States growing out of the destruction or *appropriation* of, or damage to property, etc."

It was contended under the circumstances of that case that the vessels in question had been appropriated by the United States. The Court of Claims held against this contention, finding that during the time each of the said steamers was in the service of the United States they were in command of the claimant, or of some person employed by him subject to his control. Further, that when the steamers were respectively taken into service of the United States, the officers acting for the United States did not intend to "appropriate" these steamers to the United States, nor even their services; but they did intend to compel the captains and crews with such steamers to perform the services needed. Part of the opinion of the Court at p. 628, reads as follows:—

"Three steamboats, owned by the appellee during the rebellion, were employed as transports in the public service for the respective periods mentioned in the record, without any agreement fixing the compensation to which the owner should be entitled. Certain payments for the services were made in each case by the government to the owner, but he claimed a larger sum, and the demand being refused he instituted the present suit. Prior to the orders hereinafter mentioned the steamboats were

employed by the owner in carrying private freights, and the findings of the court below show that he quit that employment in each case and went into the public service in obedience to the military order of an assistant quarter-master of the army. Reference to one of the orders will be sufficient, as the others are not substantially different. Take the second, for example, which reads as follows, as reported in the transcript: 'Imperative military necessity requires the services of your steamer for a brief period; your captain will report at this office at once in person, first stopping the receipt of freight, should the steamer be so doing.' Pursuant to that order or one of similar import in substance and effect, the respective steamboats were impressed into the public service and employed as transports for carrying government freight for the several periods of time set forth in the findings of the court. Throughout the whole time the steamboats were so employed in the military service they were in command of the owner as master, or of some one employed by him and under his pay and control, and the findings of the Court show that he manned and victualled the steamboats and paid all the running expenses during the whole period they were so employed."

The facts in the present case before me are much weaker than the facts in the case before the Supreme Court, as during the whole time that the order in question was being filled, the steel company, as I will point out, were carrying on their own business in addition to the turning out of the rails as required by the order in question.

I have come to the conclusion after a good deal of consideration, and after hearing the forcible argument before me by Mr. Meredith, and of Mr. Nesbitt and Mr. Stewart, that the relationship between the Crown and the steel company was one of contract and not a compulsory order under the provisions of the War Measures Act. Even if it were not one of contract it would make but little difference as in point of fact the steel company accepted the terms of payment as provided by the order of March 15, 1918, namely, that the price should be determined on the recommendation of the said Minister approved by His Excellency in Council, after an investigation of the company's costs by experts appointed by the Minister.

Before discussing the question of contractual relationship between the Crown on one side and the steel company on the other, I think I should refer to what I think has a strong bearing on this feature of the case. Section 7 only applies to a case where the Crown appropriates property for its own use. It is admitted here that the bulk of the order in question of the 99,000 tons of

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steel rails, was not for the use of His Majesty, but only a comparatively small portion of the order. There is no dispute on this point. The Order in Council of March 15 stated "that rails for renewals be obtained immediately for the various railways in Canada,"—the greater portion of which rails were being ordered for the various railways, namely:—the Canadian Pacific, the Grand Trunk, etc.

Under sec. 6, had the Crown been acting under the powers thereby conferred, they could have directed the steel company to furnish the rails for these different railway companies. As I read the section there would be no liability on the part of the Crown. The liability would have been a direct liability as between the steel company and the various railways obtaining their share of the tonnage of the rails. The Crown did not purport to act under sec. 6, but themselves became the contracting party, and became liable to the steel company, and have subsequently paid large sums to the steel company, amounting according to the claim of the steel company to some $5,500,000. I was informed on the argument that since the presentation of the claim a further sum has been paid. This would, to my mind, have a strong bearing on the question whether it was a compulsory mandate or not. There is no question that the steel company had an intimation that if they refused to comply with what the Minister requested, power would be invoked under the War Measures Act to compel the production and manufacture of these rails to be furnished to the railway companies.

The Order in Council of March 15, 1918, contains a provision that the Minister recommends that authority be granted under the War Measures Act, 1914, for an order, etc. It confers upon the Minister power, if the parties could not come together, to invoke the provisions of the War Measures Act. That the steel company did not consider it as a mandatory order is apparent from the correspondence had between the parties.

In exhibit 3, the letter of March 12, 1918, the proposition is put forward on the part of the steel company. I may refer to a portion of this letter, which has a bearing on another phase of this case, with which I will have to deal later, in which it states that the rate of rolling is to be the capacity of the Dominion Iron and Steel Co.'s rail mill. There is no distinction between that and the words "fullest capacity."

The company asked that they should be paid for No. 1 rails, $70 per ton, and for No. 2's $68 per ton; and the letter further states that: "The above proposal is made subject to acceptance within a reasonable period, and will in the event of the same meeting with your approval be followed by a formal contract."

This letter is answered by a subsequent letter from the Minister of Railways in which he states: "I am in receipt of your letter of the 12th instant, covering your offer for the rolling of 100,000 tons of steel rails and in reply, beg to say that your offer to manufacture is quite acceptable, the price will be submitted to council."

This letter from the Minister is followed up by a letter from the steel company, in which it is urged that, "it is very desirable and essential that the price be established before rolling arrangements commence. We would appreciate your early confirmation of price quoted my letter of twelfth."

There is further correspondence which was referred to at length in the argument of counsel, and, eventually, the parties came together with the exception as to the specifications which were to govern under the contract, and for a time the price to be paid. It was pointed out on behalf of the steel company that as these rails were to be supplied to the different railway companies, it would make the work more difficult if a common specification was not agreed upon. Thereupon, a meeting took place in Ottawa, on March 22, 1918, and at this meeting Mr. Lavoie, the purchasing agent, details in his evidence, what took place. He says he met Mr. McNaughton, the representative of the steel company in Ottawa, on March 22, 1918, and were present at the meeting, Mr. Bell, the Deputy Minister of the Department of Railways and Canals, the Chief Engineer Fairbairn, of the Canadian Pacific Railway, Chief Engineer Stewart, of the Canadian Northern Railway, Chief Engineer Blaiklock, of the Grand Trunk Railway, and Chief Engineer Brown, of the Canadian Government Railways, and at this meeting, specifications applicable to the manufacture of these rails were arrived at without dissent. It was under the provisions of these specifications that the manufacture of the rails was proceeded with. The only other point left undetermined was the price. The steel company through its president was anxious to have the price fixed as quoted in his letter. To this the Minister would not agree, and the steel company went on with the order and rolled the rails which were subsequently delivered and accepted. The steel company had been furnished with a copy of the Order in Council of March 15, 1918, by which the manner of ascertaining the price was set out; and with full knowledge and without dissent, they proceeded to carry out the contract, evidently accepting that provision of the Order in Council which required the price to be fixed by the method stated in the order.

The proposal of the steel company contained this statement: "The above proposal is made subject to acceptance within a

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reasonable period, and will, in the event of the same meeting with your approval, be followed by a formal contract."

No formal contract was ever executed, and, in my view, that is of no consequence, as the documents showed a contract, and the contract has been performed (*Lewis* v. *Brass* (1877), 3 Q.B.D. 667, 26 W.R. 152).

Had a formal contract been drawn up and executed by the parties, it would have no doubt contained a provision as to the manner in which the price was to be ascertained. It is quite evident that the steel company, if the price could not be agreed on, had no objection to this method of providing for the ascertainment of the sum they should be paid.

An Order in Council was passed on December 6, 1918, providing for a contract with the steel company, for 125,000 gross tons of 85 pound rails. This was followed up by a written agreement which bears date April 1, 1919. It throws light on the willingness of the company to accept the method of fixing the price.

"8. His Majesty, in consideration of the premises agrees that, upon delivery of the said rails as aforesaid, and the production of a certificate from the said agent or inspector that the said rails as herein contracted for have been manufactured and delivered in accordance with this agreement, and certifying to his approval of and satisfaction with the same, the company will be paid for and in respect of the said rails so delivered, such price or prices as may be fixed by the Minister of Railways and Canals of Canada upon and subject to the approval of the Governor in Council."

It appears from the Order in Council of February 26, 1919, that the Minister was of opinion that $65 a ton was a fair and equitable price in his judgment to be paid to the steel company. Instead, however, of proceeding to make a final adjudication by himself and obtaining the approval of the Governor in Council and ending the matter, he makes this reference to the Exchequer Court.

Counsel argued with considerable force that this action of the Minister arriving at the sum of $65 was in fact an adjudication by the Minister, and that his finding became binding and conclusive with the result that the reference to the Exchequer Court was abortive. I do not agree with him. It is perfectly obvious there was no intention to adjudicate on the price. It was a mere recital of facts. The object of the Order in Council is to provide for a reference to the Court, as a forum to adjudicate in place of the Minister. It was simply changing the forum, and nothing more. I would refer to the cases cited, of *Cameron*

v. *Cuddy*, 13 D.L.R. 757, [1914] A.C. 651, and also *Yule* v. *The Queen* (1898), 6 Can. Ex. 103; (1899), 30 Can. S.C.R. 24.

It was also argued by counsel that the effect of this Order in Council of February 26, 1919, was to fix the price for a subsequent order, for the 125,000 tons of rails ordered by the Order in Council of December 6, 1918. This Order in Council of December 6, 1918, might have been worded in clearer language, but it could hardly have been the intention to fix the price of the order of the 125,000 tons of rails. As I have pointed out, the contract for these rails was executed on April 1, 1919, and contained the provision which I have quoted, as to the manner in which the price was to be fixed, namely, upon the completion of the contract.

I am of opinion that a contract is proved for the reasons stated; but, even if what has taken place is not in fact to be deemed a contract, it would not affect the case, as I think it quite clear that it never was contemplated or intended that compensation should be made to the steel company for any loss of profits by reason of the interference with the munition contract. The contract for the munitions was not cancelled or done away with. The time for the completion of this contract was only postponed, and placing oneself in the position of the parties in March, 1918, it is apparent that no claim was ever thought of being put forward in respect of any loss that might be sustained by reason of the company being asked to turn out steel rails in lieu of shell steel. If such a claim was contemplated it should have been put forward by the steel company at the time. There is no suggestion in any of the correspondence or documents that such a claim was ever in their mind. What is termed the contract with the Munitions Board for shell steel, are the orders which were given. There was no other more formal contract. It is admitted the steel company, had the Munitions Board terminated the contract, would have lost nothing because the Munitions Board would have had to order rails or other material produced by the steel company at a price which would have given them the same profit as if they had complied with their steel contract.

During the course of the trial the following conversation took place:

"His Lordship: Is there any contract produced which required the Imperial Munitions Board to accept that quantity (referring to the tonnage to be turned out for the Munitions Board)?

Mr. Holden: Yes, they bought the steel.

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His Lordship: There has been so much evidence submitted that I do not profess to follow the details: has anything been produced showing a contract which required the Imperial Munitions Board to take so many tons, as that before me in evidence?

Hon. Mr. Nesbitt: That information has been filed in the nature of an exhibit, and there is an Order in Council dated March 22, expropriating the work for rails which were to be supplied. Perhaps your lordship has forgotten that in the turmoil. It was understood by the Minister of Railways at the time of taking over these works that the rails would all be delivered some time towards the end of the summer. Then the idea was that we should continue after this to produce the 118,000 or the 100,000 of shell steel to the Imperial Munitions Board."

This, evidently, was the view of the counsel for the steel company, and is in my opinion the correct view. It is also obvious from the manner in which the claim was made upon the steel company, signed by Mr. MacInnes, solicitor for the steel company, that he was of the same opinion. In the second clause of his claim he refers to the fact that "the price was to be determined on the recommendation of the said Minister approved by His Excellency in Council after an investigation of the company's costs by experts appointed by the Minister."

Mr. MacInnes proceeds to state that the company in obedience to the said order rolled and delivered to the Government of Canada the said 100,000 tons of steel rails, "but the Governor in Council has not determined the said price but has referred it to the Exchequer Court."

I think it obvious that this claim which is set up for compensation for loss of profits, on the munitions contract, is an afterthought. In point of fact, as I will point out later, had the steel company run their mills to full capacity, instead of carrying on their other more profitable business, they would probably have completed their munitions contract.

I propose now to deal with the question of what sum should be allowed as the cost of the rails furnished by the steel company with a reasonable profit added thereto. The plaintiffs by the ex. No. "U.B." claim the cost per ton to be the sum of $61.01, less profit. The Crown and the railways accept this as the basis, taking issue with the plaintiffs as to certain items, notably the price charged for the coal. The plaintiffs in making up their statement of costs, place the price of the coal at $3,442. The Crown on the other hand, claim that the cost of this coal should be taken at the rate of $1.55 per ton. The difference makes a very considerable amount in the cost per ton. I think

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the contention of the Crown, as put forward by their counsel, should be given effect to, and that in arriving at the cost the sum of $1.55 per ton should be the amount allowed.

It appears from the evidence that both in the accounts of the Dominion Coal Co., Ltd., and the Dominion Iron and Steel Co., Ltd., the cost of coal has been carried in their books at the rate of $1.55 per ton. A contract has been entered into between the Dominion Iron and Steel Co., Ltd., and the Dominion Coal Co., Ltd., by which at the time this particular order was given, namely in March of 1918, and down to the present time, the Dominion Coal Co. had contracted to furnish the coal to the steel company at certain rates, subject to revision. At the date of this particular order, the price at which the coal was to be furnished was the sum of $1.55 per ton. There had been no further fixing of the price under the terms of the contract. What happened was that some time in September, 1918, the parent company, namely, the Dominion Steel Co., Ltd., readjusted the price, and after certain fluctuations in the price so fixed, arrived at the sum of $3,443. This amount was not credited to the Dominion Coal Co., but is held in a sort of suspense account by the Dominion Steel Co., Ltd.

The claim put forward on behalf of the present plaintiffs is that a merger had taken place whereby both the Dominion Coal Co., and the Dominion Iron and Steel Co., had been merged in what is referred to as the parent or holding company, namely, the Dominion Steel Co., Ltd. There was in reality no merger, but each company, namely, the Dominion Coal Co., Ltd., and the Dominion Iron and Steel Co., Ltd., were kept alive as separate corporate bodies, the stock of each company being held by the holding company. The terms upon which the arrangement between the holding company and the Dominion Coal Co., and the Dominion Iron and Steel Co., are set out in two documents which have been filed as ex. No. "F." They are similar in terms except as to the separate companies, and I will refer to the one relating to the Dominion Iron and Steel Co., Ltd. It recites the fact of the stock of the company being held by the holding company, and it then proceeds:

"And whereas the corporation (meaning the Dominion Steel Co., Ltd., the holding company) is arranging to handle the products and revenues of the said steel company, and desires to handle the products of this company (Dominion Iron and Steel Co., Ltd.,) as well, so that the output of both companies may be jointly dealt with.

Be it resolved, that all the products of the company intended for sale and all rents and revenues of its property now or here-

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after existing or arising, be and are hereby assigned and transferred to the corporation to be handled by it jointly with the products and revenues of the said steel company, on the following terms, namely:

1. The corporation is to provide the company with all moneys required for its current operating expenses and also for capital expenditures approved by the corporation, as and when required.

2. The company shall issue promissory notes to the corporation from time to time to cover moneys used in operating expenses until the corporation has been recouped for the same out of the proceeds of the company's products and revenues.

For the moneys required for expenditures chargeable to capital account securities of the company shall be issued and transferred to the corporation.

3. The corporation shall from time to time pay over to the company the moneys necessary to pay its interest and other charges, now or hereafter existing as follows:—Interest and sinking fund on mortgage bonds; depreciation as hereinafter specified; interest on general indebtedness; interest on income bonds; dividends on preferred stock.

4. The amount to be provided for depreciation shall be fixed from time to time but so that the amount provided for depreciation and sinking fund together shall not in any year be less than $480,000.

5. Payments under clause 3 shall be made by the corporation as and when the respective payments therein mentioned fall due from time to time, but nothing herein contained shall make it obligatory on the corporation to pay any part thereof unless the surplus derived by it from the products and revenues of the company during the then current financial year are sufficient to meet the same. The corporation shall, nevertheless, be bound to pay over to the company whatever surplus has been so derived whenever the same is insufficient to meet the whole of the above payments.

6. If the corporation shall at any time fail to pay any part of the moneys required to meet the said charges it shall forthwith prepare a separate account of all receipts and expenditures in connection with the products and revenues of the company so assigned to it, and submit the same with proper vouchers to the company's auditors so that the company may be able to submit proper statements to the holders of its securities, provided, however, that so long as the moneys above specified are provided in full the corporation shall not be bound to furnish the company with any accounts.

7. Any part of the above charges which the corporation may leave unpaid in any year shall be added to and form part of the charges to be provided for in the following year and shall bear interest only in case of any interest charges left unpaid and unprovided for.

8. Nothing herein contained shall affect the right of the corporation to receive payment of the interest or dividend on any securities of the company held by it, as if the same were held by any other person."

It is quite apparent in my judgment that the Dominion Iron and Steel Co., Ltd., are entitled under the terms of this resolution to have the profits from their works treated separately from the profits derived from the Dominion Coal Co., Ltd. Under the terms of this resolution, the contingency might arise that by charging the steel company with this increase in price of coal, injury might be done to the steel company.

For instance, take clause 5 of this resolution. I do not think the holding company had any right whatever to readjust the price of the coal. If they did readjust it, credit should have been given to the coal company for the increased price which the coal company was supposed to derive by the increase from $1.55 to the $3.442. This so-called readjustment did not take place until, as I have stated, some time in September, 1918. By this time, had the Dominion Iron and Steel Co. carried out the bargain as it ought to have been carried out, the contract for the 99,000 tons of rails and also the extra quantity of seconds, would probably have been completed. It seems to me that this so-called readjustment was made with the view of increasing the cost so that the Dominion Iron and Steel Co. might recover from the Crown a larger sum of money.

In the same way, with the adjustment of the cost of iron ore. In the books of the companies, the cost of the ore has been treated as being 5 cents. On this claim, this price has been raised to 20 cents.

I think the arguments of the counsel for the defendants are well founded, and that from the $61.01 shown on the ex. "U.B.," this additional charge should be eliminated.

The claim put forward on the part of the Crown that credit should be given for the profits realized from the by-products should not be allowed. The steel company have given credit in their cost sheets for the sum of $100,000. The additional profits were earned by putting these by-products through a different process and manufacturing them into articles of commerce. Had there been a loss in the manufacture of these by-products it

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would be difficult to see how this loss should be added to the cost of turning out of the steel rails.

I asked counsel for the Crown to furnish me with authority in support of their contention, but they have not done so.

I would have thought it quite clear that no such claim can arise in this case, and that the Crown and the railways have received all that they are entitled to receive by this allowance of $100,000 odd.

A further claim was put forward upon the part of the Crown. If the rail mill had been operated to the fullest capacity, the Government would have had full deliveries by October 15, 1918, according to the claim of the Crown, and they argue that a deduction should be made by reason of the increased cost incurred owing to higher wages, etc. My opinion is adverse to the claim put forward under this head. It might have been a forcible claim if raised on behalf of the Munitions Board, had they complained of the failure of the steel company to comply with the contract for the turning out of the rails within a reasonable period. I will refer later to some portions of the evidence to show that this delay in reality to a great extent was occasioned by the fact that, instead of the company devoting their plant to its fullest capacity, two-fifths of the products were devoted to other business of a more profitable nature. The rails were eventually rolled and accepted by the Crown, in fulfillment of their contract.

Mr. Cameron in his evidence, describes the whole process of making the shell steel, and also of making the steel for rails. The process up to the manufacture of ingots is the same for both. When the ingots are put through the blooming mill for the making of the steel rails, about 80% of the ingots would be used in the manufacture of the rails as against 60% of the ingots used for the purpose of the manufacture of shells. Mr. Jones explains this in his evidence at p. 335.

It is quite apparent from the evidence of Cameron that the making of wire rods and barbed wire was more profitable. For instance, at the opening of the trial, in answer to Mr. Nesbitt, Cameron describes the kind of material that they were asked to supply in addition to rails, for wire rods and barbed wire, and billets in a form suitable for the manufacture of rods. He is asked this question:

"Q. How would that business compare, if you had been allowed to carry on and run your own business, how would that have compared, in point of being profitable, with either shell steel or the rolling of rails? A. It would be more profitable.

It would be a better price relatively for wire rods and barbed wire than almost any other form of steel.

Q. So that, may I take it for granted that, apart from your contention as to the 99,000 tons, as to the difference of the 16,000 tons, that the Court can be satisfied that but for this Order in Council and its interference with your business, you would have had a more profitable business even for the 99,000? A. Yes."

Towards the end of the trial I asked Cameron certain questions. I asked him the following questions:

"Q. Were the products turned out from soft steel more lucrative to your company than the product you turned out from hard steel? A. I think that they possibly may have been.

Q. Was it a matter of more importance to your company to get out the manufacture of the products of soft steel than to keep on with the contract for hard steel? A. It was a matter of importance to the company to keep on its organisation and to keep its mills going.

Q. You got your contract for the rails, that was fixed, and you wanted to keep your custom for the soft steel products; isn't that what it all boils down to, speaking man to man? A. That is true, sir."

McQuarrie, who was inspector, referring to the subsequent contract, states that they commenced the rolling in January of 1919. He also shows that in March the company rolled over 22,000 tons of rails—and the important part of his evidence to which I refer is the fact, according to the statement of this witness, that the plant was the same in 1919 as it was in 1918.

Carney, an important witness, states that if they gave the rail mill the right of way, they could easily have turned out about 18,000 tons of rails per month. He also refers to the fact that 80% of the ingots would be used for rails, as against 60% for the shell steel.

In regard to prices, it is important, as sworn to by Lavoie, that under the contract of August, 1917, the company turned out 12,000 tons of 85 pound rails at the price of $58.50 per ton; he also refers to the letter of McNaughton, the general sales agent of the steel company, in which they offered to turn out 40,000 gross tons for the price of $62.50, and afterwards for a reduced tonnage of 7,500 tons instead of 40,000, they agreed to take $60.

The claim as to the Newfoundland tax needs no consideration. The directors exercised wise judgment and their decision must be accepted.

I am afraid my reasons for judgment are too voluminous.

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The matter involved is so great I have thought it better to set out more in detail than perhaps is necessary.

Counsel devoted a great deal of time to the preparation and conduct of the case. I have felt it due to them to make an examination of the voluminous evidence and exhibits, fuller than otherwise I would have felt inclined to do.

After the best consideration I can give to the case, and having regard to all the circumstances existing owing to the war, I think the price arrived at by the Minister of $65 a ton for number one rails, will fully and amply recompense the steel company. For the second class rails, I would allow $63 a ton. The letter previously quoted from the steel company would indicate that, in their view, there should be this difference in price between the two classes of rails.

The application to amend the claim should be and is refused.

Counsel will have no difficulty in arriving at what amount should be paid at the prices I have quoted. And the fact must not be lost sight of, that since the claim was filed, further payments have been made by the Government and received by the steel company.

In regard to interest, I have no power to allow interest as against the Crown. This seems to have been conceded by counsel, who only claim interest as part of the compensation, if they were entitled to compensation under sec. 7 of the statute.

I am of opinion that under all the circumstances of the case, each party should bear their own costs.

Judgment accordingly.

CAR OWNERS ASSOCIATION v. McKERCHER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. June 6, 1922.

LANDLORD AND TENANT (§ IIIE—115)—RE-ENTRY—FORFEITURE OF LEASE—WAIVER—OVERDUE RENT—CONDITIONAL ASSIGNMENT.

A landlord's failure to re-enter the premises for the non-payment of rent when due, or his consenting, conditionally, to an assignment of the lease, the condition never having been performed, will not operate as a waiver of forfeiture.

APPEAL by the plaintiff from the judgment of Murphy, J. Affirmed.

E. C. Mayers, for appellant.

D. A. McDonald, K.C., for respondent.

MACDONALD, C.J.A.:—I agree with the conclusion arrived at by the trial Judge and, therefore, would dismiss the appeal.

I think there was no waiver of the forfeiture for non-payment of rent. The rent fell due on May 20, and there could be no re-

entry for 15 days thereafter. Therefore, the landlord could have re-entered on June 5. He did not do so then. On June 14, he was requested to consent to a transfer of the lease and consented conditionally, *i.e.*, he executed the assignment and delivered it upon the condition that overdue rent should be paid. It was not to come into force until this condition had been performed. The condition was not performed, but it is argued by counsel for the appellant that whether the assignment was delivered conditionally or not, there was an election not to exercise the right of forfeiture. With this submission I cannot agree.

MARTIN, J.A.:—I agree that the appeal should be dismissed.

GALLIHER, J.A.:—On the points argued before us, I think the appeal must fail.

With regard to the surrender, the defendant had already elected and gone into possession, thereby declaring a forfeiture under the lease, and the surrender, although on the same day, was at a later hour, possession was not taken by reason of it, and it was a voluntary suggestion and act not required or called for by the defendant, and once having taken possession and forfeited the lease, his election was made and could not be altered by the acceptance of a voluntary surrender under which possession was not taken.

With regard to the assignment, in my opinion, that never got beyond being an escrow. It is true that if the proposed arrangement had gone through by acceptance and payment of rent due, and the substituting of a new tenant, it might have been satisfactory to McKercher, but this never got beyond the stage of an executory agreement as I understand the evidence.

MCPHILLIPS, J.A.:—This case involves the consideration of rival statements of fact and the application of the law thereto, but in the main, the findings of fact determine the appeal.

The trial Judge, without hesitancy, found the fact to be that rent was overdue under the lease for 15 days or more, and that there was the right of re-entry upon this ground alone. Then, as to the assignment of the term, the finding is that that was prior to the entry, not subsequent thereto, and this was followed by bankruptcy and the surrender of the lease.

Upon these findings of fact, the action for damages would be rightly dismissed, and such was the decision of the trial Judge, save that judgment went in favor of the plaintiff for the value of certain lubricating oil and other goods of the plaintiff wrongly converted by the defendant.

Counsel for the appellant plaintiff contended strongly that although it was true that there was no privity of contract as to the demised terms between the respondent defendant and the

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appellant, yet, that the appellant was entitled to be in possession of or upon the premises by reason of the leave and license, if nothing more, of Erickson—the lessee by assignment of the term consented to by the respondent—but this is not, with deference, a tenable proposition—as Erickson had no right under the assignment of the term consented to by the respondent to further assign or sub-let. The appellant was really a trespasser under the circumstances, therefore, *Parker* v. *Jones*, [1910] 2 K.B. 32, 79 L.J. (K.B.) 921, 26 Times, L.R. 453, is not helpful to the appellant, but on the other hand, as submitted by the counsel for the respondent, is an authority in his favour; see also *Walter* v. *Yalden*, [1902] 2 K.B. 304, 71 L.J. (K.B.) 693, 51 W.R. 46.

I cannot come to the conclusion that between June 4 and June 25, the date of re-entry, the respondent, the lessor, did anything that amounted to a waiver of the forfeiture of the term. The re-entry was for non-payment of rent; there was no knowledge that there had been any assignment of the term. Note the language of Darling, J., in *Parker* v. *Jones*, as reported in 79 L.J. (K.B.) 921 at 923.

"But here it is said that the lessor did not know of the subletting and that as there can be no waiver without the knowledge of the facts, the landlord could not be said to have waived his right to eviet the plaintiff. If the question had arisen between the lessor and the plaintiff, it may be that that contention would have been right and that the lessor might have treated the plaintiff as a trespasser. . . . . ."

Then there is the rather insuperable objection that waiver was not pleaded, but it is contended that the question was considered and was debated in the course of the trial. In any case, in my opinion, waiver could not, upon the facts, be sustained. The case is not one in which the Court should grant relief against forfeiture. See *Hamilton* v. *Kellick et al* (1920), 28 B.C.R. 418.

I would dismiss the appeal.

Appeal dismissed.

ROSENTHAL v. HOPE AND HART.

Quebec King's Bench, Howard, J. April 4, 1922.

BANKRUPTCY (§ I—6)—COMPOSITION WITH CREDITORS—RATIFICATION—PETITION TO SET ASIDE—BANKRUPTCY, RULE 68 (2)—CONSTRUCTION—INCREASE OF SECURITY—JURISDICTION OF APPELLATE COURT.

The Quebec Court of Appeal has no jurisdiction to increase the security provided by Bankruptcy Rule 68 (2) on a petition praying that a ratification of a composition be set aside, and that the trustee be ordered to convene another meeting of creditors to consider another offer, this not being a special case within the meaning of the rule.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

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ROSENTHAL v. HOPE AND HART.

Howard, J.

MOTION of the respondent asking that the appellant be ordered to furnish, within such delay as the Court may fix, security for the amount of the composition offered by him to his creditors and accepted by them and approved by the Superior Court, Bankruptcy Division.

Shulman & Shulman, for appellant.

Armand Mathieu, for respondent.

HOWARD, J.:—The record reveals that the appellant, Samuel Rosenthal, in October last made an offer of composition, by which he undertook to pay his privileged debts and the expenses of liquidation in full and his ordinary or unsecured debts 65 cents in the dollar, payable by stated instalments, of which the 30 cents in the dollar that would first become due would be guaranteed. This offer, as intimated, was accepted by the creditors and approved by the Court on December 15, 1921.

It seems that the appellant paid something on account of the composition, the amount of which does not appear, and gave his notes for at least 30% in value of the unsecured creditors, for notes to that amount were endorsed by the surety, S. Rosenstein, which, though they have matured, have not been paid.

On February 14 last, the appellant presented a petition to the Superior Court praying that the ratification of the composition of December 15, 1921, be set aside and that the trustees be ordered to convene another meeting of creditors to consider a new offer by appellant of 30 cents in the dollar. That petition was rejected with costs by judgment rendered on March 8 last, for reasons which the Judge sets forth at length.

From that judgment the appellant entered the appeal to this Court of King's Bench now in question, making the deposit of $100 required by R. 68, para. (2), of the Bankruptcy Act.

The respondent in support of this motion for further security, contends that the present is a "special case", and that it is, therefore, competent under said R. 68 (2) for the Court to increase the security to be furnished by the appellant on this appeal.

One cannot read the judgment from which the appeal is entered and examine the documents of record without recognising that this case presents very special or at least unusual features, but I am not convinced that it is a "special case" within the meaning of the said R. 68 (2).

By a judgment of this Court rendered in September last in *Re Rosenstein* v. *Miller* (1921), 23 Que. P.R. 382, the debtor was ordered to furnish an additional $1,700 of security, the majority of the Court considering that case to be a special one which they were empowered to deal with under the rule cited. In that

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case the Superior Court, while rejecting the petition to put the debtor into bankruptcy, had condemned him to pay the costs of the proceedings, which were subsequently taxed at $1,700 or thereabouts. The debtor appealed from this judgment, making with his inscription in appeal the deposit of $100 under said R. 68 (2), whereupon the respondent petitioned for an order for additional security to cover the amount of these costs, judgment for which had been given in his favor, or that in the alternative he be allowed to execute his judgment. From the notes handed down by the Chief Justice it appears that the majority of the Court were influenced to this decision by the fact that the condemnation covered costs only, that the judgment appealed from was executory, and that it was not equitable in the circumstances of that case that the appellant should be permitted to suspend the execution of the judgment against him pending his appeal, without giving security therefor.

The present case is essentially different from that of *Rosenstein* v. *Miller*, in that the judgment of December 15, 1921, is not executory, but merely a formal pronouncement or order of the Court approving of the composition between the appellant and his creditors, and so no such order can be given in this case as was given in that of *Rosenstein* v. *Miller*. Moreover, no costs are involved in the order of December 15, 1921, whereas the condemnation in *Rosenstein* v. *Miller* was for costs only, a circumstance which, as already pointed out, seems to have influenced the Court in ordering the additional security in that case. While, therefore, I am free to say, as I have said, that in my opinion the present case presents special features that might dispose one to grant respondent's motion, I do not think that it is competent for me to do so under said R. 68 (2) nor any other rule or provision of the Bankruptcy Act. In my judgment, said R. 68 (2) does not apply to such a case as this. Respondent's motion will therefore be dismissed. *Motion dismissed.*

Re C.

Manitoba King's Bench, Mathers, C.J.K.B. March 31, 1922.

INFANTS (§ IC—10)—CUSTODY OF INFANT CHILD—BEST INTEREST OF CHILD TO BE CONSIDERED.

In determining which parent is entitled to the custody of an infant child, the paramount consideration is the welfare of the child, at the time the application is made, and the Court need not feel itself bound by the original order, where a change has taken place in the circumstances of the parties. In the circumstances of the case, where the wife had remarried and the child would be dependant for its support on a step-father, the Court held that the best interests of the child would be promoted by leaving it with its father, although he also had remarried; he having had the possession of it for over two years, and being well able to give it the necessary and proper care.

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PROCEEDING by way of *habeas corpus* to determine whether the father or mother is entitled to the custody of their infant child.

C. H. Locke, for the father.

R. D. Guy, for the mother.

MATHERS, C.J.K.B.:—The parties were married at Winnipeg in September, 1911, and this child, born in 1913, is the only issue. At the time of their marriage, both the parties resided at Winnipeg and they continued to make this city their home until January, 1918. On July 7, 1917, the husband enlisted in the motor transport service attached to the Royal Flying Corps, and went to Toronto, leaving his wife and child in Winnipeg. For her support, he assigned $1 per day of his army pay and she also received separation and patriotic allowance. In January, 1918, she, with his consent, took the child and went to Vancouver. The parties corresponded regularly and in May of that year the husband went to Vancouver on 14 days' leave, and while there they lived together as man and wife. In 1917 the wife had made the acquaintance of a man named Foote and after she went to Vancouver she corresponded with him. It was apparent to the husband some time before his visit to her in May that a change had taken place in her conduct and feeling towards him and she told him during that visit that she desired her freedom. Upon his return to Toronto, they again corresponded, and she continued to receive part of his army pay and separation and patriotic allowances as his wife. While in Vancouver, she secured employment and left the child in the custody of a Mrs. T. After the armistice the husband returned to Vancouver, but his wife then refused to live with him and made it very clear that she meant to secure a divorce from him, if it were possible. Eventually, in January, 1919, divorce proceedings were instituted and the papers were served upon the husband in Vancouver. He made no defence but he nevertheless waited in Vancouver until after the trial of the divorce petition in March, when a decree of dissolution was granted. The ground upon which the decree was granted does not appear, but I infer that it was upon the ground of the husband's adultery and desertion. By the decree, the custody of the infant child was awarded to the wife.

The circumstances under which this decree was obtained suggest very strongly that there was collusion between the husband and wife. He appears to have very reluctantly acquiesced in his wife's desire to obtain a divorce, and on more than one occasion after the proceedings had been instituted urged her to continue to live with him, but he did nevertheless, I think, collude with her in order that she might obtain it. I am satisfied

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that she alone desired the divorce and that she desired it for no other reason than that she had contracted a passion for Foote and desired to be quit of her then husband in order that she might marry him. The husband had admitted adultery in 1915, but the parties had lived together for 2 years afterwards. There appears quite clearly to have been no desertion by the husband, and if that were one of the grounds relied upon, it must have been procured by false evidence. Besides this, I am by no means satisfied that Manitoba was not the domicile of the parties in which the British Columbia Court would have no jurisdiction.

On August 25 following, the wife married Foote, and 2 years afterwards, in August, 1921, the husband also re-married. Under the circumstances, neither of them is in a position to contest the validity of the divorce (*Hahn* v. *King* (1902), 33 So. Rep. 121; *Rex* v. *Hamilton* (1910), 17 Can. Cr. Cas. 410, 22 O.L.R. 484 per Moss, C.J.O.), and neither of them desires to do so. That is all I propose to say about the validity of the decree.

Before the husband left Vancouver to return to Winnipeg, after the decree had been pronounced, he had some conversation with the wife as to the custody of the child. He says it was distinctly understood before the decree was pronounced that the custody should go to him. He says his wife promised to bring the child to Winnipeg in June following and deliver it into his custody. She says that it was agreed that she should bring the child to Winnipeg and leave it with him temporarily until she should desire to resume its custody. The fact is that she did come to Winnipeg in June, 1918, and saw her late husband. She then proceeded with the child to her mother's home in Ontario and returned a couple of weeks later bringing the child with her. He says she asked his permission to take the child to Ontario but she denies this. When she came back she delivered the child to his custody freely and voluntarily, the understanding being that he would place it in St. Charles Convent. The parties entirely disagree as to the terms on which the child was left. She asserts that he was only to have its custody during her pleasure, whereas he says the custody was turned over to him permanently. At that time, she was engaged to be married to Foote and, under the circumstances, I believe she found the child more or less of an encumbrance. Notwithstanding that she was an affectionate and devoted mother, I find that, in order to be free to marry Foote, she was willing, at least, for an indefinite time to part with the custody of her child. It is admitted that the child was well looked after and that its education and training was properly attended to while in the father's care.

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He seems to have spared nothing that he conceived to be for the child's welfare, and there is no complaint on that score.

This condition of affairs continued from July 30, 1919, until early in March, 1922, when Mrs. Foote, as she then was, arrived in Winnipeg, and, after endeavouring to induce her former husband to bring the child to her, she, upon his refusal, went with another woman to the convent, showed those in charge a copy of the decree of the British Columbia Court awarding her the custody of the child, and took it away with her. The same night she started on her return journey to Vancouver with the child, but was arrested en route on a charge of stealing the child and brought back to Winnipeg.

It was agreed between the parties that the matter should be heard as if writ of *habeas corpus* had actually been issued on the application of the husband and that Mrs. Foote had made a return to it setting out the decree of the British Columbia Court.

A child is not property in which either parent can have a vested interest under a decree of divorce. No authority is wanted for such a self-evident proposition but the question has been discussed in numerous United States cases: *Re Alderman* (1911), 39 L.R.A. (N.S.) 988; *Kentzler* v. *Kentzler* (1891), 28 Pac. Rep. 370; Schouler on Domestic Relations, vol. 2, para. 1896. It is at least doubtful whether a decree of a foreign Court disposing of the custody of a child can, under any circumstances, be binding upon this Court: Per Street, J., in *Re Davis* (1894), 25 O.R. 579, and per Stuart, J., in *Ryser* v. *Ryser* (1915), 7 W.W.R. 1275, at p. 1279. It will certainly not be held to be binding if fraudulently obtained; 13 Hals. 351. At best it will only be recognized and acted upon as conclusive as of the time when it was made but not as conclusive of the question for all time. If any change has taken place in the circumstances of the parties the Court will not feel itself bound by the original decree but will use its discretion with respect of altered circumstances: *Mylius* v. *Cargill* (1914), 54 L.R.A. (N.S.) 154.

The welfare of the child is the paramount consideration, and if owing to changed circumstances it appears that the interests of the child can be best subserved by awarding its custody to the parent who was deprived of it by a decree of a foreign Court or of the Court of another Province, this Court is in duty bound to do so. There has in this case, I think, been very material changes in the circumstances of the parties as they were when the British Columbia decree was pronounced. In the first place, the mother voluntarily parted with the custody of the child for 2 years and 8 months, and in the second place she was remarried.

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She was then earning her own living, but she is now dependent upon Foote for her support. The evidence shows that he is a respectable professional man but, nevertheless, she is dependent upon him and the infant would be dependent upon him for its education and support because the mother has no independent means of her own. Is it then better in the interest of the child that it should remain in the custody and care of its lawful father, who is able and willing to perform his full duty as a parent, rather than that it should be left to the generosity of a step-father? I have no hesitation in saying that in my view its welfare will be best subserved by leaving it in the care and custody of its own father, if there is nothing in his character or circumstances making the adoption of that course inadvisable. It is alleged that he has admitted having broken his marriage vows and, therefore, that he is not a suitable person to have the care of this child. The mother, who makes this allegation, did not think it a reason why he should not have the child in his charge during the past 2 years and 8 months. He admitted having committed adultery in 1915, but his wife fully condoned that offence and lived with him for 2 years afterwards. He may have also been guilty of a similar offence while in the army at Toronto in 1917 or 1918, although there is no direct evidence of the fact. There is no other allegation made against him. He appears to be an affectionate and indulgent father of steady habits who is spoken of highly by his business associates. His earnings are sufficient to enable him to properly maintain and educate the child. Charges of infidelity to marriage vows do not come with much force from the mother. Before there was any estrangement between herself and her then husband, she had contracted a passion for Foote with whom she corresponded. He was, I believe, the direct cause of the estrangement between these parties and their subsequnt divorce. Such a course of conduct can hardly be regarded as consistent with her own marriage vows and was certainly not what would be expected from a faithful wife and mother.

It may be said that the father has also remarried and that the child will, if awarded to him, be in the immediate care of a step-mother. It is a great misfortune to this child that a situation has been created wherein it is impossible that it can be under the care and protection of both its parents. I cannot close my eyes to the fact that the responsibility for forcing that situation appears to rest on the mother, but I do not propose to attach any undue weight to that circumstance. While fully recognizing the importance of a mother's influence in the life of the child, the material benefits likely to accrue from being in

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the father's care in the peculiar circumstances of this case, in my opinion, outweigh them.

For all these reasons I hold it to be in the interest of the child that it should remain in the custody of its father and I so order, with reasonable provision for access by the mother.

Judgment accordingly.

RODDEN v. GOODMAN.

Quebec Superior Court in Bankruptcy, Panneton, J. May 29, 1922.

BANKRUPTCY (§ III—31)—WAGES—PRIVILEGED AND UNPRIVILEGED CLAIMS —MONEY LOANED—RIGHT TO RECOVER AGAINST BANKRUPT.

The wages of a workman earned during the last three months before an assignment under the Bankruptcy Act are privileged, but wages earned before that period are not privileged. Money loaned to a bankrupt before the bankruptcy is not privileged. The Court may estimate the value of the services rendered.

[See Annotations 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

APPEAL by claimant from the rejection by the trustee of his claim against an insolvent for wages due and for money loaned. Claim allowed.

Max Bernfeld, for trustee.

E. W. Westover, for claimant.

PANNETON, J.:—Claimant filed with the trustee his claim for $1,100.34 of which $901.60 for wages and $198.74 for monies loaned. The claimant does not mention any privilege for wages, but the proof before the Court established that claimant worked 5 months up to within 1 week of the insolvency. The claimant's claim was rejected by the trustee from which decision the claimant appeals.

Considering that claimant did work for the insolvent and that the value of his services is estimated at $60 per month, which for the last 3 months amounts to $180, and that by law the facts being established, claimant has a privilege for last 3 months; and that he has no privilege for his wages for the 2 months previous, amounting to $120, and further that he has proved loan of money to the insolvent to the amount of $198.74; that the amount of wages not privileged and the monies which are not privileged amount to $318.74, upon which he has received $68.95, leaving a balance of $239.79 not privileged.

The Court maintains the appeal to the amount of $180 as privileged and $239.79 not privileged with costs limited for the attorney of appellant to $75 and disbursements, said costs being privileged.

Judgment accordingly.

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JOHANESSON v. CANADIAN PACIFIC R. Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, and Dennistoun, JJ.A. June 12, 1922.

JUDGMENT (§ IIA—60)—RES JUDICATA—ACTION FOR FREIGHT CHARGES—DEFENCE — CARRIER'S NEGLIGENCE — SUBSEQUENT ACTION FOR DAMAGES.

A judgment disposing of an action between shipper and carrier, wherein the issue of the carrier's negligence had been raised as against the carrier's claim for freight charges, is only *res judicata* as to the facts establishing negligence, but not as to the claim for damages therefor not in issue in the prior action.

APPEAL by defendant from judgment of Dysart, J. (1922), 66 D.L.R. 599, on an application, made in pursuance of an order of the referee, for the purpose of determining how far the issues raised by the pleadings in an action were *res judicata*. Affirmed.

H. A. V. Green, for appellant.

F. Heap, for respondent.

PERDUE, C.J.M.:—The question involved in this appeal is whether the issues in the case have become *res judicatae* by virtue of a judgment of the Court of King's Bench, 66 D.L.R. 599, in a former suit between the same parties and concerning, as it is claimed, the same subjects of litigation.

The plaintiff, on April 29, 1918, delivered to the Canadian Pacific Co., a carload of frozen whitefish for transportation to the Raney Fish Co., at Cleveland, Ohio. The fish was loaded in a refrigerator car with the bunkers filled with crushed ice and 15% of salt. An order was given the railway company to recharge the bunkers with ice and salt in transit when necessary. The car was carried over defendant's Soo Line to Chicago and thence over the Nickle Plate Line to Cleveland, where it arrived on May 7, and the consignees were notified. It is claimed that the fish arrived at destination in good order, but the consignees, after making several inspections, refused to accept the shipment. It was claimed by the plaintiff that the defendants and their agents, while the carload was still in their hands and the transit had not terminated, neglected to ice and salt the car as required by the contract, with the result that the fish became rotten and lost to the plaintiff.

On July 17, 1918, the plaintiff commenced an action against the Canadian Pacific R. Co. and the Raney Fish Co., claiming against the first defendant damages for neglect in failing to properly ice and salt the fish, and against the second defendant, damages for non-acceptance. The railway company filed a statement of defence and a counterclaim against the plaintiff for freight charges on the carload amounting to $679.41. On April 7, 1919, the plaintiff, by notice, discontinued his action against

the railway company. No defence to the counterclaim having been filed, the railway company signed judgment upon it against the plaintiff. Subsequently, by an order of the referee, the judgment was set aside and leave given to the plaintiff to file a defence which he did on August 20, 1919. The railway company's claim was for freight. The defence was failure by the company to observe the terms of the contract with the plaintiff inasmuch as it neglected to salt and otherwise care for the fish during transit, whereby the fish became bad and unsalable during the transit and while in the company's hands; that in consequence of the promises the plaintiff suffered loss to the extent of $4,000. Plaintiff also, by clause 6 of his defence, claimed against the company for his loss, but this paragraph was struck out by the referee. The issue came on for trial before Mathers, C.J.K.B., on May 31, 1921. Although the issue between the parties was the right of the railway company to recover freight charges, the whole question of the alleged negligence of the company in failing to take proper care of the fish during the period of transit became involved and was gone into and adjudicated upon. The Chief Justice held that the railway company had not fulfilled its contract to carry the goods safely and, therefore, it had no right to recover the carrying charges. Accordingly, he dismissed the company's counterclaim with costs.

Shortly after the above judgment was rendered the plaintiff commenced the present action against the C.P.R. Co. He alleges the delivery of the carload of fish to the company for shipment to the Raney Fish Co., at Cleveland, Ohio, defendant's acceptance of same for carriage and the term of the contract as to recharging the car with ice and salt when necessary, and that such recharging was necessary every 24 hours. It is also alleged that one of the terms appearing on the bill of lading was that defendant's liability as carrier should continue until the expiration of 48 hours after written notice of the arrival of the car to the consignees thereof, and that defendant would be responsible for its agents to whom the shipment might be entrusted for any portion of the distance. The plaintiff charges neglect of duty on the part of the defendant and its agents in failing to recharge the car with ice and salt, so that at the end of the transit the fish had become decomposed and worthless. There were further general charges of negligence against defendant and its agents in failing to protect the fish. The plaintiff claims $3,762.57 damages for breach of contract.

The defendant, in its statement of defence, denies the allegations in the statement of claim. It alleges that the goods were in bad condition when delivered to it for carriage, and it sets up

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the condition in the contract that the carrier should not be liable where the loss of the goods was caused by inherent vice in the goods, or the act or default of the owner. It avers that it completed the contract and is not liable for loss occurring after the transit was at an end. It claims that it and its agents exercised due care and denies all negligence or breach of duty.

In his reply to the statement of defence the plaintiff alleged that all matters and things alleged, denied and set up in the statement of defence (except the denial in par. 13, as to the weight and value of the fish and the value of the fish boxes) were, in a certain action of that Court, specifying it, "tried, determined and adjudicated in the words following, that is to say:" Then there was set out a copy of the reasons for judgment of Mathers, C.J.K.B., delivered in the first action, followed by the allegation:

"The foregoing being written reasons given by this Honourable Court for its judgment in the said former action; wherefore all the said matters became and are *res judicata* and the defendant ought not to be heard or allowed to say or plead any of the matters or things or allegations or denials pleaded and set forth in its statement of defence (except the aforesaid allegation in para. 13 of the statement of claim.)."

On September 27, 1921, the referee, on the application of the plaintiff, and after hearing both parties, made an order, "that before the issues of fact herein are tried, the following question of law, raised herein, be argued and disposed of at a Wednesday sittings of this Court.

Which, if any, of the matters of fact and matters of law decided and adjudicated in said former action are, by virtue of the judgment and reasons therefor, in the said former action, binding as *res judicata* upon the parties hereto, so as to dispense with proof, or adjudication thereof in this present action and so as to estop the parties hereto from denying or controverting the said matters in this action by evidence or otherwise."

The above question came on for hearing before Dysart, J., 66 D.L.R. 599, who allowed the defendant to amend the statement of defence by adding a new paragraph as follows:—

"13 (a) In the alternative, the defendant says that the claim of the plaintiff against the defendant has already been adjudicated upon and the plaintiff is now estopped from bringing this action or claiming further damages in respect of the said shipment from the defendant."

After hearing the argument on the question of law directed by the referee's order, the Judge declared and adjudged that the allegations set forth in pars. 2, 3, 4, 5 and 6 of the statement of claim were duly proven, adjudicated and decided to be true in

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the former action and that said matters and allegations (whether of law or fact or otherwise) thereby became and are *res judicatae* between the parties hereto, and that they are thereby estopped, etc. He declared that the allegations in paras. 9 and 10 (relating to the value of the fish and boxes and damages suffered by the plaintiff) had not been adjudicated upon the former action and are open to litigation in this. He also declared that the claim of the plaintiff against the defendant had not been adjudicated upon already and the plaintiff was not estopped from bringing this action.

The present appeal is brought by defendant from the above order of Dysart, J.

Counsel for defendant contended that the plaintiff's claim against defendant had been adjudicated upon in the first action; that the plaintiff's claim had been set off against defendant's claim for freight; and that plaintiff could not split his claim for damages by setting off part of it against defendant's claim for freight and bringing a new action for the remainder. It is plain, however, that plaintiff's claim for damages was not considered in the first suit. Plaintiff attempted to set it up in his defence to the defendant's counterclaim, but this part (para. 6) was struck out by the referee. The true ground upon which Mathers, C.J.K.B., decided the first action was as stated at the conclusion of his reasons for judgment:

"The company's contract was to carry the goods safely and not having done so it has not fulfilled the contract on its part and has, therefore, no right to recover the carrying charges."

The judgment was that defendant's counterclaim was dismissed.

The performance of the contract to carry the goods safely to their destination is a condition precedent to the carrier's right to recover the charges for carrying them: *Cook* v. *Jennings* (1797), 7 Term. Rep. 381, 101 E.R. 1032; *Metcalfe* v. *Britannia Ironworks Co.* (1877), 2 Q.B.D. 423, 46 L.J. (Q.B.) 443; see also Pollock on Contracts, 9th ed. 278 *et seq.* The counterclaim of the C.P.R. Co. in the first case, was for carrying charges simply. The defence of the plaintiff to this claim was that the railway company had not performed a term of the contract of carriage, whereby they undertook to do certain necessary acts to preserve the fish during transit, by which breach the fish became bad and unsalable and were refused by the consignee. The only issue in the first suit was whether the plaintiff was or was not liable to pay the freight. The decision of Mathers, C.J.K.B., is binding upon the parties to that issue. Now, what is the issue in the present case?

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The referee's order directing the inquiry as to what matters of fact and law have by virtue of the first judgment become *res judicata*, recites an admission by the defendant that the fish and shipment thereof and the contract for such shipment in the statement of claim in the present suit are the identical fish, shipment and contract referred to in the prior action in this Court between the same parties and that the reasons for the judgment in the prior action (whereby the defendant's counterclaim for freight charges was dismissed) are as is set forth in the plaintiff's reply in this action. This admission definitely settles that the goods, the shipment of them and the contract for shipment are the same in each case. The reasons for judgment in the former case are before us, forming part of the pleadings in the present suit, so that we can identify the questions before the Court and the disposition made of them on the trial of the first suit. The difficulty that was experienced in *Re Ontario Sugar Co., McKinnon's case* (1910), 22 O.L.R. 621 (in appeal (1911), 24 O.L.R. 332), in ascertaining the actual ground upon which the former suit was decided, does not arise in the present case. Dysart, J., 66 D.L.R. 599, has made a summary of "the matters which were necessarily decided in the earlier action and are among those raised by the pleadings in this." I agree with his finding and need not repeat it. These matters so decided support the allegations in paras. 2 and 6, inclusive of the statement of claim.

I would refer to the case of *Dunham* v. *Bower* (1879), 77 N.Y. Rep. 76, as dealing with questions similar to those which have arisen in the present case. In that case, defendant agreed with plaintiff to load a number of barrels of apples belonging to the plaintiff on a boat and carry them from Watkins to New York City. Plaintiff's evidence was that defendant agreed to load and start the apples on their journey on or before November 8, but that he did not start until November 12. The boat was stopped by ice at Ilion and could proceed no further. The apples were frozen and destroyed. The plaintiff sued for damages and defendant pleaded in Bar and proved on trial a judgment rendered in Justices Court in his favour in an action to recover freight on the apples from Watkins to Ilion. It was held by the Court of Appeal that the judgment was a bar and that plaintiff was properly nonsuited.

Church, C.J., said, 77 N.Y. Rep. at p. 80.:—

"It is sometimes difficult to draw the line between a judgment which will operate as a bar to an action for a specified claim, and one which leaves the claim outstanding to be enforced by a cross-action. It depends in a great measure upon the nature of the demand litigated, the relation which the claim sought to be

enforced bears to it, and the circumstances attending it. Any fact or allegation which is expressly or impliedly involved in a judgment, is merged in it, and cannot again be litigated."

He pointed out that if the allegations in the case were true, the defendant was not only not entitled to any freight, but the plaintiff was entitled to a judgment for the whole amount of his damages; that the right to freight and the right to damages for the destruction of the whole property caused by violation of the shipping contract could not co-exist. But the recovery for freight adjudicated either that the defendant never made the alleged agreement or that he had performed it, these qustions were necessarily involved in that action, and were merged in the judgment. In the case at Bar the carriers were defeated in their action for freight on the facts proved by the owner and this involved an adjudication that the carriers had not performed their contract to protect the goods during the transit and are, therefore, liable for the loss of them.

I would dismiss the appeal with costs.

CAMERON, J.A.:—On July 17, 1918, an action was commenced by the plaintiff against the defendant, the railway company, and the Raney Fish Co., for the recovery of $3,762.37 claimed as damages for the loss of whitefish accepted for shipment by the railway company and consigned to the Raney Co. The railway company entered a counter-claim to this statement of claim asking for $679.41, being the freight charges for the said shipment of fish. The plaintiff discontinued his action for damages but entered to the defendant railway company's counterclaim a defence in which were alleged facts substantially the same as those set out in the statement of claim, viz., that the railway company agreed properly to salt and otherwise care for the fish during transit but neglected to do so; that in consequence of such neglect the fish became bad and unsalable and were refused acceptance by the consignees and, thereupon, the railway company sold them for the transportation charges. It was further alleged that the sum so realized was $92.75, and that the plaintiff in consequence of the premises "suffered loss and damage to the extent of $4,000, being the value of the said fish and other incidental losses in connection therewith." Originally, this defence contained as para. 6 the words "and the plaintiff hereby agree accordingly against the defendant." This last paragraph was struck out by an order made on the application of the railway company. On these pleadings the case went to trial before Mathers, C.J., with the result that the railway company's counterclaim was dismissed with costs.

On June 27, 1921, this present action against the railway com-

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pany alone was brought on the same grounds as the previous action. The defence filed on July 19, 1921, sets up various defences and in one para. 13, added by amendment, it is pleaded, "that the claim of the plaintiff against the defendant has already been adjudicated upon and the plaintiff is now estopped from bringing this action or claiming further damages in respect of the said shipment from the defendant."

In his reply to this defence, the plaintiff sets up that all matters alleged, denied and set up in this defence were tried, determined and adjudicated upon in the following words, and there is then embodied in the pleading the full text of Mathers, C.J.K.B.'s reasons for judgment in the previous action.

I think this last pleading must be unique, but it was not questioned and is on the record as it comes before us. The next step in the action was the order of the referee of October 14, 1920, made on the application of the plaintiff. In this order, it is admitted by the defendant's counsel that the fish, the shipment and the contract in the two actions are identical and that the reasons for judgment in the said prior action are as is set forth in the plaintiff's reply in this action.

The question of law so submitted was, "which, if any, of the matters of fact and matters of law decided and adjudicated in said former action are, by virtue of the judgment and reasons therefor, in the said former action, binding as *res judicata* upon the parties hereto, so as to dispense with proof, or adjudication thereof in this present action and so as to estop the parties hereto from denying or controverting the said matters in this action by evidence or otherwise."

The question submitted came before Dysart, J., 66 D.L.R. 599, who declared and adjudged that the allegations set forth in the plaintiff's statement of claim in para. 2, 3, 4, 5 and 6 were duly proven, adjudicated and decided to be true in a former action and that the matters of fact and law therein set forth were and became *res judicata* and that the parties hereto are estopped from denying or controverting any of the same and that all such allegations are to be taken as conclusively proved or established. He further declared that matters set out in para. 9 and 10 of the statement of claim were and are not *res judicata*.

In the result, the action goes now to trial merely on an assessment of damages. The history of the case, the pleadings and decisions on the questions involved are fully referred to and discussed in Dysart, J.'s, reasons for judgment 66 D.L.R. 599.

On this appeal it was contended that in the first action the freight charges were earned, that the defence of the plaintiff to the railway company's counterclaim was itself a counterclaim to

that counterclaim, that, in substance, the defence sought to pay for those charges by way of damages and that, therefore, the whole matter raised by paras. 2 to 6 of the plaintiff's statement of claim in the second action was in issue and adjudicated upon in the first action. It was urged that Mathers, C.J.K.B., decided the first case upon an issue not presented in the pleadings, viz., that the company's contract was to carry the goods safely and not having done so it had not fulfilled its contract and was, therefore, not entitled to recover. The real issue, it is claimed, was that the defence set up to the defendant's counterclaim raised the whole question of damages sustained by the plaintiff by reason of the breach of contract and that the judgment of the Chief Justice must be held to have determined that question and not the mere issue as to the non-performance of the contract. *Outram* v. *Morewood* (1803), 3 East 346, 102 E.R. 630 and *Robinson* v. *Duleep Sing* (1879), 11 Ch. D. 798, 48 L.J. (Ch.) 758, were cited as supporting this view.

It was contended that the defence to the counterclaim was a counterclaim as it arose under the same contract as that on which the defendant company based its claim in its counterclaim in the first action and that all matters in question in this action were finally disposed of in the former. Reference was made to *Renton Gibbs and Co.* v. *Neville and Co.*, [1900] 2 Q.B. 181, 69 L.J. (Q.B.) 514; *Snyder* v. *Minnedosa Power Co.* (1913), 23 Man. L.R. 750. [See also 13 D.L.R. 804; 14 D.L.R. 332.]

It was also argued that the cause of action so set up in the defence to the counterclaim in the first action cannot be split and an action now taken for the balance of damages. Reference was made to Black on Judgments, pp. 731 *et seq.*

"A party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one." 13 Hals. p. 333, para. 467, citing *Re Hilton; Ex parte March* (1892), 67 L.T. 594, 9 Morr. 286.

It is necessary to consider the effect of the defence to the counterclaim in the first action. As that part of it which originally claimed damages was struck out, our consideration of it is simplified. At the trial it was evidently considered as stating facts which afforded a defence to the counterclaim. The decision in substance was that the facts shown defeated the railway company's right to recover.

I must say that I was at first under the impression that the plaintiff's remedy against the railway company was to be had only in an action (or counterclaim) for damages in contract or tort. But, on further consideration, it appears that this is not

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the case. The defence to the counterclaim in the first action can properly be regarded as setting forth facts intended to raise the plea that the destruction of the goods by the negligence of the railway company destroyed its claim for the transportation charges. Such was the view taken of it at the trial and justifiably so, especially considering the amendment which had been made in striking out the claim for damages.

Whatever may have been the rule in the past "the Court looks to the purpose and effect of the contract as a whole, as a guide to the probable intentions of the parties and the presumption, if any there be, is that breach or default in any material term of a contract between men of business amounts to default in the whole:" Pollock on Contracts, 9th ed., p. 279.

I refer to the further discussion of this subject at pp. 282 *et seq.* A test often applied is whether the term of the contract in which default has been made "goes to the whole of the consideration" or only to part. "Can it be said that the promisee gets what he bargained for, with some shortcoming for which damages will compensate him? or is the point of failure so vital that his expectation is in substance defeated?"

Pollock quotes from the judgment of Blackburn, J., in *Bettini* v. *Gye* (1876), 1 Q.B.D. 183, 45 L.J.(Q.B.) 209, approving the rule laid down by Parke, B. in *Graves* v. *Legg* (1854), 9 Ex. 709, 23 L.J. (Ex.) 228, 156 E.R. 304, and says, at p. 284: "If, however, there be any presumption either way in the modern view of such cases, it is that, in mercantile contracts at any rate, all express terms are material."

From this point of view the proof of the allegations in the defence to the defendant company's counterclaim was properly regarded by the Chief Justice as showing that the company had committed a breach of a most material term of the contract, a term that went to the whole of the consideration, and in holding that such breach amounted to a default in the whole contract.

What was set up by this plaintiff in the former action was set up as a defence and not as a cause of action. The claim for damages having been struck out, the pleading to the counterclaim was obviously treated at the trial as a defence which, when established, excused the payment of freight and had no other effect.

This is a case, therefore, where the matters pleaded in the statement of claim in the present action, although they might have been used as a defence in the first suit, constitute a substantive and distinct cause of action which the present plaintiff was not in the former suit bound to plead or set up. 23 Cyc. p. 1163. The case of *Dunham* v. *Bower*, 77 N.Y. Rep. 76, which

was cited to us is in point. There, it was held that where goods are destroyed by a failure on the part of the carrier to perform his contract of transportation, the failure to perform is a defence, going to the whole cause of action for freight and that the shipper, having thus defeated the action for freight, is at liberty to sue for damages. Church, Ch. J., says at p. 81:—

"The defendant was not only not entitled to any freight, but the plaintiff was entitled to a judgment for the whole amount of his damages," and:

"This was clearly a case where the owner was 'excused freight' not merely because the goods were damaged, but because they were destroyed by the violation of the contract of shipment."

The Chief Justice of the King's Bench held that there was such a destruction, though the fish in their damaged condition realized a trifling amount, and his finding stands and cannot be disputed.

In my opinion, it is clear that in the former suit, in which the claim for freight was disposed of, the claim of the present plaintiff for damages, an entirely distinct matter, was not in issue or actually determined therein, and that his right of action, therefore, is still outstanding. It follows that there is nothing in the objection that the plaintiff in this action is splitting his cause of action.

It is now established in cases where the defence of *res judicata* is raised that we are entitled to look at the reasons for judgment as well as the pleadings and formal judgment to ascertain with precision the issues decided in the former action. Those reasons are on file as part of the record in the present case and are made part of the referee's order under which the question of law was submitted. Apart from these considerations, there is ample authority for so doing.

The former rule that to constitute an estoppel by a former judgment, the precise point which is to create it must have been put in issue and decided and that it was so put in issue and decided can appear by the record alone is now generally repudiated.

"It is now fully settled upon the authorities that extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible for the purpose of indentifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial." See Black on Judgments, Vol. 2, para. 624, a statement of the law that is supported by overwhelming authority.

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In support of this view *Barber* v. *McCuaig* (1900), 31 O.R. 593, was cited. There it was held by Meredith, C.J., that, where the defence of *res judicata* is set up, the Court may properly examine the pleadings, evidence and proceedings at the trial of the former action as well as the reasons given for the judgments thereon for the purpose of showing what was decided. In *Re Ontario Sugar Co.*, 22 O.L.R. 621, Meredith, C.J., held in an instructive judgment that, in order to ascertain whether the judgment in the former suit is a bar, the Court may look outside the judgment and the pleadings. He points out that the difficulty of applying the rule that the Court shall not try a suit or issue in which the matter has been directly in issue in a former suit is greater under the existing system of pleading than it was under the system prevailing before the Judicature Act, in which case, as pointed out by Williams, L.J., in *Ripley* v. *Arthur* (1902), 86 L.T. 735 at p. 736, you, necessarily, have to go to the evidence to identify what was in truth and in fact the subject-matter in respect of which the plaintiff succeeded. Meredith, C.J.'s decision was affirmed on appeal, 24 O.L.R. 332, and leave to appeal from the Court of Appeal to the Supreme Court was refused (1911), 44 Can. S.C.R. 659. Anglin, J., says at p. 661:—

"The proposition that the Court may look beyond the judgment and pleadings to ascertain what issue was actually determined in an action is well established by the authorities which the learned Chief Justices cite."

In *Sorensen* v. *Smart* (1884), 5 O.R. 678, it was decided that the defence of *res judicata* goes not only to the points actually decided but to every point that properly belonged to the subject of litigation and which with reasonable diligence might have been brought forward at the time, citing *Henderson* v. *Henderson* (1843), 3 Hare 100, at p. 115 (67 E.R. 312), and the evidence in the first case was examined to determine this point.

"Parol evidence is admissible to identify the points or issues adjudicated in a former action, when the record thereof is silent or ambiguous on this point." 23 Cyc. p. 1539.

These considerations are apart from those of the statements in the referee's order which cannot now be disputed, and of the pleadings in which the reasons for the judgment in the former case are set up. So that we are entitled to examine these reasons to discover what was actually decided in that action.

I can add nothing useful to the remarks of Dysart, J., 66 D.L.R. 599, on the doctrine of *res judicata* and its application to the present case. I agree with him that the plaintiff here is at liberty to rely on the many facts and matters that are

common to this action and the former, and that the plaintiff's claim for damages is not *res judicata*.

The case is not wholly free from difficulty and in its development a novel situation has been created, but after consideration, it is my opinion that the order appealed from must be affirmed.

FULLERTON, J.A.:—This appeal is from an order of Dysart, J., 66 D.L.R. 599, adjudging and declaring that all allegations set forth in paras. 2, 3, 4, 5 and 6 of the statement of claim were duly proven, adjudicated and decided to be true in a former action between the parties hereto and that all the said matters and allegations (whether of fact or law or otherwise) thereby became and were *res judicata*; and further adjudging and declaring that the claim of the plaintiff has not been adjudicated upon.

In the prior action, the respondent sought to recover damages for the loss of a quantity of fish shipped by the respondent over the appellant's railway and alleged to have become worthless through the negligence of the appellant in failing to ice in accordance with the terms of the contract of carriage. In that action the appellant counterclaimed for freight on such shipment. The action was discontinued, but the counterclaim was proceeded with and was tried before the Chief Justice of the Court of King's Bench, who dismissed the action.

Counsel for the appellant contends that the claim of the plaintiff in the present action has been adjudicated upon in the prior action for freight. The defence to the prior action alleged a contract to carry the fish and to care for them properly in transit and failure to exercise care whereby they became a total loss. The contention is that these facts, even if established, would not be a defence to the action, but only a ground of counterclaim, that the relief given must have been damages for breach of contract sufficient to meet the claim of the appellant and that the respondent having recovered in the former action damages cannot now maintain an action for the same cause.

I cannot agree with this contention. The defence did not claim damages for breach of contract nor was the right of the respondent to recover damages ever considered. The Chief Justice states in his judgment that:—"the only ground of defence relied upon at the trial was that the company received the fish upon terms requiring them to properly salt and otherwise care for them during transit and neglected to do so, in consequence of which the fish became bad and unsaleable."

Whether the Chief Justice was right as a matter of law in holding these facts, an answer to the action is not in question here. He decided the case on that ground and did not treat

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the facts alleged in the defence as raising any question of counterclaim.

As to the appeal from the declaration that paras. 2 to 6 inclusive are *res judicata* it cannot be questioned that the facts alleged in these paragraphs were considered and decided in the former action. Counsel for the appellant did not argue that this was not so. His sole contention, as I understood it, was that, inasmuch as these facts were established in the former action with a view of defeating the appellant's claim for freight they cannot be treated as *res judicata* for the purpose of establishing the respondent's claim in this action. The authority cited for this proposition was *Renton, Gibbs & Co.* v. *Neville & Co.*, [1900] 2 Q.B. 181, 69 L.J. (Q.B.) 514. This case turned on a question of pleading and raised no question of estoppel.

It would be curious indeed if authority could be found in support of such a proposition. If, in any action between parties, findings of fact are made upon which a judgment is based, these facts are *res judicata* in a subsequent action between the same parties, and it can make no difference whether the party in whose favour the judgment is, was plaintiff or defendant in the first action.

In my view the order appealed against was properly made.

The appeal should be dismissed with costs to the plaintiff in any event of the cause.

DENNISTOUN, J.A.:—This is an appeal from Dysart, J., in the Court of King's Bench, 66 D.L.R. 599, holding certain allegations of fact set up in the pleadings in this action to be *res judicata* in a former action between the same parties.

The trial Judge has carefully, and in my humble view, correctly set forth the law and the facts upon which this case depends and it is not necessary to add anything to his reasons.

One point, however, needs a word of explanation and that is the trial Judge's finding that the railway company has, by silence, admitted the plaintiff's allegation in para. 7 of the statement of claim that the facts in issue in paras. 2 to 6 are *res judicata*, the fact being that para. 7 had been stricken out by order of the referee before the railway company were called upon to plead, their silence, therefore, was justified and no admission made thereby.

On the appeal to this Court, it was urged by counsel for the railway company that if anything was *res judicata*, everything was *res judicata*, and that the plaintiff's claim for damages had been disposed of in the former action.

The first action was to recover freight charges. The present plaintiff alleged by way of defence that the goods were not car-

ried safely and he counterclaimed for damages. The counterclaim was stricken out and the freight issue alone tried. This is abundantly clear when the reasons for judgment of Mathers, C.J.K.B., are looked at and it also appears from an examination of the pleadings and formal judgment. The claim of the railway company was dismissed on the ground that they did not carry the goods safely, inasmuch as they negligently permitted them to decay for lack of ice, the plaintiff's claim for damages was not dealt with and is not *res judicata*.

Alternatively, the appellants' second point was that the facts established negligence sufficient to impose liability in the present action were not *res judicata* in the first action. This point has been fully dealt with by the trial Judge, who holds that the parties are bound by what was decided in that case, in so far as it directly concerns the issue both in that case and in this one.

In 13 Hals., p. 331, sec. 463, it is stated that:

"A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him. Though the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties. And this principle has been applied when the point involved in the earlier decision, and as to which the parties were estopped, was one rather of law than of fact."

This proposition stated by Dysart, J., 66 D.L.R. 599, is supported by quotations from 23 Cyc., pp. 1288, 1290 and 1300, to the effect that the estoppel of a judgment is effective only so far as questions in issue have been actually adjudicated upon. Such estoppel does not extend so as to include additional matters unnecessary to the decision of the case, although they may come within the scope of the pleadings, unless they were actually litigated and passed upon.

The true test is identity of issue. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that point or question was in issue and adjudicated in the first suit, otherwise not.

I will endeavour to illustrate by example. A plaintiff sues to recover possession of a chattel. The defendant denies title and claims the chattel as his own. The issue is simple and clear. During the course of the trial it appears in evidence that the chattel has been damaged by the defendant, and the trial Judge, when giving judgment for possession, finds as a fact that the

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ownership is in the plaintiff and that damages have been done by the defendant.

In a second action to recover such damages the only question which is *res judicata* is that of ownership. The references in the evidence and in the reasons of the trial Judge to damages were unnecessary to the decision of the case, and were but incidental or collateral to the real issue.

In the case at Bar, the situation is quite different. Here, the first claim was to recover freight charges and the answer was—you did not carry my goods safely, you negligently allowed them to become worthless and you are not entitled to carrier's charges by reason of that negligence. The facts are found against the carrier on that issue, and his claim for freight charges is disallowed. In the second claim, the facts which were directly in issue as necessary to the determination of the first case are the foundation of the plaintiff's claim for damages. They have already been solemnly determined in an action so framed as to make them vital. Had the claim now pressed been tried in the first case by way of counterclaim, judgment could have been given upon it, and would have been given upon it, had not the railway company procured an order from the Referee in Chambers striking out the plaintiff's present claim for damages. Why the claim in the present action was severed from the issue tried in the first action I am unable to say, for it would have been convenient and expeditious to have tried them in the same action as claim and counterclaim, but the parties went to trial on the freight issue alone with full knowledge that the claim for damages for negligence was pending and would come up for trial at a subsequent hearing in due course.

I refer to *Lockyer* v. *Ferryman* (1877), 2 App. Cas. 519, 4 Rettie 32 (Sess. Cas. 4th series); *Re Ontario Sugar Co.*, 22 O.L.R. 621; 24 O.L.R. 332; and 44 Can. S.C.R. 659; *Barber* v. *McCuaig*, 31 O.R. 593; *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141, 53 L.J. (Q.B.) 476; 23 Cyc. pp. 1539, 1163, 1172, 1204 and 1312.

In conclusion I agree with the trial Judge that the matter is *res judicata* to the extent indicated in his judgment and would dismiss the appeal with costs. *Appeal dismissed.*

ST. JOHN AND QUEBEC R. Co. v. BANK OF BRITISH NORTH AMERICA AND THE HIBBARD Co.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, J.J. June 27, 1921.

ASSIGNMENT (§III—30)—NOTICE TO SOLICITOR—CONSTRUCTIVE NOTICE.

Notice to the solicitor of a debtor that the claim against the latter was to be paid to a third party is notice to the debtor himself that such claim had been assigned.

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Idington, J.

APPEAL from a decision of the Appellate Division of the Supreme Court of New Brunswick (1920), 52 D.L.R. 557, 47 N.B.R. 367, affirming the judgment on the trial in favour of the plaintiff bank.

The only question dealt with on the decision of this appeal was whether or not the appellant had notice of the assignment to the bank of the claim of the respondent, the Hibbard Company. The notice to appellant's solicitor was given in the manner set out in the judgments reported.

W. P. Jones, K.C. and *T. M. Jones* for appellant.

F. R. Taylor, K.C. for respondents.

DAVIES, C.J.:—After much consideration of the facts of this appeal and of the argument of counsel at Bar I have reached the conclusion that the appeal fails and should be dismissed with costs.

I concur substantially in the reasons for the judgment of the Appeal Division of New Brunswick (1920), 52 D.L.R. 557, 47 N.B.R. 367, delivered by Hazen, C.J., where all the material facts are stated, confirming that of Chandler, J., the trial Judge.

IDINGTON, J.:—The respondent sued as assignee of several choses in action owing by the appellant, and which had been assigned to the respondent by the Hibbard Co., Ltd., as security for advances made to said company.

The respondent bank, by notice in writing accompanied by a copy of the said assignment, duly served by mail the Provincial Treasurer of New Brunswick and beyond doubt intended that the like notice should be mailed the appellant's secretary.

The proof of the latter mailing of notice is claimed to be rather weak inasmuch as it depends only on the evidence of the stenographer in the office of the said Hibbard Co., in which she testifies as follows:—

"Q. Whose work did you mostly do while you were in their office? A. Mr. Hibbard's work. Q. Will you take communication of the document now shewn you marked No. 33, September 11th, 1914, initialed W.B.C., and state if you recognise that in any way? A. Yes, I recognise that as a letter I wrote. Q. What would be the date of the writing of that letter? A. The date would be exactly the date that is on the letter. Q. Do you know whether the letter was mailed or not? A. Well, I could not say as to the mailing of the letter. Q. What would be the ordinary procedure in the office regarding the typing and other details concerning a letter like that? A. The ordinary routine generally was that I would take the letter in, you would sign the letter, I would write the envelope and if there was any enclosures put the enclosures in the en-

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velope, get the letter from you signed, and leave the envelope and the letter on the boy's desk. That was the usual procedure. Q. Do you recall whether you followed that procedure in regard to this particular letter or not? A. I could not positively say in regard to that particular letter, but as a general rule that was the procedure I always followed. Q. In what way were copies of letters kept at that time? A. Well, a carbon copy such as that one would be put into the folder or claim. Q. By whom? A. By myself."

The boy, whoever he was, whose duty it was to do the mailing, is not called. Why is not explained.

It is however urged, and with much force, that the Provincial Treasurer was served in same way and received his copy, but I cannot see this fact attested to in such a manner as to shew that the actual writing of that letter and its mailing was concurrent with the other.

I am, therefore, unable to find that reliance on the routine of business as proof of the mailing is quite as satisfactory as I should wish, but if the Courts below had clearly accepted it as such I should not feel inclined to disturb such finding.

The Courts below do not seem to have relied so much thereon as upon the notice to the appellant by the knowledge of the attorney under the following peculiar circumstances.

There had been suggestions made of a meeting for a settlement between the said company and appellant. In bringing that about there certainly was on the part of appellant's officers, or some of them, a want of courtesy in failing to notify the solicitor for the respondent bank, though he had specially so requested. That has justly given rise to much suspicion and charges needless to consider herein.

The solicitor for appellant drew up a form of resolution to be passed by the directors of the Hibbard Co., authorising one Gall, who was treasurer of said company, to negotiate such settlement.

The directors, instead of adopting that form of resolution, passed one which in substance covered all that was therein essential, but varied in the essential as to signing any regular and lawful agreement respecting such claims by adding to the words "giving full and final discharge for all payments made," the following:—"provided the same be paid into the Bank of British North America according to its rights of transfer and subrogation."

This clearly to my mind was notice to the solicitor of the fact that respondent had a claim upon the results. The excuse of the solicitor is that he had no concern with that but to produce

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a resolution such as would be agreeable to his client's instructions.

I cannot attribute any meaning to this provision except that the respondent contends for in the first place, that it disclosed the rights of the respondent, or, secondly, which is much more destructive of the appellant's contentions, that it knew of the said claims having been definitely assigned to the respondent.

The information to the mind of a solicitor directing his attention to it inevitably must have been that the respondent bank was entitled to receive the proceeds by virtue of a transfer. And that would in law be attributable to the appellant. If it chose, as he says, to take the matter into its own hands, and he was impliedly directed to exclude that provision, so much the worse for the appellant. It either was submitted to his clients or it was not. If not, then the client is bound by his knowledge which to my mind is conclusive. If it was, as I suspect, anticipated by the client, so much the worse for its contentions.

In conclusion, I am of the opinion that the judgment appealed from is right.

Having considered the authorities cited on the question of notice to the solicitor, and searched further, I find *Gale* v. *Lewis* (1846), 9 Q.B. 730, 115 E.R. 1455, 16 L.J. (Q.B.) 119, and *Tibbits* v. *George* (1836), 5 Ad. & El. 107, 111 E.R. 1107, 6 L.J. (K.B.) 255, worthy of consideration as of a time antecedent to our present state of the law when the equity rule has precedence, as it were.

It was urged that the men at the back of this appeal and litigation are those responsible as sureties to the bank. I am unable to find how such an issue is presented to us on the pleadings, or necessarily arises from anything therein.

We might as well speculate on what might have arisen if the Government of New Brunswick, or His Majesty, on behalf of New Brunswick, or the Attorney General thereof, could have been in any form brought into the case.

We are only dealing with what is in due form brought before us.

I think the appeal should be dismissed with costs.

DUFF, J.:—I am not satisfied that express notice in writing within the statute was proved. By applying the test which is now the settled test in all cases of constructive notice I think the proper conclusion is that the officers of the railway company had before them knowledge of facts which ought to have put them on inquiry and that if they had acted with reasonable business prudence they would have learned that the bank had an interest in the Hibbard Co.'s claim which made the assent of

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the bank an essential condition of any valid settlement of that claim. I may add, I think it is only fair to add, that I accept Hanson's testimony and have no doubt that he did not in fact realise what the nature of the bank's claim was.

ANGLIN, J.:—Mr. Jones' able argument failed to convince me that there was error in the conclusions of the Supreme Court of New Brunswick, 52 D.L.R. 557, against which his client appeals either as to the sufficiency of the assignment to the respondent bank or as to the existence of constructive notice thereof to the appellant and its effect. Subsequent consideration of the evidence has not disturbed the tentative views which I had formed upon these points at the conclusion of the argument. Substantially for the reasons assigned by the Chief Justice of New Brunswick, I would affirm the judgment *a quo*.

MIGNAULT, J.:—This case comes to us without a dissenting opinion in the Courts below, 52 D.L.R. 557, and the finding that sufficient notice was given to the appellant of the transfer to the respondent of the claims of the Hibbard Co., Ltd., against the appellant, is a unanimous one and is supported by the very carefully prepared judgments of Chandler, J., in the trial Court, and of Hazen, C.J., in the Appellate Court, 52 D.L.R. 557.

The whole circumstances of the case support this holding. Hanson, the solicitor of the appellant, had prepared a form of resolution to be adopted by the Hibbard Co., for the settlement of the claim it had against the appellant. This resolution was returned to him with the added words, "provided the same be paid into the Bank of British North America according to its rights of transfer and subrogation."

In other words, Hanson was informed that the amount due by the appellant to the Hibbard Co. was to be paid into the bank because the latter had rights of transfer and subrogation. This could only mean that the claim of the company had been assigned to the bank and that the latter was subrogated to the company for its collection.

Hanson objected to this and another resolution (the one originally prepared by Hanson) was adopted omitting these words; the result being that Gall, under this resolution, was able to get payment, out of moneys due to the company and assigned to the bank, of his personal claim against the appellant.

I have no doubt that Hanson acted in absolute good faith, for solicitors as a rule object to any change in resolutions drafted by them for the payment of moneys by their clients, the more so if the disposal of the moneys is, by such changes, made subject to conditions or restrictions. But the fact still remains that the addition made to the first draft of the resolution should have

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put Hanson on inquiry as to what were the rights of transfer and subrogation of the bank. In plain English it stated that the bank was a transferee of the claim and was subrogated in any right of recovery of the Hibbard Co. Hanson could not close his eyes to this plain intimation and make an unconditional settlement with Gall without running the risk of the trouble that has arisen from the action of Gall in illegally paying himself out of moneys of which, even under Hanson's draft resolution, he was a trustee. The bank, at the time of the trial was still a creditor of the Hibbard Co. for more than $5,000 and, although it had possibly ample security, it had the right to receive any moneys due to the Hibbard Co. under the transfer the latter had made to it.

I feel that I can really add nothing to the judgments in the Courts below and my opinion is to dismiss the appeal with costs.

Appeal dismissed.

HUNTTING MERRITT LUMBER Co. v. COYLE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. June 6, 1922.

APPEAL (§ VIIID—311)—TRIAL BY JUDGE WITHOUT JURY—PRESUMPTION THAT DECISION RIGHT ON THE FACTS—NECESSITY OF APPELLANT DISPLACING PRESUMPTION.

Where a case tried by a Judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and in order to succeed on the appeal it is incumbent on the appellant to shew that the trial Judge had no sufficient evidence before him which would admit of his reasonably finding as he did.

[*Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, 67 L.J. (Ch.) 402; *Lodge Holes Colliery Co.* v. *Mayor of Wednesbury*, [1908] A.C. 323, 77 L.J. (K.B.) 847; *Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q.B. 38, 65 L.J. (Q.B.) 100, applied.]

APPEAL by defendant from the trial judgment holding the appellant liable for the loss of certain logs from out of two booms of logs that were under contract to be towed. Affirmed.

E. C. Mayers, for appellant.

E. P. Davis, K.C., for respondent.

MACDONALD, C.J.A.:—I entirely agree with the reasons for judgment of Murphy, J., who tried the action.

At our Bar it was argued that the boom had been taken away by thieves. This is mere conjecture, and even the conjecture is, I think, rebutted by the evidence of the finding of part of the boom in the jetty, while it is curious that none of the missing logs, which were marked, have ever been found or heard of, yet in the absence of evidence of theft or of facts from which an

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inference of theft could be drawn, the defendants' contention is hopeless.

MARTIN, J.A.:—In my opinion, it is impossible to say that the Judge below was "clearly wrong" in finding that the boom was not reasonably safely tied up and, therefore, the appeal should be dismissed.

GALLIHER, J.A.:—Owing to the unfortunate circumstances of this case and the more or less mysterious disappearance of certain of the logs in question, I have been at some pains to ascertain if the trial Judge may not have misinformed himself as to the facts. I am, however, unable to say that he has done so, and as I am in agreement with him that it is a case of contract, the appeal must fail.

MCPHILLIPS, J.A.:—This appeal is from the judgment of Murphy, J., who held the appellant liable for the loss of certain logs from out of two booms of logs that were under contract to be towed to the booming grounds of the respondent. It was admitted at this Bar by counsel for both sides, that the question to be determined was whether the appellant had securely tied up the booms, the subject matter of the towage contract—and if not —then liability would follow and the judgment would, as a matter of legal sequence, be affirmed.

Upon careful consideration of the evidence I am satisfied that the trial Judge had sufficient evidence before him to entitle him to come to the conclusion that he did, *i.e.*, that it was a case of insecurely tying up the booms of logs. In consequence of this negligence upon the part of the appellant, a large number of the logs held in the booms were lost—one complete boom and 29 pieces from the other boom being completely lost—which the appellant cannot be said to have made delivery to the respondent.

The circumstances under which the towing was done and the attempted securing of same may be shortly stated in this way: The tug made the booming grounds at a time too late really to effectively secure the booms; it was at the turn of the tide and difficulties ensued—instead of it being possible to tie up the booms along the shore line of the booming grounds—owing to the shallowness of the water and the tide running out—the booms were tied across the stream, putting too much stress upon the wires attached to the dolphins, and consequent upon this, the loss of the logs occurred, being carried away owing to the insecure fastening and the force of the stream. It is true the evidence is conflicting and there is rival evidence but the trial Judge had ample evidence before him upon which he could find that there was both insecure fastenings made of the booms and further negligence in tying the booms across the channel, thus

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subjecting the booms to undue strain. The appellant must be held responsible for the negligence of the master of the tug in not securely and properly tying up the booms.

The case is not one which would admit of the reversal of the judgment—it is not the province of the Court of Appeal to interpose its views as against that of the trial Judge except in such cases as come within the *ratio decidendi* of *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, 67 L.J. (Ch.) 402, and in my opinion the present case is not one. In *Lodge Holes Colliery Co., Ltd.*, v. *Mayor, etc., of Wednesbury*, [1908] A.C. 323, at p. 326, 77 L.J. (K.B.) 847, Lord Loreburn said:—

"When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury except that a jury gives no reasons."

In *Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q.B. 38, at pp. 39, 40, 65 L.J. (Q.B.) 100, 44 W.R. 212, Lord Esher said:—

"Where a case tried by a Judge without a jury, comes to the Court of Appeal the presumption is that the decision of the Court below on the facts was right and that presumption must be displaced by the appellant."

I am not of the opinion that the presumption in the present case has been displaced; that there is evidence both ways is not enough. It is incumbent upon the appellant to shew that the trial Judge had no sufficient evidence before him which would admit of his reasonably finding as he did—*i.e.*, that the trial Judge was clearly wrong, *C. P. R.* v. *Bryce* (1909), 15 B.C.R. 510—515 (n); *Ruddy* v. *Toronto Eastern Ry. Co.* (1917), 33 D.L.R. 193, 21 C.R.C. 377, 38 O.L.R. 556, 86 L.J. (P. C.) 95.

I would therefore dismiss the appeal.

Appeal dismissed.

RUDDER v. LUNDIN; Re EXTRA-JUDICIAL SEIZURES ACT.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 29, 1922.

CHATTEL MORTGAGE (§ VI—55)—BREACH OF COVENANTS—SEIZURE UNDER DISTRESS WARRANT—APPLICATION TO JUDGE FOR ORDER ALLOWING REMOVAL AND SALE—JURISDICTION OF JUDGE TO GO INTO QUESTION OF SEIZURE—EXTRA-JUDICIAL SEIZURES ACT, 1914, ALTA., CH. 4, SEC. 4—CONSTRUCTION.

Upon an application to a District Court Judge for an order giving the sheriff leave to remove and sell certain goods seized under a distress warrant, issued by a mortgagee alleging breaches of a covenant in the mortgage, by reason of which the whole of the mortgage moneys became due and payable; the Judge must be satisfied before making

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the order that the goods are under seizure at the time of the application, and, in doing so, has jurisdiction to go into the question of abandonment of the seizure raised in affidavits used by the applicant, on the application.

[*Re Wener and Pollard* (1917), 12 Alta. L.R. 141, referred to.]

CASE stated for the opinion of the Appellate Division of the Supreme Court of Alberta.

The facts are fully set out in the judgments given.

A. U. G. Bury, for applicant.

J. A. Ross, for respondent.

SCOTT, C. J.:—The following case is stated by the parties for the opinion of the Appellate Division:

By mortgage dated May 15, 1920, the respondent mortgaged certain goods and chattels to the applicant to secure payment of $600. On August 27, 1921, the appellant, alleging breaches by the respondent of her covenant in the mortgage by reason of which the whole of the mortgage moneys became due and payable, issued his distress warrant to the sheriff at Edmonton and seized certain of the mortgaged goods, and on November 10, 1921, applied to a District Court Judge for an order giving the sheriff leave to remove and sell the goods so seized.

Upon that application, affidavits were used by the applicant deposing to (among other matters) facts which, if true, would, he claimed, constitute an abandonment of the seizure prior to the application. Appellant's solicitor objected to the Judge going into the question of the abandonment of the seizure, which abandonment was denied by the appellant in an affidavit used on his behalf without prejudice to his objection. The Judge over-ruled the objection, and held that he had jurisdiction upon the application to go into all the said matters and found that the seizure had been abandoned, and dismissed the application with costs.

The appellant appealed from this order on the grounds that the Judge erred in dismissing the application and in ordering the applicant to pay the respondent's costs, and in holding that he could on that application go into any contested questions between the applicant and the respondent or into any question except the question whether a removal and sale of the goods then was advisable in view of the state of the market and the possibility of undue loss to the respondent.

The question submitted for the decision of the Court is whether upon that application the Judge had jurisdiction to go into the question of the abandonment of the seizure or into any question of fact in issue between the parties.

The parties agreed that in the event of the Court holding that the Judge was right in going into the question of the abandon-

ment of the seizure, the appeal shall be dismissed with costs to the respondent of the argument of the appeal only.

Section 4 of the Act respecting Extra-Judicial Seizures, ch. 4, of 1914, provides that, "Notwithstanding any rule of court or provision of any Statute or Ordinance in force in the province, no sale after seizure under process issued out of any court of record of the province or after distress or seizure under any of the authorities mentioned in section one of this Act shall be made, executed and carried into effect except upon the order of a judge of the Supreme or District Court respectively or of a master in chambers granted *ex parte* or on notice, after consideration of all the facts and circumstances and upon such terms and conditions as to costs and otherwise as he shall determine, and there shall be no appeal from any such order, nor shall any goods, chattels, effects or other property be removed from the premises where the seizure is made before sale without such an order and the original or a copy of such order or orders shall be filed with the sheriff or sheriff's officer having charge of the matter."

The following proviso was added to that section by ch. 4 of 1918, sec. 7 (2):—

"Provided further that the judge or master in chambers before whom the application for sale under this section is made may, if he is of opinion that an order for sale should not be made, and that the circumstances are such that the property seized should be released, order the release of such property, and the original or a copy of such order shall be filed with the sheriff's officer forthwith."

In my opinion, the Judge or Master to whom an application is made under sec. 4 must be satisfied before making the order that the goods were under seizure at the time of the application. Even if they had originally been lawfully distrained and seized in the first instance, if it were contended before him that the distress and seizure had been abandoned, and reasonable evidence were adduced before him in support of that contention, it would be within his province if it would not even be his duty to inquire into that question in order to determine whether the goods were then under seizure.

In *Re Wener and Pollard* (1917), 12 Alta. L.R. 141, Hyndman, J., in dealing with a similar application, at p. 142 says:—

"In my opinion, the sole question for consideration upon such an application is, assuming the goods have been rightfully seized, should the removal and sale be advisable and proper under all the circumstances surrounding the case, that is, for instance is the time opportune taking into consideration the state of the

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market, the primary object being as far as possible to avoid a sacrifice of the goods and undue loss to the debtor."

It appears from a perusal of the report of that case that it was assumed that the goods were under seizure at the time of the application and I doubt whether Hyndman, J., intended to express the view that, when it was shewn that the goods had been lawfully seized, the owner was precluded from shewing that the seizure had been abandoned, or that they were not under seizure at the time of the application.

I may point out also that under sec. 7 of ch. 4 of 1918 which was passed after that judgment was pronounced, has materially enlarged the powers of the Judge or Master on such an application.

Upon the case submitted, it is not open to us to consider whether the evidence adduced before the Judge appealed from was sufficient to support his finding that the seizure had been abandoned.

In my opinion, the Judge appealed from had jurisdiction to go into the question of the abandonment of the seizure, and I would answer in the affirmative that portion of the question submitted.

As that was the only question raised before him on the application, I doubt the propriety of our expressing an opinion upon the question whether he had jurisdiction to go into any other question of fact in issue between the parties. It is apparent, however, that under sec. 7 of ch. 4 of 1918 he would have had jurisdiction to inquire into certain other matters, but the extent of that jurisdiction and what matters are within it will have to be dealt with when those questions arise.

I would dismiss the appeal with costs to the respondent of the argument of the appeal only.

STUART and BECK, J.J.A. concur with SCOTT, C.J.

HYNDMAN, J.A.:—I concur in the judgment of the Chief Justice and only wish to add that I do not think it is in any way in conflict with my former decision in *Re Wener and Pollard*, *supra*, as in that case it was assumed from the beginning that the goods were properly under seizure. I think had the question of seizure or no seizure been raised before me I would certainly have satisfied myself on the point.

CLARKE, J.A.. concurs with SCOTT, C.J.

Appeal dismissed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. June 27, 1921.

CONTRACTS (§ ID—50)—OFFER AND ACCEPTANCE—CONSENSUS.

The letter of a company, in answer to a letter of the Government enclosing a copy of an Order in Council placing certain construction work with it, saying that the terms of the order were satisfactory and adding, "but in order that all will be quite clear our understanding is that we are to assign our insurance policies to the Government and that the temporary buildings, now being constructed, are to be replaced by permanent buildings," does not contain an unqualified acceptance of the terms set out in the order; and there never being a *consensus ad idem* between the parties, the company could not recover for work done under the provisions of the order.

APPEAL from the judgment of the Exchequer Court of Canada, 20 Can. Ex. 67, 56 D.L.R. 682, dismissing the suppliant's petition of right.

Jenks, K.C. and *Roper*, for the appellant.

W. L. Hall, K.C., for the respondent.

DAVIES, C.J.:—This was an appeal from the Court of Exchequer (1920), 56 D.L.R. 682, 20 Can. Ex. 67, in an action brought by the suppliants, appellants, to recover the sum of $195,638 under the provisions of an Order in Council dated January 15, 1918, for the expenditure upon the work of repair and reconstruction of the dock and shops, etc., at Halifax, damaged by the explosion of December, 1917.

The trial Judge, Mr. Justice Audette, dismissed the suppliant's petition having come to the conclusion that there existed no legal contract between the parties on which a recovery could be maintained.

In his reasons for judgment the Judge has set out the Order in Council above referred to and all the correspondence and documents which followed which renders it unnecessary for me to repeat them now.

After hearing the lengthy argument at Bar I have given this Order in Council and all the correspondence and documents my most careful attention and consideration and have had no difficulty in reaching the conclusion that there never was any unqualified acceptance by the appellant of the only terms upon which the Government agreed to reconstruct the graving dock. The parties were never *ad idem* as to the amount the appellant was to contribute to the cost of reconstruction. In order that the suppliant's action should be sustained, it was essential that such a contract should exist.

Some reference was made by the trial Judge as to the suppliant having been paid already, in the expropriation proceedings of the dock already taken by the Government, for what-

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ever outlay they incurred. Counsel, however, at the argument did not press this point, the two proceedings, as he said, being quite distinct.

I would dismiss the appeal with costs.

IDINGTON, J.:—The appellant was the owner of a dock in Halifax Harbour which was materially injured by the explosion which took place there during the war. The respondent was deeply interested by reason of the war in having the said dock restored. In consequence thereof there ensued some negotiations between the Dominion Government's Department of Public Works and the appellant.

These resulted in the passing of an Order in Council resting solely upon the powers conferred upon the said Government relative to war emergencies, whereby after writing that and other facts, the appellant was offered as follows:—

"1. The Halifax Graving Dock Co., Ltd., the owners of the dock damaged, to contribute towards the cost thereof the sum of $111,000. 2. The balance of the outlay required to be defrayed by the Government from the war appropriation. 3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant as well as the actual work of reconstruction and purchase of material therefor, to be under the inspection, supervision and control of the representative of the Minister of Public Works."

The only acceptance, so called, of this offer, which was presented in reply thereto, was the following letter:—

Jan. 19th, 1918.

"Hon. F. B. Carvell,
Minister of Public Works,
Ottawa.

We beg to acknowledge receipt of yours of the 17th enclosing a copy of the order in council with reference to the reconstruction of the Halifax Dry Dock, which is satisfactory; but in order that all will be quite clear our understanding is that we are to assign our insurance policies to the Government and that the temporary buildings now being constructed are to be replaced by permanent buildings of the same kind as the original.

Halifax Graving Dock Co., Ltd.,
(Sgd.) Saml. M. Brookfield, Chairman."

I am unable to hold that the said letter was a clear and unconditional acceptance of the offer made by said Order in Council. It was clearly a substitution of the assignment of some policies of insurance for an absolute contribution of $111,000 in cash. And that cannot be amended by anything passing afterwards going beyond the limitations set forth in said Order in Council.

The writer of the said letter, persistently, throughout the later correspondence and the litigation which has ensued, seemed determined to have his own way and to be taken as absolute interpreter of the language used and the law bearing thereon. I cannot agree with him and hence conclude that there never was, as appellant claims, any binding contract.

Another incident is significant that there was to have been drawn up a formal contract which, if drawn, never was executed.

I cannot see any useful purpose to be served by following the history of what ensued.

I may be permitted, however, to express the hope that the work done by the appellant, though not recoverable on the basis of a *quantum meruit* as it might have been in a case of a like history transpiring between private individuals, was amply covered by the amount awarded appellant in the expropriation proceedings.

The appeal should be dismissed with costs.

DUFF, J. (dissenting):—I am unable to agree in the view of the trial Judge that there was no acceptance. I think there was an acceptance.

ANGLIN, J.:—I would dismiss this appeal. I am satisfied that there never was an acceptance by the appellant of the only terms on which the Government agreed to reconstruct the graving dock. The parties appear never to have been *ad idem* as to the amount to be contributed by the appellant to the cost of reconstruction. The existence of such a contract is admittedly a *sine qua non* of the suppliant's right to recover.

MIGNAULT, J.:—In so far as it could be contended that the Order in Council of January 15, 1918, constituted a contract between the Crown and the appellant, the latter admittedly did not contribute in money the sum of $111,000, said to be the amount of the insurance on the dry dock, which contribution, according to the Order in Council, was the condition on which the Government decided to furnish the balance required for the reconstruction. It is indeed as to this contribution that the chief difficulty arose from the very beginning, and this difficulty shews that between the appellant and the Crown there was never that *consensus ad idem* which is essential for the existence of a valid contract.

The Order in Council referred to two proposals, a main one and an alternative one, which the appellant had made to the Government. The alternative proposal, which was the one given effect to, is stated in the following terms:—

"That an alternative proposal has, however, been made by the owners in which they offer to proceed with the reconstruction

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of the dock and to furnish the sum of $111,000, which is the amount of the insurance, towards the cost, provided the Government supply the balance of the cost of reconstruction by way of a subsidy, relieving the Government of any further liability, as well as responsibility for the operation and maintenance of the dock. It is understood that the work of repair and reconstruction shall not consist of anything beyond the replacement of the dock and shops, etc., in the same condition in which they existed at the time of the disaster. The final decision as to the exact nature and extent of such repair, reconstruction and re-equipment, of the dock and plant to rest entirely with the Minister of Public Works or his delegated representative on the work; the actual work of reconstruction and purchase of material therefor to be under the inspection, supervision and control of the representative of the Department of Public Works."

The Order in Council concluded as follows:—

"The Minister, in view of the foregoing and of the imperative necessity that docking and repairing facilities at Halifax be forthwith re-established and made available at once for ships awaiting repairs in that port, recommends that authority be given, under the War Measures Act, to proceed with the repairing, reconstruction and re-equipment of the dock and plant at that place under the following conditions:—

1. The Halifax Graving Dock Co., the owners of the dock damaged, to contribute towards the cost thereof the sum of $111,000.

2. The balance of the outlay required to be defrayed by the Government from the war appropriation.

3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant as well as the actual work of reconstruction and purchase of material therefor to be under the inspection, supervision and control of the representative of the Minister of Public Works.

The Committee submit the same for approval."

A copy of this Order in Council was in due course sent to the appellant, but the latter took exception to the clause concerning the contribution of $111,000, and in a letter of January 19, 1918, to Mr. F. B. Carvell, Minister of Public Works, stated that "our understanding is that we are to assign our insurance policies to the Government."

Mr. Hunter, Deputy Minister of Public Works, on January 30, answered that this was not the arrangement at all, adding:—"You are to collect your own insurance policies and hand over the cash results to the Government."

On February 2nd, the appellant's chairman answered Mr.

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Hunter:—"I have just received your letter of the 30th of January with reference to the insurance policies and temporary and permanent buildings. Both clauses in your letter are quite satisfactory."

The appellant relies on this correspondence as constituting the contract whereby it was merely to collect what insurance it could and hand over the cash results to the Government. But obviously the deputy minister could not change the Order in Council which imposed on the appellant a contribution of $111,000 in money and not of the cash results of its collection of the insurance policies. On the other hand, the appellant did not accept purely and simply the Order in Council, but qualified its acceptance by insisting on a modification which could only be made by another Order in Council, and not by the mere acquiescence of the Minister of Public Works.

I think this shews that the parties were never *ad idem*, and therefore, that no contract existed between them for the reconstruction of the dry dock. What the Government did was not for the purpose of carrying out any binding contract, but solely to further public interests. And if there was no contract, the appellant's action fails.

The appeal should be dismissed with costs.

Appeal dismissed.

BRITANNIA COLLIERIES, Ltd. v. HAUSER.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 29, 1922.

COMPANIES (§ VB—176)—FORMATION — SUBSCRIPTIONS TO TRUST AGREEMENT—FORMATION OF COMPANY DEPENDENT ON SUFFICIENCY OF SUBSCRIPTIONS—SALE OF SHARES ACT, 1916, ALTA. STATS., CH. 8, SEC. 4, AND AMENDMENTS—CONSTRUCTION OF ACT.

A person who solicits subscriptions to a trust agreement, by which until subscribers have been obtained to such an amount as in the opinion of the person soliciting justifies the formation of a proposed company, and until a meeting of the subscribers has been called, in pursuance of the agreement, does not sell or offer for sale shares in a syndicate within the meaning of sec. 4 of the Sale of Shares Act, 1916, Alta. stats., ch. 8, and amendments.

[*R. v. Malcolm & Olson* (1918), 42 D.L.R. 90, 13 Alta. L.R. 511, distinguished. See Annotation 63 D.L.R. 1.]

APPEAL by defendant from the judgment of Walsh, J., in an action upon a promissory note. Judgment at the trial was given for the plaintiff, and the counterclaim of the defendant was dismissed. Judgment affirmed.

The facts of the case are fully set out in the judgment of Beck, J.A.

G. B. O'Connor, K.C., for appellant.

H. H. Hyndman, K.C., for respondent.

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Beck, J.A.

The judgment of the Court was delivered by

BECK, J.A.:—This is an appeal by the defendant from the judgment of Walsh, J., at trial. Judgment was given for the plaintiff upon his claim, and the counterclaim of the defendant was dismissed.

The action was upon a promissory note payable to the plaintiff company. The note was a partial renewal of one given to one Day as a subscription to a syndicate which Day was forming for the purpose of incorporating a company to acquire certain coal lands for which Day's daughter had an agreement of sale from the Western Canada Land Co. The proposed company was eventually formed and the defendant and the other subscribers to the syndicate were allotted shares in the company. No share certificate was actually issued to the defendant inasmuch as he had not paid for them in full.

The defendant, by way of counterclaim, set up false and fraudulent misrepresentations on the part of Day and one Nierengarten, joined with the plaintiff company as a defendant to the counterclaim.

Having read the entire appeal book and had the advantage of hearing an excellent argument on either side, I think the trial Judge's findings upon the facts and his application of the law thereto are right and that, consequently, the appeal should be dismissed with costs.

There is one question of law raised which calls for special consideration. Hauser, in his counterclaim, sets up that he is not liable on the ground that his promise to pay was a promise to pay for shares in a syndicate and the provisions of the Sale of Shares Act (ch. 8 of 1916; amended ch. 3 of 1917, sec. 27; ch. 4 of 1918, sec. 65; ch. 17 of 1918) were not complied with; sec. 4 of that Act provides that:—

"It shall hereafter be unlawful for any person or persons, company or any agent acting on his, their or its behalf, to sell or offer to sell or to directly or indirectly attempt to sell in the Province of Alberta, any shares, stocks, bonds or other securities of any corporation or company, syndicate or association of persons incorporated or unincorporated other than the securities hereinbefore excepted without first obtaining from the Board of Public Utility Commissioners a certificate to the effect hereinafter set forth and a license to such agent in the manner hereinafter provided for."

Counsel for Hauser submitted that the transaction between Hauser and Day was either a sale of shares in a syndicate or a sale of shares in a company; and referred to the decision of this

Court in *R.* v. *Malcolm* and *Olson* (1918), 42 D.L.R. 90, 13 Alta. L.R. 511.

The facts, so far as this point is concerned, are as follows: Day had arranged with the Western Trust Co. to act as trustee for those persons who should become subscribers to a proposed syndicate. An agreement with the trust company was prepared some time in the summer of 1918. The material terms of it are as follows:—It was expressed to be made between the trust company of the one part and "the several persons whose names are subscribed in the schedule hereto" of the other part. It recited:—

"Whereas it is intended to register a company under the Companies Ordinance . . . . . with an authorized capital of $100,000, divided into 100 shares of $100 each, having for one of its principal objects the acquisition of the coal and surface rights in certain land, namely the land for which Day's daughter held an agreement for sale from the Western Canada Land Co.

And whereas it is desired to establish a syndicate for the purposes aforesaid and to provide funds therefor.

It was agreed that:—

1. That the parties hereto shall constitute a syndicate . . . . . with the object of entering into a contract to purchase the said coal and surface rights . . . . . for the sum of $46,400, to be paid as to the sum of $27,200 by the allotment to the vendors of 272 shares of the par value of $100 each in the said *company*, and the sum of $19,200 in cash, which sum may be extended over a term of 6 years with interest at 7% per annum (this was the total amount of purchase money which Miss Day had agreed to pay to the Western Land Co., and had been made payable in instalments, the last of which was payable on December 1, 1924).

2. The trust company is to act as trustee for the syndicate members.

3. The trustee or any other of the syndicate members who shall enter into any contract for the purchase of the said lands shall be deemed to have entered into the same on behalf of the syndicate members and shall be entitled to be indemnified against all liability undr such contract out of the funds to be provided as hereinafter mentioned.

4. Provided for meetings of the members, the election of a chairman and secretary; all questions were to be decided by the vote of a majority.

5. A syndicate fund shall be raised in the manner following: Each of the syndicate members shall pay the sum set opposite his name to the Western Land Co., Ltd.

6. The syndicate fund shall be applied in the corporation

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and organization and development of coal rights of the said company and in completing the said purchase.

7. Provides for service of notices on the members of the syndicate.

8. Provides for the retirement or removal of the trustee and the appointment of a substitute.

9. If the said lands shall not have been acquired by the company on August 1, 1918, the syndicate shall be dissolved, and after payment of all expenses connected therewith the fund subscribed shall be divided among the syndicate members in proportion to their respective interests therein.

10. The trustee shall forthwith proceed with the incorporation of the company. Upon the incorporation of the said company each member of the syndicate shall receive fully paid up shares of the par value of $100 each to the extent of the moneys paid by him to the trustee."

Subscriptions to this agreement were obtained from 29 persons, and their subscriptions amounted in the aggregate to $28,000. Hauser's name is the 18th in order of subscription.

The plaintiff company was incorporated in pursuance of the agreement after the completion of the syndicate and after a meeting of the members of the syndicate called in pursuance of the trust agreement. The evidence is that the company was incorporated "after the syndicate was completed," and "after a sufficient amount had been subscribed"; Hauser's own evidence is to the effect that he got notice of a meeting of the subscribers but did not attend.

It seems to me that Day, in soliciting subscriptions to the trust agreement, was not selling or offering for sale shares in a syndicate within the meaning of sec. 4 of the Sale of Shares Act. It seems to me that until subscribers had been obtained to such an amount, as in the opinion of Day, was sufficient to justify the formation of the company, and consequently to call a meeting of the subscribers there was no syndicate in existence; or perhaps at any period after some subscriptions had been obtained, those who had already subscribed might have taken the matter out of Day's hands and constituted themselves the judges instead of him; but as a matter of fact, the syndicate was not considered by anyone to be complete until the 29 signatures actually obtained were obtained. I think that up to, at least, the time of the meeting, any of the the subscribers might, as a matter of law, have withdrawn their subscriptions. At all events, the contemplated syndicate was not, in my opinion, formed until the 29 subscribers who actually subscribed had done so; up to that time, at least, what Day was doing was, in my opinion, not sell-

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ing or offering for sale or attempting to sell "shares" in a "syndicate", but was soliciting subscriptions to a fund which, when created to a sufficient sum, would then become, as distinguished from specific sums under the individual control of the respective subscribers, a fund controllable by the body of subscribers; and only upon the fund passing into the control of the body of subscribers was there a syndicate interests or shares in which became capable of being sold. I am of this opinion not, as I think I have already made clear, solely on the ground of the non-existence of a syndicate in the sense intended by the Act, but also—though it is involved in what I have already said—because I think the word "share" in the Act, (Involving as I have intimated first the formation of a syndicate holding property or funds as a body; the members being interested in common equally or unequally) means a fractional interest in the common property or funds of the syndicate.

If there was no selling, offering or attempting to sell shares in a syndicate, still more strongly can it be said that there was such act or attempt to sell shares in a company. The company was not yet in existence. It might never come into existence. The case is one of shares in a syndicate or not. The case of *R.* v. *Malcolm* and *Olson, supra,* was quite a different case. In that case there were actually completed sales. The sales were sales of a specified number of shares. The price was actually paid. The transaction was concluded once for all. There was no question of forming a fund with the view of constituting a syndicate. The syndicate was already formed. I see nothing in the opinion of any of the members of the Court which decided that case inconsistent with the opinion I am now expressing. For my part, I there said that I thought the case one in which "the accused sold actually existing shares in an actually existing syndicate."

In my opinion, therefore, the appeal should be dismissed with costs. *Appeal dismissed.*

HADDEN v. NORTH VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. January 10, 1922.

PUBLIC LANDS (§ II—20)—VANCOUVER HARBOUR—TITLE TO FORESHORE—B.N.A. ACT—PLEADING—NUISANCE—TRESPASS—AMENDMENT.

One in possession of foreshore property by virtue of a lease from the Vancouver Harbour Commission, who had title thereto under a Crown grant from the Dominion Government, cannot maintain action for injury to the property from sewer outlets in the absence of proof that the foreshore was part of the public harbour at the date of the Union of the Province with Canada, within the purview of sec. 108 of the British North America Act.

An amendment was allowed changing the form of action from nuisance to the possessory action for trespass.

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HADDEN v. NORTH VANCOUVER.

Macdonald, C.J.A.

APPEAL by plaintiff from judgment of Gregory, J. Affirmed.

A. H. MacNeill, K.C., and *H. Bird*, for appellant.

E. C. Mayers and *A. C. Sutton*, for respondent.

MACDONALD, C.J.A.:—The plaintiff came to the nuisance, and while if he had obtained a title to the property instead of being a trespasser this would not affect his right of recovery, yet being a trespasser, as I must hold that he was, he is not entitled to recover either for trespass or for nuisance.

Plaintiff's root of title, if any, is in sec. 108 of the British North America Act. If the *locus in quo* was at the date of the Union with Canada, part of a public harbour, then plaintiff's title is unimpeachable, but he has not shewn that that part of the foreshore in question was part of a public harbour at that date. This is a question of fact. *Att'y-Gen'l for British Columbia* v. *C.P.R. Co.*, [1906] A.C. 204, 75 L.J. (P.C.) 38; *Att'y-Gen'l for Canada* v. *Ritchie et al Co., and Att'y-Gen'l for B.C.* (1914), 17 D.L.R. 778, 20 B.C.R. 333; aff'd 20 B.C.R. 333 at p. 343; (1915), 26 D.L.R. 51, 52 Can. S.C.R. 78; 48 D.L.R. 147, [1919] A.C. 999.

What was said by Duff, J., in the trial of the first mentioned case, (1904), 11 B.C.R. 289, must be confined to the question at issue in that case. I have no doubt that the Judge did not intend any broader meaning to be placed on his words; he was dealing with a small poriton of the southern shore of Burrard Inlet and not with any portion of the northern shore.

Now, in the present case there is no evidence at all that the property in question, namely, what is known as "McLaren's Lease", was part of a public harbour in 1871, and hence the plaintiff has failed to make out his title and cannot succeed in this action.

An application was made to amend by setting up a case of trespass and we reserved judgment. It is immaterial to my present judgment, whether the amendment be made or not, but as the case may go farther, I would accede to the motion.

A very large part of the evidence was devoted to the surveys, the contest being as to whether or not the outlet of the sewer falls within the boundaries of the McLaren lease. That question was thoroughly gone into on both sides and I can see no objection to allowing the amendment.

I would dismiss the appeal.

MARTIN, J.A., would dismiss the appeal.

GALLIHER, J.A.:—I am, though I say so with regret, forced to the conclusion that this appeal must be dismissed.

MCPHILLIPS, J.A. (dissenting):—The action may be said to have been tried out as one claiming the existence of a nuisance and a possessory action for trespass. It is true the pleadings

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might have been more precise, but in these days it has unfortunately come about, owing to present practice, to proceed with the trial almost ignoring the form of the pleadings. (See *Banbury* v. *Bank of Montreal*, 44 D.L.R. 234, [1918] A.C. 626, 87 L.J. (K.B.) 1158, Lord Parker of Waddington, at pp. 294-302.)

The facts as led at the trial well established that the appellant was in possession of the land in question and was the assignee of a lease of the land covered by water, the lease assigned to the appellant being from Vancouver Harbour Commissioners, describes as forming a part of the Public Harbour of Vancouver, the Harbour Commissioners having had title thereto granted to them by Crown grant from the Government of Canada. The appellant being in possession of the land, it is trite law that the appellant was not called upon to prove title. That the evidence establishes that there was a trespass is beyond question and, in my opinion, it was equally well established that the respondent is maintaining a nuisance and that the appellant is suffering special and particular damage therefrom and independent of the public generally. The respondent attempted to justify the maintenance of the sewer outlet upon provincial Government approval, but the evidence well discloses that no protection can be gained from this contention in that the scheme approved by the provincial authority was not carried out, and an entirely different outlet for the sewer was adopted than that approved by the provincial authority, even if it could be claimed that, following the scheme, there would be immunity from liability. The trial Judge held that the land in question in the action did not form a part of a public harbour—*i.e.*, was not within the confines of the Public Harbour of Vancouver. With great respect, in my opinion, this holding was in error, it was as long ago as 1905 when that question was finally determined and ever since that time and even before, *i.e.*, ever since 1871, when British Columbia entered the Canadian Confederation, the Government of Canada has exercised control over Vancouver Harbour—inclusive of the *locus in quo*—as being a public harbour in pursuance of sec. 108, of the B.N.A. Act, 1867.

The physicial conformation of the land being looked at, there can be no question of the nature and extent of the public harbour. The entry into the harbour from the Gulf of Georgia is through what is called the "First Narrows", and when entry is made, the harbour is clearly before you and is entirely land locked—constituting one of the great harbours of the world.

In 1905 the case of the *Att'y.-Gen'l. for British Columbia* v. *C.P.R.*, was carried to the Privy Council, (see [1906] A.C. 204), and their Lordships affirmed the judgment of the Full Court of

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British Columbia which had affirmed the judgment of Duff, J., that the foreshores of Vancouver Harbour was under the jurisdiction of the Parliament of Canada, either as having formed part of the harbour at the time of the Union of British Columbia with the Dominion or by reason of the jurisdiction of the Dominion attaching at the union. To turn to the judgment of Duff, J., see *Att'y.-Gen'l.* v. *C.P.R.*, (1904), 11 B.C.R. 289, at pp. 291, 292), we find this language:—

"I am, however, of the opinion that the lands in question here passed to the Dominion under section 108, of the B.N.A. Act. I find, as a fact, that at the time of the admission of British Columbia into Canada, that part of Burrard Inlet, between the First and Second Narrows, was a public harbour, and that the parts of the foreshore subject to the public rights of passage referred to were in use as, and were in fact part of the harbour; as was the whole of the foreshore adjoining the townsite of Granville.

Moreover, if formal Provincial assent were necessary, I must give effect to the presumption arising from long, notorious occupation with the knowledge and acquiescence of the Provincial Government; these circumstances, cogent in any case, become conclusive in the absence of any evidence indicating the non-existence of such assent."

Now, the land (and foreshore) in question in this action is admittedly "between the First and Second Narrows", and it may be said that this is a matter of common knowledge. How many times must there be a decision as to whether certain lands or foreshore form a part of a public harbour? It is unthinkable that the matter is always to be one of continued litigation—and that it may be agitated as to every foot of land lying within the generally accepted and well known limits of the harbour. There must surely be finality at some time, and when we find that the Attorney-General for British Columbia was the active litigant in the case above referred to, in fact the action was brought by the Attorney-General for British Columbia at the relation of the City of Vancouver, it is impossible to have it now contended that the land in question is not within the Public Harbour of Vancouver, and that the title to the lands in the bed of the harbour is vested in the Government of the Province of British Columbia. It seems to me that it is clear to demonstration that the title in the lands is in the Government of Canada, and that the Crown Dominion was entitled to make the grant to the Harbour Commissioners and the Harbour Commissioners rightly leased the lands, and the appellant is the successor in title, an unassailable

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title, although as I view it, possession alone was sufficient title, the respondent not establishing title in itself.

It may be remarked that the only proof of title advanced at the trial was title in the Crown Dominion, and the Attorney-General for British Columbia is not a party to this litigation, and I fail to see how it can be at all contended that the title to the land is vested in other than the Crown Dominion, and the appellant is the assignee of the lease executed by the Harbour Commissioners, the grantees from the Crown Dominion, assuredly the title in the Dominion upon the facts is established, and the onus most certainly rested upon the respondent to displace this title, which onus was not discharged.

Apart from the well established action for trespass, there is the maintenance of a nuisance owing to the sewer outlet upon the property of the appellant. Undoubtedly, it is a nuisance and at this Bar it was not denied, as I understood it, that a nuisance existed, but the contention was that the appellant failed to establish a cause of action—that it was a public nuisance, and the action was not well constituted, as in that case, the Attorney-General of the Province should be a party to the proceedings. The facts however establish, and I do not go into them in detail, that the nuisance is one which affects the appellant, and the works carried on by the appellant being within the area of operation of the works of the appellant and upon the property of the appellant,—injures the appellant and causes inconvenience to the appellant in carrying on of the business operations, and unquestionably special damage has been suffered by the appellant over and above that imposed upon the general community, (*Paine* v. *Partrich* (1690), Carth. 191, *Williams* case. (1592), 3 Co. Rep. 72 b.; *Bell* v. *Quebec Corporation* (1879), 5 App. Cas. 84, 49 L.J. (P.C.) 1; *Whelan* v. *Hewson* (1871), I.R. Vol. 6 C.L. 283).

The facts here disclose that what is being done is the discharge of sewage into the sea, *i.e.*, the harbour; Coulson and Forbes on Waters, 3rd ed. (1910), at p. 63, has this statement:—

"At common law there is no right to discharge sewage into the sea so as to cause nuisance to another, neither does any such right exist under the Public Health Acts, 1848 and 1875, nor can such a right be acquired by prescription." (*Hobart* v. *Southend-on-Sea Corporation*, 75 L.J., K.B. 305; 94 L.T. 337; 54 W.R. 454; 70 J.P. 192; 4 L.G.R. 757; 22 T.L.R. 307, 530; *Foster* v. *Warblington Urban Council*, (1905), 21 T.L.R. 124; 69 J.P. 42; 3 L.G.R. 605; *Owen* v. *Faversham Corporation*, (1909) 73 J.P. 33, C.A.)

The sewage as established upon the facts adduced at the trial of this action is most offensive and endangers the health of the

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operatives working for the appellant—it is untreated sewage—pollutes the water and renders the water unfit for booming bolts or timber and is destructive of otherwise possible business operations.

In *Owen* v. *Faversham Corporation* (1909), 73 J.P. 33, the Court of Appeal held—on the authority of *Foster* v. *Warblington Urban District Council*, [1906] 1 K.B. 648, 75 L.J. (K.B.) 514, 54 W.R. 575, that the defendant had no right to discharge sewage into the sea so as to cause a nuisance, and that an injunction ought to be granted, the action was one brought by the owners of an oyster fishery for an injunction to restrain a municipal corporation from discharging untreated sewage into tidal waters so as to pollute the plaintiffs' oyster beds, the defendants pleading that they had a right both at common law and by prescription to discharge their sewage into the sea. Here we have the case of a municipal corporation also contending that it has the right to discharge this untreated sewage into the sea. In my opinion, this decision is conclusive and entitles the appellant to the relief claimed in the action.

I would, therefore, allow the appeal.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

NEW TRIAL (§II—8)—COLLISION BETWEEN TRAIN AND AUTOMOBILE—NO QUESTION OF ULTIMATE NEGLIGENCE—QUESTIONS SUBMITTED TO JURY DEALING WITH—REVERSAL OF TRIAL JUDGMENT ON QUESTIONS PROPERLY SUBMITTED—SIGNIFICANCE OF QUESTIONS PROPERLY SUBMITTED BY THOSE IMPROPERLY SUBMITTED.

In a case of a collision between a railway train and an automobile on a level crossing at the intersection of the defendant company's line with a public highway, where primary negligence only had been established against the defendants, and no question of ultimate negligence on its part arose, the inquiry by the jury should not have extended further than to ascertain whether or not there was contributory negligence on the part of the plaintiff, and a further question as to whether the accident should be attributed to the negligence of the one rather than of the other, which may have altered the significance of the other questions in the minds of the jury, is ground for granting a new trial.

[*Ottawa Electric R. Co.* v. *Booth* (1920), 60 D.L.R. 80; *G.T.R. Co.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838; *B.C. Electric Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, discussed.]

APPEAL by defendant from the trial judgment in an action for damages for injuries received in a collision between plaintiff's automobile and defendant's train at level crossing. New trial ordered.

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J. F. Frame and *A. M. McIntyre*, for appellant.

G. H. Yule, for respondent.

HAULTAIN, C.J.S.:—I agree that there should be a new trial.

LAMONT, J.A. concurs with TURGEON, J.A.

TURGEON, J.A.:—This is a case of a collision between a railway train and an automobile on a level crossing at the intersection of the defendants' line with a public highway. The accident occurred in daylight, in the summer. The respondent was acquainted with the crossing and with the hour of passing trains, and he knew that the train in question was about due to pass when it did,—it being on time. He was driving his automobile with a companion, one Birkett, sitting next him. The automobile was proceeding eastward on the highway towards the track, which crosses it at right angles running north and south. On both sides of the highway were trees in foliage running up to the appellants' right-of-way, and shutting out all view of the track north and south of the crossing until the right-of-way was reached. From the entrance upon the right-of-way to the track at the point where the accident occurred is a distance of approximately 50 ft., and it was only upon reaching this entrance that a clear view of the track became possible to the respondent and Birkett. According to the finding of the jury, the appellant's train came on from the south towards the crossing without giving the signals required by the Railway Act 1919 (Can.) ch. 68 to be given by blowing the engine whistle and ringing the bell. The only evidence as to the respondent's conduct in approaching the crossing is that given by himself and by Birkett. From this evidence, it would appear that the automobile was travelling at the rate of 10 to 12 miles an hour. For about one mile from the crossing the respondent, being aware of the probability of a train passing, was looking out for the smoke and listening for the whistle. On arriving at the entrance to the right-of-way, he looked towards the south, but did not see the train. He then gave his attention to his automobile and proceeded towards the crossing. Just before reaching the tracks he looked again, and saw the train, as he says, "almost on top of him." The train, it appeared, was travelling at the rate of 30 miles an hour, which was not an excessive rate of speed. In the emergency, he endeavoured to speed his automobile ahead to cross before the train, but he failed to clear the track in time and the train struck him, wrecking the automobile and injuring the respondent severely.

The appellants alleged in their defence that the accident

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was due to the respondent's own negligence, (1) in driving on to the track without looking to see whether the train was coming, and (2) in not having his automobile under control.

At the close of the respondent's case at the trial, counsel for the appellants applied to have the case withdrawn from the jury and the action dismissed, on the ground that the respondent's evidence showed that the accident was due to his own negligence. This application was refused, and the evidence for the defence was heard.

The following are the findings of the jury by question and answer:—

"1. Q. Was the plaintiff injured by any negligence of the defendant company? A. Yes. 2. Q. If so, in what did such negligence consist? A. Failing to carry out warnings to be given regarding signals at crossings of railway, in so much that the whistle was not blown or the bell rung. 3. Q. Did any negligence of the plaintiff contribute to cause the accident? A. Yes. 4. Q. If so, in what did such contributory negligence consist? A. In not taking the precaution that an ordinary prudent man would take to satisfy himself that it was safe to cross the railroad. 5. Q. If you find that both plaintiff and defendant were guilty of negligence, can you further determine that the accident should, in fact, be attributed to the negligence of the one rather than of the other? A. Yes. 6. Q. If so, to which? A. The defendant company. 7. Q. Assess the damage. A. (a) special, $2,000. (b) general, $5,000."

Upon these findings being delivered, it was contended at the trial that the appellants were entitled to judgment because the jury had found the respondent guilty of contributory negligence. The trial Judge, however, interpreted these findings to mean that, notwithstanding the respondent's negligence, the negligence of the appellants was the real cause of the accident, and he ordered judgment to be entered for the respondent.

In my opinion, the trial Judge was right in refusing to withdraw the case from the jury at the end of the plaintiff's case. At that period of the trial, the case was governed, and it is still so governed in this Court, by the rules laid down by Anglin, J., in *Grand Trunk Ry.* v. *Griffith* (1911), 45 Can. S.C.R. 380, at p. 399:—

" . . . Parliament has deemed it wise to enact that railway trains approaching highway crossings shall give certain signals not for the purpose of attracting the attention of those who are already on the alert and need no warning, but for the purpose of arousing those who are distracted or

whose attention is absorbed owing to whatever cause and who, therefore, need warning. Parliament has specified the particular signals which in its judgment are best fitted to serve this purpose. Where it is clearly proved that those signals have been omitted and that an accident, which the giving of them *might* have prevented, has occurred, it must, I think, always be within the province of a jury to say whether or not, having regard to all these circumstances, the breach of statutory duty should be taken to be the determining cause of the accident. The moment the decision is reached that the statutory signals, if given, might have prevented the accident and there is evidence of their omission, it is not proper for the trial Judge to withdraw the case from the jury, (unless, indeed, what is incontrovertibly contributory negligence is admitted or is so clearly proved in the plaintiff's own case that it would be proper to direct a jury to find it) and if, upon the case being submitted to them, the jury see fit to draw the inference that the omission of the signals was in fact the cause of the accident, it is not competent for an appellate court to disturb that conclusion."

The difficulty that confronts us now, however, lies in the fact that the jury have found three things: (1) negligence on the part of the defendants in the case, (2) contributory negligence on that part of the plaintiff, and (3) that the accident was, in fact, attributable to the negligence of the defendants. It is contended on behalf of the appellants that the question, (No. 5), which brought forth this third finding is an improper question, confusing to the jury, and that the real meaning to be taken from their verdict, read in the light of the evidence, is that the respondent's own negligence, which they describe, was such as to disentitle him from recovering judgment. On behalf of the respondent, it is contended that the questions were properly submitted, and that the meaning to be taken from the jury's answers is that the appellants' negligence was in the main the cause of the accident, and, such being the case, it is argued, they are liable to the respondent for the damages suffered.

The general rule of law is that a plaintiff's contributory negligence will disentitle him from recovering from the defendant. But it is not every act of negligence on his part which will come within the meaning of the rule. In so far, however, as I can understand the authorities, this negligence of the plaintiff does come within the rule and so operate to defeat his claim, when it cannot be shown that the defendants could by

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the exercise of ordinary care and caution have avoided the consequences of it.

G.T.R. Co. v. *McAlpine*, 13 D.L.R. 618, 16 C.R.C. 186, [1913] A.C. 838, 83 L.J. (P.C.) 44.

This reasoning which fastens the liability upon the defendant notwithstanding the plaintiff's contributory negligence, has been enunciated many times in different forms of language, but, in so far as actual decisions go, it seems to have been applied only in cases where the defendant had an opportunity, after the plaintiff's act of negligence, to prevent the accident happening and failed to do so. Thus it was in *Davies* v. *Mann* (1842), 10 M. & W. 546, 152 E.R. 588, 12 L.J. (Ex.) 10; *Tuff* v *Warman* (1858), 5 C.B. (N.S.) 573, 141 E.R. 231, 27 L.J. (C.P.) 322; *Radley* v. *London & N.W.R.* (1876), 1 App. Cas. 754, 46 L.J. (Ex.) 573, 25 W.R. 147. And so it was again in *B.C. Electric Co.* v. *Loach*, 23 D.L.R. 4, 20 C.R.C. 309, [1916] 1 A.C. 719, 85 (P.C.) 23, where two things which constituted negligence on the part of the defendants, a defective brake on a car and an excessive rate of speed,—although they existed prior to the happening of the plaintiff's negligence—became effective, after the danger had arisen through such negligence of the plaintiff, to prevent the motorman from stopping the car in time to avert the accident. But except in such cases of what has been called "ultimate" negligence, I cannot find that the reasoning applies. In the other cases, which seem to bear upon the subject, and where the defendant has been held liable, notwithstanding something done or omitted to be done by the plaintiff, it will be found upon examination that, in the opinion of the Court, this act or omission of the plaintiff's was not contributory negligence at all. So it was in *Doyle* v. *C.N.R.* (1918), 12 S.L.R. 216; (1919), 46 D.L.R. 135, 12 S.L.R. at 239, another level crossing case, where it was held that the failure of the defendants to give the statutory signals was the proximate cause of the accident, because the omission of the occupants of the buggy to keep a look-out at the crossing could not, under the circumstances of the case, be charged against them as contributory negligence, since they were entitled to assume that the whistle would be blown as required by law. And like wise in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, 27 W.R. 191, 39 L.T. 365, the question appears to have been whether or not the evidence for the plaintiff disclosed contributory negligence; if it did, the case ought to have been withdrawn from the jury. This was another case of a failure to whistle on the one side and a failure to look

out on the other. The majority of the House of Lords held that the conduct of the person killed was properly left to the consideration of the jury in order that they might determine whether or not it constituted contributory negligence. The minority held that the evidence, on its face, disclosed contributory negligence, and that the plaintiff ought to have been nonsuited. In that case, the duty to whistle was imposed upon the locomotive driver by rule of the company only and not by law, and it is of interest to note that Lord Hatherley, one of the dissentient Lords, said that he might have looked upon the case differently if the duty of whistling was a statutory duty, for, in that case, he said, the deceased might have depended upon that kind of warning only.

This leads me to a consideration of the decision in *Ottawa Electric R. Co.* v. *Booth* (1920), 60 D.L.R. 80, which was relied upon very strongly in the argument as authority for the course followed in the trial of this case and in support of the judgment entered for the respondent.

In the case at Bar question No. 5 is attacked as being inapplicable, and it is contended that the jury's answers to questions 3 and 4 should be taken in themselves as settling the real issue involved in favour of the appellant. On the other hand the respondent contends that this question 5, following after the previous questions, complies with the formula suggested by a statement of Duff, J., in the *Ottawa Electric* case, 60 D.L.R. 80. In this *Ottawa Electric* case the deceased alighted from a south-bound street car at a street corner and proceeded hurriedly to cross the street by passing around the back of the car with his head down. He was struck and killed by a north-bound car, which came along travelling at an excessive rate of speed and without sounding the gong as prescribed by the company's rules. The jury found that the defendants were guilty of negligence and that the deceased had committed no negligence which contributed to the accident; and judgment was entered against the company. On appeal it was contended, (1) that the verdict was against the evidence; (2) that the plaintiff's own case showed contributory negligence on the part of the deceased; (3) that the trial Judge should have directed the jury that if the deceased failed to look and listen before attempting to cross the street, such conduct would, in itself, constitute negligence, and (4), that the direction which he gave them, to the effect that the deceased's whole duty was to exercise whatever the jury might deem to be reasonable care having regard to all the circumstances, was a

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wrong direction. The appeal was dismissed on all these grounds, Davies, C.J., dissenting. Here again, it may be observed, we have the question, merely, of negligence on the one side and no contributory negligence on the other. The passage referred to from the judgment of Duff, J., 60 D.L.R. at p. 87 is as follows:—

"I am inclined to think that the concrete question on which the jury ought to have been asked to concentrate their attention was whether, if they found the issue of reckless want of precaution on the part of the victim in favour of the company, and the issues touching the ringing of the gong and the speed of the car in favour of the plaintiff, the real cause of the plaintiff's injury was the recklessness of the victim, or the negligence of the company in respect of speed and failure to give warning. Whether or not, in other words, notwithstanding the recklessness of the victim he would probably have been roused to attention if the motorman had exercised proper prudence in respect of speed and given due warning by sounding the gong."

This statement is quoted as authority for introducing into a case such as the *Ottawa Electric* case and the case at Bar, an inquiry which would extend beyond a finding of contributory negligence on the part of the plaintiff. In my humble opinion, such an inquiry does not lie in cases such as these but is appropriate only, as I have already said, in cases where there is evidence of the failure of the defendant to make use of an opportunity, afforded him by the circumstances, to avoid the consequences of the plaintiff's contributory negligence, as in *Tuff* v. *Warman, supra*, and *B.C. Electric Co.* v. *Loach, supra*. If I may be permitted to place an interpretation upon this statement of Duff, J. I would say, with all deference, that it is nothing more than a declaration that conduct which might, in some circumstances, appear reckless on the part of a plaintiff may, in other circumstances, on account of something done or omitted to be done by the defendant, not amount to contributory negligence at all so as to defeat the plaintiff's claim; and that we are still where we were after the decision in *Doyle* v. *C.N.R., supra*. If this statement goes further, it was not, in my opinion, necessary to the determination of the questions involved in the case in which it was pronounced. My opinion in this matter is strengthened by the following passage from the judgment of Anglin, J. in the same case, 60 D.L.R. at p. 90:—

"Whether the deceased was or was not negligent under the circumstances is eminently a question for the jury. While, if

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trying the case upon the printed evidence now before us, I should strongly incline to think that contributory negligence had been established and should probably on that ground have dismissed the action, I am not prepared to hold that on the undisputed facts contributory negligence of the deceased is so clear that no reasonable jury could refuse to find it proven."

This makes it clear to me that in the *Ottawa Electric* case, as in the case at Bar, primary negligence only having been established against the defendants, and no question of "ultimate" negligence on their part arising, the inquiry by the jury should not have extended further than to ascertain whether or not there was contributory negligence on the part of the plaintiff.

In my opinion, therefore, the questions submitted to the jury in this case were not properly founded upon the evidence and the judgment entered thereupon in favour of the respondent cannot be allowed to stand.

The next question is whether there should be judgment for the appellants or a new trial. As I have already said, the case was properly one for the jury, and they should have been asked, by appropriate questions, to determine whether, in the event of it appearing to them that the appellants failed to perform their statutory duty of whistling and ringing the bell, the conduct of the plaintiff under those circumstances was reasonably careful. The case was not left to them in that manner.

It is contended on behalf of the appellants that we should deal with the matter as if question No. 5 had not been put, and order judgment to be entered for the appellants on questions 1—2—3 and 4. If these four questions stood alone, they would, no doubt, if the view of the law which I have expressed in this judgment is sound, have necessarily to result in a judgment for the appellants. But they do not stand alone. When I examine all these questions and answers in the light of the Judge's charge, I cannot help feeling that questions 3 and 4 and the answers given to them may not have had, in the minds of the jury, the same significance that they would have had if the trial Judge had not, in his charge devoted himself to the elaboration of a theory around question 5. The portions of the charge to which I refer are too lengthy to cite here, but they will be found in the appeal book from pp. 194 to 205 and particularly from line 20 on p. 204 to the end of p. 205. I think, therefore, that the ends of justice in this case demand a new trial.

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The appeal should be allowed, with costs, and a new trial ordered.

MCKAY, J.A. concurred with TURGEON, J.A.

New trial ordered.

HARRIS v. GARSON.

New Brunswick Supreme Court Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. April 22, 1921.

JUDGMENT (§IVB—230)—JUDGMENT OF OTHER PROVINCE—ACTION ON—DEFENDANT SUCCESSFUL—COSTS OF FOREIGN JUDGMENT GIVEN AGAINST HIM—APPEAL—REVERSAL.

When a defendant, being sued in the Province of New Brunswick on a foreign judgment, defends the suit upon the merits and succeeds, he is not liable for the costs of the foreign suit and judgment cannot be entered against him for such costs. The foreign judgment being for an amount with costs of suit the two sums together make the amount of the judgment.

[*Star Kidney Pad Co.* v. *McCarthy* (1886), 26 N.B.R. 107, referred to; *Russell* v. *Smyth* (1842), 9 M. & W. 810, 52 E.R. 343, followed.]

APPEAL by defendant from the judgment at the trial of an action on a foreign judgment, wherein judgment was signed against him for the amount of the costs of the foreign judgment although he was successful in defending the action. Reversed.

D. Mullin, K.C., for appellant; *W. B. Wallace*, K.C., for respondent.

The judgment of the Court was delivered by

MCKEOWN, C.J., K.B.D.:—The respondent in this suit brought action against the appellant in the Supreme Court of Ontario claiming damage for a breach of contract on the part of appellant. A writ of summons therein, issued out of said Court on May 23, 1918, was left with a clerk in appellant's employ at his place of business in Montreal. The said writ subsequently came into the possession of the appellant Garson by whom it was sent to a firm of solicitors in Toronto. An appearance was entered and a statement of defence filed, but no further attention was paid to the suit, and it came to trial as an undefended action on October, 1919, whereupon it was adjudged by the Court that respondent recover against the appellant the sum of $2,320.60 and costs of suit to be taxed. It further appears that on December 23, 1919, such costs were taxed at the sum of $269.50.

It is admitted that the appellant did not carry on business in the Province of Ontario, nor did he reside therein at the time the above mentioned action was brought, nor at any time during its continuance. The appellant Garson is a resident

of the Province of New Brunswick and carries on business therein, as well as at Montreal, in the Province of Quebec. On July 7, 1919, the respondent caused a writ of summons to be issued out of the Supreme Court of this Province claiming to recover against appellant as defendant the sum of $2,320.60, being the amount of said judgment so recovered in the Supreme Court of Ontario as aforesaid, and a further sum for the costs of said action alleged to have been taxed and allowed at the sum of $400 as well as costs of execution and other expenses to the amount of $100 and costs of suit.

To this claim appellant in the first place denied that respondent had commenced an action against him in the Supreme Court of Ontario or at any other place, and further denied the existence of a judgment in said action for the sum of $2,320.60 and costs, and that any costs at all were ever taxed or allowed or incurred as alleged.

It may be stated here that in addition to a denial of liability, appellant put on the record a counterclaim in this suit, to which a reply was filed, but no evidence was submitted in support thereof and no further consideration need be given to it. After appellant had pleaded the defences above indicated, he made application to Barry, J., who, by order dated December 11, 1919, permitted the defence above stated to be struck out, and an amended statement of defence to be substituted therefor, the first three paragraphs of which read as follows:—

"1. The alleged judgment mentioned in the statement of claim is a foreign judgment and the defendant was not personally served with the first process in the suit within the jurisdiction of the Supreme Court of Ontario in which Court said judgment was obtained. 2. That the said defendant was not residing or domiciled nor within the jurisdiction of the said Court either at the time the contract was made or at the time the suit was commenced, or at any time thereafter. 3. That the said alleged judgment was obtained for an alleged breach on the part of the defendant of a written contract dated the sixteenth day of November, 1917, it having been claimed on the part of the plaintiff that defendant agreed with the plaintiff to purchase 35 tons of brass turnings at 17c per pound, same to be loaded on cars at London, f.o.b. London, and the defendant to attend at London to check the loading, and to pay one half the purchase price in cash, and to deliver a note at thirty days for the balance, without interest."

In addition to the above quoted portion of such amended defence, further paragraphs were allowed setting out a merit-

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orious defence to the action, and denying that respondent had suffered any loss or was entitled to recover anything against appellant for the alleged breach. A reply to such amended defence was duly put in and the cause was tried at the March sitting of the St. John Circuit Court 1920, with a jury, before Chandler, J. At such trial, respondent put in evidence certain documents in proof of the judgment so obtained by her in the Supreme Court of Ontario, and appellant, pursuant to his pleas, defended the action upon its merits, availing himself of the provisions of ch. 137 of the C.S.N.B. 1903, which reads as follows:—

"In any action now pending or hereafter to be instituted in any Court in this Province on a foreign judgment, where the defendant was not personally served with the original process or first proceeding in the suit, within the jurisdiction of the Court where the said judgment may be obtained, it shall be competent for the defendant to enter into the subject matter of such foreign judgment and to avail himself of any matter of law or fact which would have been available as a defence, had the action on which such judgment was had and obtained been originally brought and prosecuted in any of the Courts of this Province, provided always, that such defence be pleaded or notice thereof be given in like manner as is required by the course and practice of the Court in which the action is brought, any law, usage or custom to the contrary notwithstanding."

Respondent's claim (as plaintiff) in the action brought by her in the Supreme Court of Ontario, was that she had suffered damage by reason of appellant's breach of a written contract by which he bound himself to purchase from her a number of tons of fuse and socket turnings at 17 cents per pound. It was admitted that appellant did not, for reasons unnecessary to be set out here, carry out his part of the bargain, whereupon respondent, after notice, sold the goods against appellant's account and claimed a loss thereby, which alleged loss was put forward as the measure of the damages she suffered by respondent's breach of such contract. It is apparent that the Ontario judgment is based upon the assumption that such contention is true, but respondent was unable to establish it at the St. John Circuit.

At the conclusion of the evidence the Judge submitted a single question to the jury as follows:—"What was the market price per pound of fuse and socket turnings on the 27th day of December, 1917?" To this the jury replied—"17 cents per pound." Other questions were submitted by counsel, but the

jury made answer only to the one so put by the Judge, and the result of their answer was such that, as remarked by the trial Judge, "respondent" sustained no loss and is, therefore, entitled to recover nothing on that head"—that is to say, on the head of damages claimed for the breach of contract. But the Judge considered that there was an obligation on appellant under the judgment obtained in Ontario to pay the sum of $269.50 costs of suit and entered a verdict against him for such amount. This appeal is taken from that decision, the claim of appellant being that, as respondent was entitled to recover no damages in the suit, costs therein should not be allowed.

Before considering this contention, it is well, I think, to give attention to certain other matters which were argued before the Court. In the first place, it was objected on behalf of appellant that the judgment relied upon by respondent was not properly proven. In proof thereof, respondent put in evidence the following documents:—

"In the Supreme Court of Ontario.

The Honourable Mr. Justice Lennox.

Monday, the seventh day of October, 1918.

Between Harris & Co., plaintiffs, and H. J. Garson & Co., defendants.

This action coming on for trial this day at the Sittings of this Court, held at London, without a jury, in the presence of counsel for the plaintiffs, no one appearing for the defendants, and having heard the evidence on behalf of the plaintiffs this Court doth order and adjudge.

That the plaintiffs do recover against the defendants the sum of $2,320.60.

This Court doth further order and adjudge that the defendants do pay to the plaintiffs the costs of this action forthwith after taxation.

(Signed) H. S. Blackburn, Depy. Regr. Mddx.

Entered Oct. 8, 1919. H. S. Blackburn, Depy. Regr. Mddx."

(Certificate of Official Document)

"DOMINION OF CANADA.

Province of Ontario)
To wit)

I, Henry S. Blackburn, of the City of London in the County of Middlesex, Deputy Registrar of the Supreme Court of Ontario at London

Do hereby certify that the annexed paper writing each page of which is stamped with my seal as identifying the same, contains a true copy of a judgment in a certain action pending in said court at London wherein

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That I have carefully compared the said transcript with the original judgment in my said office, that it is a true transcript thereof and that I am the officer authorized to give this certificate.

(Seal) In witness whereof I have hereunto set my hand and seal of office this twenty-seventh day of November A. D. 1919

H. S. Blackburn
Depr. Regr. Mddx."

In the Supreme Court of Ontario.

Harris & Co., plaintiffs, and H. J. Garson & Co., defendants.

(Seal) I certify that pursuant to judgment dated 7th October 1918 and order dated 9th November 1918, I have taxed the costs of the plaintiffs at $269.50.

Dated at Osgoode Hall
Dec. 23rd, 1919. J. T. MacGillivray
Taxing Officer."

Each of the latter two of the above quoted documents has a seal attached. To that signed by the Deputy Registrar there is a red seal bearing the words "Deputy Registrar Middlesex" and other words illegible, and a crown is impressed. To the certificate of costs above set out is also attached a red seal bearing a faint impression wholly undecipherable.

Now the provision for proof of foreign judgments is found in sec. 58 of ch. 127 C.S.N.B. (1903) (Evidence Act) which, as far as need be quoted, reads as follows:—

"If the document sought to be proved be a judgment, decree, order or other judicial proceeding of any British, foreign, Canadian or Colonial Court, or an affidavit pleading or other legal document filed or deposited in any such court, the authenticated copy to be admissable in evidence must purport either to be sealed with the seal of the said British, foreign, Canadian or Colonial Court in which the original document is filed or deposited, or, in the event, of such Court having no seal to be signed by the Judge or if there be more than one Judge, by any of the judges of the said Court, and such Judge shall attach to his signature a statement in writing on the said copy that the Court whereof he is a judge has no seal."

From the stenographer's report it appears that the trial Judge had very grave doubt about the admissibility of the documents submitted in proof of respondent's judgment. On objection by Mr. Mullin the Judge of the Court below said, referring to the certificate of judgment offered:—

"I have very great doubt about it, but I do not like to shut it out if you offer it, Mr. Wallace. It does not appear to be the seal of any Court. I will not rule it out, and if it is not sufficient, you will have to take the consequences. I do not rule absolutely that it is not a compliance with the statute. I am willing to allow it subject to objection and Mr. Mullin will have the benefit of the objection."

I think it is very clear from an examination of the papers themselves, and by reference to the above, in part, quoted section of the Evidence Act, that the requirements of such Act have not been fulfilled in any degree. There is no Court seal attached to any of the papers put in evidence, neither is there any certificate of a Judge that the Court has no seal. In my view, the documents were improperly admitted.

But the respondent claims that even if the judgment upon which she relies was not properly proved, it is not open to appellant to urge such objection, because in his statement of defence he does not deny such judgment, and must, therefore, be taken to admit its existence. Considerable argument was addressed to the Court upon this point, and having examined the statement of defence, I think appellant has not put the judgment in issue at all.

Order 19 of our rules of pleading contains general provisions concerning the contents of statements of claim and defence. In R. 4 of the above mentioned order, it is stated that—

"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, etc." and R. 13 of the same order further says:—

"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 an infant, lunatic, or person of unsound mind not so found by inquisition."

Now the appellant's pleas, as far as they touch the question of the existence or non-existence of the judgment in the Supreme Court of Ontario, are hereinbefore set out. The first three paragraphs of his amended statement of defence specifically mention the Ontario suit and judgment, and, while speaking of the latter as an "alleged" judgment, they neither deny its existence nor is it said in any of them that the judgment is not admitted.

The aim of these rules is, that each party in turn should fully

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admit, or clearly deny, every material allegation made against him so that an issue may be promptly arrived at. Questions may, and do, arise as to the sufficiency of admissions and as to the denial by implication, of allegations of fact, but it is clearly established that a party pleading must make perfectly plain how much he disputes and how much he admits, and he cannot be taken to dispute anything concerning which he remains silent. See notes to R. 13 O. 19, White Book, 1920, at p. 347.

In this case appellant was allowed to strike out pleas which squarely denied the existence of the Ontario judgment and to substitute those now upon the record, his object being, I presume, to bring his pleading into line with the defences set up in the suit of the *Star Kidney Pad Co.* v. *McCarthy* (1886), 26 N.B.R. 107. In the judgment of Allen, C.J. in that case at p. 110 it is stated:—

"The defendant pleaded, that the alleged judgment was a foreign judgment, and that he was not personally served with the first process in the suit within the jurisdiction of the Court where the said judgment was obtained; that the contract on which the judgment was obtained was not made within the jurisdiction of the said Court; and that he (defendant) was not residing or domiciled, nor within the jurisdiction of the said Court either at the time . . . the suit was commenced or at any time thereafter; and that he never was indebted to the plaintiffs in the claim on which the alleged judgment was obtained.

I will take occasion to refer to this judgment a little later, but having regard now to this matter of pleading, it is to be noticed that, in the case just referred to, plaintiffs demurred to defendants' pleas. The demurrer admitted all the statements of fact made in the pleas, and the case was argued and decided wholly upon the binding effect of a foreign judgment under pleadings similar to those in the present suit as above quoted. But in the *McCarthy* case the admission of all the facts alleged in defendant's pleas did not raise an issue as to the existence of the foreign judgment, and it would seem to me, therefore, that it must be similarly held in this case, that the existence of the Ontario judgment is not called in question by the defendant's pleading in its present form. Having arrived at this conclusion, it, therefore, becomes necessary to consider the propriety of entering judgment in respondent's favor for the taxed costs of the Ontario judgment, under the circumstances which are disclosed in the present case.

Although at the trial at the St. John Circuit, appellant succeeded on the merits of his suit, thereby defeating the respondents' claim as far as it is represented by the amount of damages recovered in the Ontario Court, yet a verdict was entered against appellant for the costs of such foreign suit. I do not think it necessary to enlarge upon the rights of a plaintiff under a foreign judgment when he seeks to enforce the same before the Courts of this Province. There is no uncertainty as to plaintiff's right to bring suit upon a foreign judgment, nor as to the right of a defendant to fully answer plaintiff's claim, whether he challenge the foreign judgment or the original cause of action. This is fully settled by the case of the *Star Kidney Pad Co.* v. *McCarthy* above cited.

The question here raised is:—When a defendant, being sued within this Province on a foreign judgment, defends the suit upon the merits and succeeds, is he, nevertheless, liable for the costs of the foreign suit and should judgment be entered against him, for the costs of the action in such foreign Court?

With the utmost respect for the view expressed by the trial Judge, I do not think that the verdict against the appellant for such costs can be sustained. When a verdict is obtained against a defendant for any amount with costs of suit, the two sums, viz.: the amount of damages and the amount of taxed costs, together make the amount of the judgment. Reference has been made to the documents put in evidence by respondent in proof of her judgment. Looking at them for a moment, it will be seen that respondent's verdict in the Ontario Court was for the sum of $2,320.60 with costs to be taxed, and that such costs were later taxed at $269.50. I have already concluded that for the reasons above set out these documents are not sufficient proof of a judgment, but dealing with the phase of the question now before me, it seems to me that they simply show two separate amounts, which when added, comprise the sum total of appellant's liability under the decision of the Supreme Court of Ontario, and for which total, judgment could there be signed. The judgment in the Ontario Court, in my opinion, would be for the sum of $2,590.10, the taxed costs being added to the amount of damages assessed, and judgment entered for the entire sum. But the costs are simply accessory to the judgment. They were originally, and are yet, in the nature of a penalty enforced against an unsuccessful litigant. Their existence presupposes that the party in whose favour they are taxed has succeeded in his action. If he does not succeed, he is not only not entitled to receive costs, but he must pay them. In other words,

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in my opinion a judgment cannot be separated into damages and costs, and payment of the costs enforced when the verdict for damages is not sustained. When a plaintiff sues in this Province upon a judgment of a foreign Court, he cannot, in my view, sever such judgment into damages and costs of suit. To such judgment so sued upon, the costs are merely incidental, and when he fails in the merits of his case, his claim for costs must disappear as well. The trial Judge when entering verdict made reference to Piggott on Foreign Judgments, 2nd ed. At pp. 206, 207 of that work it is said:—

"If the foreign court by its judgment has awarded costs to the successful party, they also become an integral part of that judgment to enforce which the action is brought in the English courts and as such cannot be recovered," citing *Russell* v. *Smyth* (1842), 9 M. and W. 810, 152 E.R. 343, as authority for the course pursued.

In that case, a decree for divorce had been entered against a defendant in Scotland with costs, and the defendant being in England was sued for the amount of the costs taxed by the Scottish Court. It was held that such amount was recoverable, but it will be noticed that the decree still stood unchallenged and the judgment for costs would, consequently, stand with the decree. If the respondent's verdict in Ontario had been reaffirmed here in whole or in any substantial part, his costs as "an integral part of the foreign debt" would have stood as well, and the case drawn to the Judge's attention would have been authority for such procedure.

Costs are provided for by statute. There were no costs obtainable or payable at common law, but, as stated in Bacon's Abridgment under the title "Costs" it is said at p. 288 vol. II.:—

"It being thought exceeding hard that the plaintiff for the costs which he was out of pocket in obtaining his right could not have any amends, by the Statute of Gloucester . . . . . it is provided that demandant may recover . . . the costs of his writ together with his damage, and that this act shall hold place in all cases where the party is to recover damage."

Further statutes extended such right to the defendant when successful, and to almost all forms of action, but they were still considered in the nature of a penalty either against an unsuccessful plaintiff or against an unsuccessful defendant. See cases cited in Bac. Ab. under "Costs." Discussing "Costs, how assessed or taxed," Bac. Ab. at p. 332 Vol. II it is said:—

"After the making of the statutes that introduced costs, it was agreed on as a rule that the jury should tax the damages a-

part, and the costs apart, that so it might appear to the court that the costs were not considered in the damages. And when it was evident that the costs taxed by the jury were too little to answer the costs of the suit, plaintiff prayed that the officer might tax the costs and that was inserted in the judgment, and therefore said to be done *ex assensu* of the plaintiff, because at his prayer."

In speaking further upon the method of taxation and assessment, the author refers to the case of an action brought jointly by a baron and *feme* and a verdict obtained, but concerning which the Baron "only expended and disbursed the money for the costs of the suit", and he says " the baron and *feme* shall recover the costs, for there cannot be one judgment for the costs and another for the damages."

I think that where action is brought upon a foreign judgment, which represents the damages accruing to a successful plaintiff together with a certain sum which the defendant is penalized because of the wrong position he has taken in connection with the matter under dispute, such taxed costs must follow the event and share the hazard of the claim to which they attach when such claim is put to the test in our own Court. If the claim be sustained, they stand on the strength of the plaintiff's position. If the plaintiff be ultimately unsuccessful, they must disappear with the disallowance of plaintiff's claim.

No decisions directly in point were cited to us at the argument, but cases are not lacking to show that in an action upon a foreign judgment, no distinction is made between the amount of damages and costs of which such judgment is made up. The case of *Gavin, Gibson & Co. Ltd.* v. *Gibson,* [1913] 3 K.B. 379, was a claim to recover £2,775, 13s. 5d. being the amount of a final judgment recovered by plaintiffs against a defendant in the Supreme Court of Victoria, Australia. The action was brought in London, England, and tried before Atkin, J. without a jury. In his judgment, at p. 383, 384, of the report, he says:—

"The writ was served upon the defendant in London on November 21, 1911; the defendant did not appear to the writ in Melbourne, and on March 9, 1912, after the expiration of the time limited by the writ for appearance, the plaintiffs by leave of a judge of the Supreme Court of Victoria signed judgment against the defendant for £2732. 0s. 9d. and costs to be taxed, which costs were afterwards taxed and allowed at the sum of £27 12s. 8d. making a total sum of £2755 13s. 5d. For this the plaintiffs sued the defendant in this action by writ

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dated April 26, 1912, claiming the said sum as being due on the foreign judgment recovered in the Supreme Court of Victoria."

After discussing various defences which were held to be good, the verdict was entered by the Judge for the defendant and he was awarded his costs of suit.

It is evident that if the procedure followed in the case now on appeal before us be correct, the plaintiffs in the case just cited, should have had their costs of the foreign judgment. In all material particulars the cases are identical. But no contention that plaintiffs were entitled to the costs of their foreign judgment was raised or considered in the English case. It was taken for granted there, and I think we will have to decide here that the costs could not be considered as a claim separate from the damages to which they attached. In my view, this appeal must be allowed and a verdict entered for the appellant with costs.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. June 6, 1922.

MONEY IN COURT (§I—1)—MONEY PAID IN WITHOUT AUTHORITY—REFUSAL TO ACCEPT IN SETTLEMENT OF CLAIM—PROPERTY IN MONEY—JUDGMENT CREDITOR OF PERSON REFUSING TO ACCEPT—RIGHT TO CHARGING ORDER ON SUM PAID IN.

Money paid into Court without authority to the Registrar who has no authority to receive it is in the same position as if it had been paid to a trustee of the person paying it, and if the person to whom it is intended to be paid in settlement of his claim, refuses to accept it on the conditions offered, it remains the property of the person paying it in, and is not subject to a charging order at the instance of a judgment creditor of the person who has refused to accept it in settlement of his claim.

APPEAL from an order of a County Court directing payment out of certain monies paid into Court. Reversed.

F. C. Elliott, for appellant; *D. S. Tait*, for respondent.

MACDONALD, C.J.A.:—This is an appeal from an order of the County Court directing payment out of monies paid into Court in the action of *Safety Storage & Warehousing Co.*, v. *Lanchick*. The plaintiff in that action is a judgment creditor of the defendant Lanchick.

The facts are shortly as follows:—Lanchick was employed to repair a van of the storage company. The storage company refused to pay amount demanded for repairing the van and Lanchick took the van from the storage company and held it under an alleged lien for the work done on it. He had no right

to do this, but that is not in question here. The storage company commenced a replevin action against him and having tendered him the sum of $61 which together with the $10 which had been paid on account of the work, the storage company thought sufficient to satisfy Lanchick's claim, and brought this sum into Court. Lanchik declined to accept the sum and the action proceeded to trial. In that action, the plaintiffs, the storage company claimed damages for illegal detention and were awarded $175 therefor. The defendant, Lanchick, counterclaimed for his said charges and was awarded $125 therefor. After all set-offs had been made, a balance was found in favour of the plaintiff.

The money was not paid into Court in strict accordance with the rules contained in Order 6 of the County Court Rules. The proper course for the plaintiffs to have pursued was to have paid into Court the whole amount for which the lien was claimed with costs, whereupon the van would be ordered to be delivered up and the money in Court would stand in its place. *Gebruder Naff* v. *Ploton* (1890), 25 Q.B.D. 13, 59 L.J. (Q.B.) 371, 38 W.R. 566, or if they wished to proceed in the way they did, by replevin, to wait until the counterclaim was set up and bring into Court with the defence to the counterclaim the sum which they thought sufficient to satisfy the defendant's counterclaim. What they did was to pay the money in with their plaint which was out of accord with the rules.

If we ignore the irregularity and treat it as paid in under O. 6, R. 4 (1), then it is money paid in under that rule *without denial of liability*, the plaintiff not having denied liability to the extent of the money paid in. But, notwithstanding non-denial of liability, the plaintiffs were entitled to the notice specified by O. 6, R. 5 (1). Such notice was not given, nor was there any acceptance of the money, in fact made by the defendant. The defendant might have accepted it at any time prior to the trial but he did not in fact do so.

So that if the payment in is to be treated as payment in pursuance of O. 6, R. 4, (1), while it would be an admission *pro tanto* of the claim, yet the mere fact of payment into Court would not of itself operate to change the property in the money from the plaintiffs to the defendant. It would require the act of the defendant to do this, which, admittedly, he has never done.

There was a charging order made before the case came to trial but this could not operate to change the property in the money and the plaintiff in this action, King, must rely entirely on the order for payment out which was made after the trial in

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the replevin action and after the rights of the parties in that action had been fully adjusted by set-off.

But it was contended that the payment into Court not having been regularly made, is not subject to the protection of O. 6. Assuming this to be so, then the money was paid in without authority, to the Registrar, who had no authority to receive it. It was as if it had been paid to a trustee or agent of the storage company with instructions to him to pay it to the defendant, if the defendant chose to accept it on the conditions offered, but, until acceptance, the money would remain the property of the storage company. It appears to me that treated in this way there has been no passing of the property in the money to the defendant any more than in the case first cited, and hence Lanchick's creditor could have no higher right to the money than he himself had. On either assumption therefore, the money remained the money of the storage company and never became that of the defendant. It was, therefore, not subject to any order such as the one complained of.

The cases to which we were referred do not assist the plaintiff King. In *Townend* v. *Jones* (1889), 5 Times L.R. 609, the point was as to the jurisdiction of the Registrar to make a charging order. Incidentally, it was said that a charging order may be got against money in Court when the plaintiff *has accepted it* in satisfaction of his claim, but the point here is that defendant did not accept the money. *Stumore* v. *Campbell*, [1892] 1 Q.B. 314, 61 L.J. (Q.B.) 463, 40 W.R. 101 decides that monies paid to a solicitor for a purpose which has failed remain the client's monies, notwithstanding that the solicitor could counterclaim against the client for a bill of costs, if the client should sue for the return of the money. It is merely authority for this, that if the money in Court were, in fact, the money of Lanchick, that is, if he had accepted it, thereby changing the property in it from the storage company to himself, the fact that the storage company had a counterclaim would not prevent the judgment creditors reaching it by lawful process.

It was argued that by the course pursued the plaintiff King was prevented from attaching in garnishing proceedings this money, namely, the debt owing by the storage company to the defendant. Whether or not this be so, does not appear to me to be relevant to the issue involved in this appeal.

I would therefore allow the appeal.

MARTIN, J.A.:—I agree that this appeal should be allowed.

GALLIHER, J.A.:—I think the appeal should be allowed.

The monies in Court here were paid in for a special purpose

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which failed, owing to their non-acceptance by the defendant Lanchick. They, therefore, never became his monies and had they been put in the hands of a stakeholder on failure of the purpose would have been returned to the plaintiff. That they were paid into Court does not, I think, alter the position if we can consider that no property in the monies passed to Lanchick as if so, there were no monies of his in Court to which a charging order could attach even if the County Court Judge had the power to make such order.

McPHILLIPS, J.A. (dissenting):—In my opinion, his Honour Judge Lampman arrived at the right conclusion. I have no doubt that there is jurisdiction in the County Court, as there is in the Supreme Court, (and if it is an unprovided case, the practice in the Supreme Court will prevail—secs. 22, 27 and 41 of the County Courts Act, R.S.B.C., 1911 ch. 53, sec. 2, (7). Laws Declaratory Act, R.S.B.C. 1911, ch. 133) to make a charging order on cash in Court payable to the judgment debtor which is the present case. If authority is needed, I would refer to the following cases: *Watts* v. *Jefferyes* (1851), 3 Mac. & G. 422, 42 E.R. 324. *Brereton* v. *Edwards* (1888), 21 Q.B.D. 488; Esher, M.R. at p. 494, Lindley, L.J. at p. 497 (also reported 37 W.R. 47, 60 L.T. 5.).

No point can effectively be made that sec. 22 and 27 of the County Courts Act, have relation only to "cause or matter pending"—See *Salt* v. *Cooper* (1880), 16 Ch. D. 544, 50 L.J. (Ch.) 529, 29 W.R. 553; sec. 24 (7) of the Judicature Act 1873, (Imp.) ch. 66, is similar to sec. 2, (7) of the Laws Declaratory Act, R.S.B.C. 1911 ch. 133.

The practice with regard to the appointment of receivers and the making of charging orders is in the main, gathered from what was the prevailing practice in the Court of Chancery, and we have the express aidance as well of the statutory power as conferred by sec. 13, of the Execution Act, R.S.B.C. 1911, ch. 79; also see O. 46,—Rules of the Supreme Court, Charging Orders, (see Execution Act). The authorities shew that under the statutes or by virtue of the ordinary jurisdiction of the Court of Chancery, there was always power to make an order charging cash, and this could be done by an order made in one division as against money in another division, i.e., in the Queen's Bench Division upon cash standing to the credit of the debtor in the Chancery Division—*Brereton* v. *Edwards*, 21 Q.B.D. 488, was a case of that kind. Lord Esher, M.R., in the *Brereton* case said at pp. 493, 494,

"In the present case the execution creditors had obtained a

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judgment against the execution debtor in the Queen's Bench Division, and they applied to Field, J., in chambers for a charging order upon money which was standing to the debtor's credit, in the name of the Paymaster-General in an action in the Chancery Division, in order to assist the creditors in obtaining the fruits of their judgment out of that money. If the money had been in the debtor's own drawer it is clear that, by virtue of sec. 12 of 1—2 Vict. ch. 110, the sheriff could have seized it under the fi. fa. Then arises the question, whether the Chancery Division will by any, and, if so, by what, process, assist a creditor, who has obtained a judgment in the Queen's Bench Division, to obtain the fruits of his judgment out of money standing to the credit of the debtor in an action in the Chancery Division?

The case of *Watts* v. *Jefferyes* 3 Mac. & G. 422, seems to me to shew that the Court of Chancery would formerly have given assistance of that kind to a judgment creditor. In that case a cheque, drawn by the Accountant-General of the Court of Chancery in favour of the debtor, was in the hands of the Accountant-General. If the cheque had not been in the hands of the officer of the Court, the sheriff could, by virtue of sec. 12, have seized it under the fi. fa., and Lord Truro, L.C., held that the Court ought to allow the sheriff to seize the cheque, which must be considered as belonging to the judgment debtor, on the principle that, when the Court had in its possession a thing which would otherwise have been liable to seizure under a fi. fa., the Court ought to assist the creditor to obtain the fruits of his judgment by means of it. It appears to me that the same principle applies to money in the hands of the Paymaster-General under the control of the Chancery Division. When the Court of Chancery and the Courts of Common Law were distinct Courts it appears that the Court of Chancery would have given this assistance to the process of a Common Law Court. The Judicature Act has made all the judges of the High Court judges of all of the Divisions; they are all now parts of one and the same Court. It seems to me, therefore, that Field, J., stood in the same position as if he had been a judge of the Chancery Division, and that he was entitled to make the charging order to assist the creditor in realising his judgment.

Then arises the question, in what form ought Field J., to have made the order? Was he bound to go through the ceremony of appointing a receiver, or was he entitled to make a charging order directly in favour of the creditor? Was he bound to make an order that the sheriff should apply to the Chancery

Division? In my opinion, both those steps would have been a mere waste of time and money. I think the judge had jurisdiction to make the charging order at once."

And Lindley, L.J., 21 Q.B.D. at pp. 496, 497, said:—

"I am of the same opinion. The question is whether the charging order nisi can be maintained, and, if so, what is the effect of it. Both these points are important.

The first question is, whether there is any mode of procedure by which a judgment creditor can obtain a charge upon cash standing to the credit of the judgment debtor in the Chancery Division. Reliance was placed upon sec. 14 of 1-2 Vict. ch. 110, and sec. 1 of 3-4 Vict. ch. 82, but those sections are confined to stock and shares and the dividends and interest of stock and shares; they do not apply to cash generally. Is there any other method by which a judgment creditor can obtain a charge upon cash belonging to the judgment debtor. The law upon the point is somewhat peculiar. Before the Act, 1-2 Vict. ch. 110, the sheriff could not under a writ of fi. fa. seize either cash or cheques belonging to the execution debtor, but by sec. 12 of that Act power was given to the sheriff to seize both cash and cheques. In *Watts* v. *Jefferyes*, Lord Truro, L.C., acting, not under the Act, but by analogy to it, held that the Court of Chancery ought not to prevent the sheriff from seizing under a fi. fa. a cheque which the Accountant-General of the Court had drawn in favour of the judgment debtor, and which was then in the Accountant-General's hands. That case goes a very long way, for it shews that, when there was property of a judgment debtor which could be seized under a fi. fa., that property could be reached by the judgment creditor, although it was in the custody of the Court of Chancery. After consulting our colleagues in the other division of this Court, we think that there is no reason in principle why cash standing to the credit of a judgment debtor in the Chancery Division should not be handed over to his judgment creditor, there being no authority or practice to the contrary. I think, therefore, that the order of Field, J., was right in substance, though it could not be made under the statutory power under which it purports to have been made. I doubt whether he would have made the order if he had not thought that he was acting under the authority of the statute; but it cannot be said that he had no jurisdiction to make it."

The judgment of Bowen, L.J., is most comprehensive in its terms, and it would seem to effectively, meet all the arguments advanced by the counsel for the appellant. At pp. 498—500, Bowen, L.J., said:

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C.A.

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"I think the broad principle of law which we are now deciding is this—that any judge of the High Court has power, at the instance of a judgment creditor, to make an effectual order charging the judgment debt upon a sum of money standing to the credit of the judgment debtor in the name of the Paymaster-General in an action in the Chancery Division. I think that this follows as the true effect of the Act 1—2 Vict. ch. 110, which is a most important step in the history of our law. One object of that Act was to 'abolish arrest on mesne process in civil actions, except in certain cases, and to extend the remedies of creditors against the property of debtors.' At the time when that Act was passed nothing could be taken in execution by the sheriff under a fi. fa. which could not be sold; such things as cheques and money could not be taken. But sec. 12 of the Act empowered the sheriff to seize money, bank notes, cheques, and many other things, belonging to the judgment debtor. By sec. 14 a further attempt was made to follow the property of a judgment debtor. It enabled the Courts of common law to make a charging order upon property which could not be taken under the writ, and to which sec. 12 did not apply. The Act 3-4 Vict. ch. 82, by sec. 1, carried the provisions of sec. 14 still further. But still a considerable amount of imperfection was left in the remedy of an execution creditor. On the one hand, a Court of Common Law could not make an order charging cash belonging to the judgment debtor which was in the hands of a Court of Equity, or, indeed, charging any cash at all. In *Robinson* v. *Peace,* (1838), 7 Dowl. 93, it was held that money deposited by a company in the hands of a third party for the use of the defendant, against whom judgment had been recovered by the plaintiff, could not be charged under sec. 14 of 1-2 Vict. ch. 110, or seized under sec. 12. On the other hand, a Court of Equity could not avail itself of sec. 14 to make a charging order under the statute. What, then, did the Act 1-2 Vict. ch. 110, enable a Court of Equity to do? Section 12 made cheques and money available for execution, and, by analogy, it enabled a Court of Equity to assist a judgment creditor, by means of equitable execution against money belonging to him in its own hands. *Watts* v. *Jefferyes,* 3 Mac. & G. 422, 42 E.R. 324, shews that a Court of Equity would aid a judgment creditor in that way. But still this difficulty remained, that a Common Law Court could not make an order charging cash in the hands of the Court of Chancery. This relief was finally given by the Judicature Act, which placed all the judges of the High Court in the same position. A judge of the Chancery

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Division can now make an order charging a judgment debt upon stock or shares belonging to the judgment debtor, and a judge of the Queen's Bench Division can charge cash under the control of the Chancery Division.

But the question still remains, in what mode is equitable execution to be given to a judgment creditor as regards cash standing to the credit of the judgment debtor in the Chancery Division? It has been suggested that this can be done only by means of the appointment of a receiver. That would be the merest formality, when such an appointment would be useless or worse than useless. What could be the use of appointing a receiver of money which was already in the hands of the Court? In my opinion a charging order is quite sufficient, without the appointment of a receiver."

It will be observed that Bowen, L.J., said, (and as I have pointed out, we have exactly similar statute law and applicable to the County Court as well as the Supreme Court), "What, then, did the Act 1-2 Vict. ch. 110, enable a Court of Equity to do? Section 12 made cheques and money available for execution and *by analogy it enabled a Court of Equity to assist a judgment creditor by means of equitable execution against money belonging to him in its own hands.*" That is exactly the present case, and the charging order of his Honor Judge Lampman is supported not only by the long existent practice as the cases show but by the authority as well of the Execution Act, so well indicated by the Court of Appeal in England in the *Brereton* case, 21 Q.B.D. 488.

I do not understand that my learned brothers differ from my view that a charging order could be made but proceed upon the view that the money in Court is not the money of the judgment debtor, I have though assumed as I think correctly, with great respect to all contrary opinion, that the money is the money of the judgment debtor, and was rightly charged under the charging order, and the money so charged should be available to the creditor in the way of satisfying *pro tanto* the judgment debt.

I would dismiss the appeal. *Appeal allowed.*

BEAVER LUMBER CO. v. SASKATCHEWAN TRUST CO.; Re SOLOMON ESTATE.

Saskatchewan King's Bench, Mackenzie, J. June, 1922.

MECHANICS' LIENS (§V—30)—TO WHAT PROPERTY ATTACHES.

No lien can attach to a building erected upon land unless the owner at whose request and upon whose credit the materials were furnished has an interest or estate in that particular land.

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Held, also, that the facts and circumstances shewed that the building in question was not a fixture but a chattel, and as such passed to the trustee on an assignment by the insolvent, by whom it was erected.

[*Galvin Lumber Yards Co.* v. *Ensor* (1922), 65 D.L.R. 687, applied.]

ISSUE submitted by the Judge in Bankruptcy as to the right to a lien on a certain building erected by an insolvent and where the said building passed as a chattel on an assignment made by the insolvent.

F. H. McLorg and *A. E. Bence*, for plaintiff.

G. H. Barr, K.C., for defendant.

Mackenzie, J.

MACKENZIE, J.:—In this case I would say that I compliment counsel on the way they presented the arguments, because both of them have presented excellent arguments, and ones which have been very helpful to me.

Considering the questions of law involved—interesting law—I would have liked to have taken time to write a judgment on this, but my circumstances hardly permit it within a reasonable time, and, in any event, I feel that as my mind is made up, I should dispose of the questions that are submitted to me, without delay.

The matter comes before me in the form of an issue submitted to me by the Judge in Bankruptcy, between the plaintiff, the Beaver Lumber Co., and the defendant, the Saskatchewan General Trusts Co. Ltd. In this issue the plaintiff first affirms, and the defendant denies, that the Beaver Lumber Co. had, on February 11, 1921, a mechanic's lien against lot No. 1, block No. 1, in the townsite of Leroy, in the Province of Saskatchewan, according to a plan of record in the land titles office for the Humboldt land registration district as No. T-667, and against the building thereon erected by one Harry Solomon.

It seems to me that my decision of this question must rest upon a determination of what right, if any, Solomon, the assignor in bankruptcy, had in this land, when he put the building there. As to that, I must come to the conclusion that he had no right; he had no title, according to any form that I can find, known to the law; that he put the building upon a point of his own selection; before making such selection, there was no right, so far as the evidence goes to shew, no right was given to him, nor any consent given to him by any persons who had the title to the land. In view of what took place subsequently, it seems clear to me that the position of the building was subject to change, and that there was no exact location or site to which the building actually belonged, and that its actual

location was such as Solomon might vary from time to time, according to the circumstances under which he found himself to be placed. So that I must conclude upon the evidence that he was a trespasser as to the place where he put the building, and in view of the decision of Lamont, J.A., in *Galvin Lumber Yards Co.* v. *Ensor, et al* (1922), 65 D.L.R. 687, at page 689, where he says:—

"I agree that no lien can attach to a building erected upon land unless the owner at whose request and upon whose credit the materials were furnished has an interest or estate in that particular land,"

I have come to the conclusion that Solomon had no estate or interest in the said land upon which a lien could attach, and, consequently, I must answer the first question submitted to me in the issue in the negative, that is to say, that the plaintiff in the issue had obtained no lien against that land, viz., lot No. 1, in block 1, according to said plan, or against the building thereon erected by Solomon.

There is an addition to the question I have referred to, made in the submission of the Bankruptcy Judge, which says, that I am to find whether the plaintiff is entitled to rank as a secured creditor on the assignment in respect to the said lien. As I find that there is no lien, I must, of course, also find that he is not entitled to rank as a secured creditor in respect to it.

The next question submitted to me is this: "Does the plaintiff now own the building erected by the said Harry Solomon situate on the said lot?" This question is the one to which the greater part of the evidence has been directed, and the effect of that evidence to my mind is this: that Solomon, in the month of July, 1920, put up the building in question on a place of which he hoped to ultimately obtain title, although the land was not surveyed, and that in so doing he was moved by the expectation that he might have to move that building, and that he put it on sills which were fashioned in the nature of skids, that is to say, shaped off at the ends, and projecting both before and behind the building, in order to be ready to meet the situation if his expectation were realized. That he may have used bad judgment in expecting to make it properly moveable in this way I think is manifest from the weight of the building when it was put upon the sills or skids. Solomon's expectation as to the necessity of moving the building was in fact early realized, because, after he had it up to a certain extent, so that the joists were down and the studding was up, and to some extent sheeted on the inside, and the roof was on, a survey was made by the

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railway company, with the result that one of the lines of the survey, being the limit of a street, ran through the building; he, thereupon, immediately procured assistance and had the building dragged sideways so as to conform with what were the limits of the new survey, and to take it off the streets at the intersection of which, according to the survey, his building was placed. When he had done this, he completed the building, put on the outside sheeting, set under the sills or skids certain uncemented and unattached stones and blocks of different sizes, his purpose evidently being to put the building on a level foundation; he also built two additions to it, one behind of considerable extent for the purposes of residence, and the other smaller and to the side for the purpose of a flour storehouse.

Now, I find Solomon did all this after the survey had been made, having the pious hope and expectation that he would not have to move the building again, and to that extent gave the building, upon its new location, some permamency; not such great permanency, however, that it could not be moved again without much difficulty if the necessity arose. Notwithstanding all this, however, Solomon knew that he did not have the ownership of the lot; he knew that he had no legally enforceable assurance from the railway company to compel title even though it might be disposed to give him such favorable consideration as it was accustomed to give squatters like himself; and he knew that the question of whether the building should remain where he had moved it would altogether depend upon the location conforming to the ultimate purposes which the railway company in its wisdom might conceive. That there were such further changes possible is shown by the fact that a second survey of the townsite was, in fact, subsequently made, not, however, interfering with the part on which Solomon had placed his building. I must find, therefore, that whether the building remainded there was wholly a question of contingency, a contingency of which Solomon was fully aware, and that he held himself ready to move the building again if and when such contingency should arise.

That such was Solomon's state of mind is corroborated, if corroboration be necessary, by a verbal statement made by him about the 6th or 7th of January, 1921, to Carter, a representative of the trust company, when the latter was taking over the assets after the assignment in bankruptcy. My admission of this statement was objected to by counsel for the plaintiff. I think, however, such statement is admissible, not to prove the truth of anything contained in it, but to show Solomon's state

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of mind, that is to say, his knowledge and intention. It is also to be noted that it forms a part of the *res gestae* of his assignment in bankruptcy as much as the written statement of his affairs which he gave to the trust company. I have this opinion on the authority of Phipson on Evidence, 6th ed., pp. 63-65. In that verbal statement Solomon told Carter that he had gone to Bog End and put a building where it was nice and clear. Then he went on and said, "I have had to change it once, and there is an agitation to have it changed, and I may have to move it again." It has been admitted by counsel for both parties that the second survey which took place was after the assignment had been made, and the evidence shows that the second survey was made at the solicitation of some of the residents of the new townsite, and this statement would, therefore, indicate that Solomon was aware of what was going on towards a further survey, and that he was fully seised of what might be necessary in the event of that second survey being made.

That being so, and having consideration, too, to the attitude both of the trust company and the lumber company, that is, to the plaintiff and the defendant in the issue regarding this structure, it seems to me that it was not only in the mind of Solomon, but that it was clearly in the mind of the plaintiff and the defendant, or, to put it more accurately, perhaps, that it was in the mind of the defendant; and the plaintiff, as is shown by its correspondence, accepted the view that this building was separate from the soil, and that it was not a fixture; so that my conclusion is that this building was not a fixture, having regard to all the circumstances of the case, and that it was looked upon by all the parties, until the plaintiff obtained title to the land, as a chattel, and as a chattel it passed under the assignment by Solomon to the trust company, and that it is a part of the insolvent's estate. So that, in answer to the second question submitted to me, I would say that the plaintiff the Beaver Lumber Co. does not own the building erected by the said Harry Solomon situate on the said lot.

I think the defendant is entitled to the costs of the issue.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., Barry and Grimmer, JJ. April 21, 1922.

EXECUTORS AND ADMINISTRATORS (§IIIB—70)—ASSIGNMENT OF BOND FOR SUIT—PRIMA FACIE CASE—PROBATE COURT (N.B.)—DISCRETION OF COURT.

Where an estate is not administered according to law, and no inventory is filed nor an account of the administration rendered,

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a *primâ facie* case of a breach of the conditions of the administration bond has been established as will warrant the granting of an application under sec. 92 of the Probate Courts Act, 1915 (N.B.), ch. 23, for the assignment of the bond for the purpose of suit thereon. While the granting of such application is within the discretion of the Court, a refusal of the application when a *primâ facie* case is shewn is not a proper exercise of discretion.

EXECUTORS AND ADMINISTRATORS (§IIIB—70)—SUIT ON ADMINISTRATION BOND—PRACTICE—NOTICE.

Although the statute be silent on the subject, the recognised practice as a fairness to the sureties is to require a citation calling upon the administrator to file and pass the accounts before putting the administration bond in suit.

EXECUTORS AND ADMINISTRATORS (§IIIB—70) — RIGHTS TO SUE ON ADMINISTRATION BOND—CREDITORS.

An administration bond is intended for the benefit and protection of all persons interested in the estate and the proper application of its assets, and an action thereon may be maintained by any person so interested, who has sustained an injury by any breach of its conditions. A creditor of the estate may, therefore, sue on the bond for a breach of its conditions by which he has been injured, but one creditor cannot sue for his individual debt and recover the full amount thereof to the prejudice of other creditors equally entitled.

EXECUTORS AND ADMINISTRATORS (§IIIB—70)—POWERS OF JUDGE AS TO GRANTING LETTERS—CONDITIONS—WAIVER OF LIMITATIONS TO CLAIM AGAINST ESTATE—VALIDITY OF JUDGMENT—SUIT ON BOND—LEAVE.

A probate Judge has no power to impose as a condition precedent to the granting letters of administration that the applicant for the letters agree not to plead the Statute of Limitations to a claim against the estate. The validity of a judgment recovered against the administrator, because thus prevented from pleading, is to be considered in determining the application for leave to put the administration bond in suit.

APPEAL by plaintiff from judgment of the Judge of Probate for the County of Queens, refusing petition for assignment of administratrix's bond. Reversed.

J. F. H. Teed, for appellant.

R. St. J. Freeze, for respondents.

HAZEN, C.J.:—The appellant under the provision of the Probate Courts Act, 1915 (N.B.), ch. 23, sec. 92, applied to the Judge of Probate for the County of Queens, for the assignment to him of an administration bond given by the respondents, and that an order might be made that he might bring an action upon this bond in his own name.

Section 92, under which the application was made, reads as follows:—

"No bond given under this Act shall be put in suit without an order of the Judge for the purpose being had, which order

shall vest in the party interested and applying therefor, a right to bring an action on such bond in his own name."

This application was refused and the appeal is from the judgment or decree dismissing the application. The facts in connection with the case are very fully stated in the judgment of my brother Barry, and it is, therefore, unnecessary for me to again state them. The appropriate cases are also referred to and commented upon in his judgment. I think there is no question whatever under the authorities but that the Probate Court has discretion in making the order, but such discretion must be a judicial one, exercised on consideration of the facts of each case and must not be merely capricious. The assignment may be refused on a frivolous or vexatious ground, but the assignment will be ordered when the Court is satisfied that the bond is made *bonâ fide* and that a *primâ facie* case of a breach of the condition has been made out, and that the applicant is the proper person to sue.

The question arises in this case as to whether the Court has before it the facts that were necessary in order to exercise proper discretion, and in the opinion of my brother Barry, it had not. Without entirely dissenting from his opinion in that regard, I may say that it appears from the respondent's factum para. 8, that at the return of the citation calling upon the respondent to shew why the bond should not be assigned at Gagetown on January 17 last, the Judge and Registrar of Probate were present as well as the three respondents, and their counsel, Mr. Ralph St. John Freeze. Paragraph 9 states that Mr. J. F. H. Teed, the proctor for the appellant, was not present, owing to having missed his connection at Fredericton in the morning, and did not arrive at Gageton until about 4 o'clock in the afternoon. The Court awaited his coming, but owing to the lateness of his arrival the proceedings were made as brief as possible, as the Judge and the three respondents, having a long distance to drive, were anxious to get away before darkness set in. Mr. Freeze on behalf of the respondents claimed that taking into consideration the fact that no citation had ever been issued calling upon the administratrix to file an inventory or to file and pass her accounts as provided for in the Probate Act, and the other circumstances surrounding the case, the Judge in his discretion should not assign the bond to the appellants "at the present time," and offered to give evidence before the Court of the various circumstances set forth in the paras. numbered 1, 2, 4, 5, 6, 8 and 9 in the respondents' factum. But Mr. Teed did not require that these

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facts be proved and as they were not contested they were accordingly taken as admitted. The Probate Judge held that the Probate Act gave him discretion in the matter of the application to have the bond assigned, and that under the circumstances he considered it only fair that the bondsmen should be given a reasonable opportunity of having the accounts filed and passed if required. Mr. Freeze gave an undertaking on behalf of the bondsmen to take out a citation to pass the accounts as soon as the same were filed, without any payment being made or citation taken out requiring the administratrix to do so, and Mr. Teed stated that a passing would probably not be necessary if a copy of the accounts were sent to him as soon as they were filed, so that he would see if he required them to be passed. The Probate Court accordingly dismissed the application, and as no costs were asked for by the respondent the application was dismissed without costs to either party.

If this statement of facts is correct, and I have no reason to doubt it, it is a little difficult to understand why an appeal is now made, for such action seems to me not to be in accordance with the agreement that was come to according to the statement in para. 9 of the respondents' factum.

Now the facts which it is alleged were stated in paras. 1, 2, 4, 5, 6, and 8 of the appellant's factum are:—

The death of David J. Thorne intestate in November, 1913, leaving his widow, then Etta May Thorne, afterwards remarried and now the respondent Etta May Patterson, and several small infant children him surviving.

That his widow, without taking out any administration of the estate, immediately realised on what few personal assets there were belonging to her late husband, something over $400, and paid the funeral expenses and different claims that she knew to be owing by him, and that no affidavits of indebtedness have been taken by her from the parties to whom these claims were paid.

That no application for administration of the estate of David Thorne, deceased, was made by any person until almost 6 years had elapsed from the death of David Thorne when a citation was taken out by the appellant Mortimer Thorne to shew cause why he should not be appointed administrator of the late David J. Thorne's estate, but the respondent, E. M. Patterson, on the return of the citation herself made application for the administration, and upon her entering into an agreement not to plead the Statute of Limitations against any claim the said Mortimer Thorne might bring against the estate of David Thorne, an

adjournment was made in order to enable her to prepare the necessary papers for her application, and she was accordingly appointed administratrix on November 5, 1919, the respondents W. E. Worden and H. G. Ellsworth being her bondsmen. No personal property or assets of any kind belonging to David Thorne came into the hands of E. M. Patterson after her appointment as such administratrix.

That, shortly after her appointment as administratrix, an action was commenced by the said Mortimer Thorne as administrator of the estate of Michael B. Thorne, father of the said David Thorne, and also an administrator of the said Elizabeth H. Thorne, and in his own right as plaintiff against the said E. M. Patterson, administratrix, by which he sought to recover in his several capacities the sum of $950 for the support of Michael B. Thorne and Elizabeth H. Thorne from November, 1904, to November, 1913; and in the alternative sought to recover $1,350 for nine years' use and occupation of certain lands and premises from November, 1904, to November, 1913; and in the alternative for $1,350 for nine years *mesne* profits from November, 1904, to November, 1913.

That the said respondent E. M. Patterson appeared to the action by the late J. R. Dunn, attorney at law, and after his decease by F. M. O'Neill, attorney at law, and a defence was entered. The case was set down for trial at a number of circuits, and was adjourned several times, sometimes at the instance of the plaintiff and sometimes at the instance of the defendant, and finally came on for trial, and in the absence of the defendant, who was ill at the time, and who had not filed a satisfactory affidavit of her illness, judgment was entered against the defendant for $900 and costs, and judgment was signed on October 22, 1921, for $900 debt and $473.05 costs. Shortly after this, a letter was written to each of the respondents by the solicitor for the said Mortimer Thorne, stating that he had recovered judgment against E. M. Patterson, administratrix of David Thorne, for $1,373.05 and as she had not filed her inventory and had not filed and passed her accounts, unless the judgment was paid by the bondsmen, proceedings would be taken to have the administration bond assigned and an action brought against them. The respondents Worden and Ellsworth got in touch with the said E. M. Patterson, who was then working in the city of Montreal, and ascertained that she had not filed an inventory or filed and passed her accounts, and arrangements were made with her at once to prepare and file her inventory and to file and pass her accounts, and an

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inventory was prepared and filed accordingly on January 13 last.

That owing to the fact that all the assets of the estate of David Thorne that were received by the respondent E. M. Patterson came into her hands shortly after her husband's death in November, 1913, and the outstanding bills were paid by her at that time without the formalities of an affidavit or a statement of account, considerable difficulty was found in getting the affidavits that the Probate Act required, and the administratrix required a little longer time to get her accounts ready for filing and passing.

Now as I have already stated the respondents' factum, which has not been contradicted so far as I am aware, states that Mr. Teed did not require these facts to be proved, and that they were, accordingly, taken as admitted, and if such was the case I am not prepared to say that there were not sufficient facts before the Judge of Probates to justify him in refusing at the time to order an assignment of the bond and in dismissing the application, although there are other facts, as pointed out by my brother Barry, which may have an important bearing upon the case and which, perhaps, ought to be the subject of inquiry on the part of the Probate Court. The case also involves an important point of practice, that is, whether it is necessary or not to issue a citation calling upon the administrator to file an inventory and accounts before an order is made directing the assignment of the administration bond. There is nothing bearing on this point in sec. 92 or any other section of the Probate Courts Act so far as I have been able to ascertain, and in our own Court there is no case which can be regarded as an authority upon the point, for in the case of *In re Hunter* (1867), 12 N.B.R. 233, referred to by Barry, J., the administrator had been cited to file both an inventory and an account of his administration, and had, in fact, done so before the application was made for the assignment of the bond.

The cases which have been referred to by my brother Barry undoubtedly seem to establish that in England and in Ontario there are authorities of undoubted weight to justify the contention that before putting an administration bond in suit a citation calling upon the administratrix to file and pass her accounts is unnecessary. I agree with him, however, in hesitating about expressing any such opinion, for, so far as I have been able to ascertain, not only from the opinion of my brother Barry, who had long years of experience as Judge of Probates in this Province, but from the statements made to me

by other Judges of Probate, and from my own experience during the many years I was at the Bar, I am of opinion that the universal practice in this Province has been to require a citation to be issued for the filing of the inventory and accounts of the administrator when such have not been filed, before an application for the assignment of the administration bond can succeed, and I do not think that this practice should be interfered with after having been followed for so many years.

It might, therefore, not be improper to dismiss the appeal, but this would, I presume, lead to the filing of a citation by the appellant calling upon the respondent to file an inventory and accounts, and the matter could then be proceeded with, and in view of the peculiar circumstances of the case referred to by my brother Barry, and the desirability that they should be known to the Judge of Probates, and as the parties are now before the Court, and "as no good purpose would be served by wasting the proceedings which have already been taken in the Probate Court, and putting this small estate to the expense of proceedings *de novo*, the administratrix and sureties can be protected against the hardship, if hardship there be, of being obliged to answer on the administration bond without having been first cited to file her accounts, by giving her the necessary time in which to do so. Such a course would not be desirable." These words I have quoted are from the judgment of Barry, J., and with them I heartily concur.

I, therefore, am of opinion that the conclusion which he has come to, to the effect that the appeal should be allowed, the order dismissing the application before the Probate Court vacated and the case remitted to the Judge of Probate to resume jurisdiction over the citation and to adjourn the hearing for three months is a wise and proper one, for, in the meantime, the administratrix can file her inventory and pass her accounts if she desires to do so, and after this time has elapsed the Judge of Probate can determine whether or not in the exercise of his discretion the bond should be assigned.

I also agree that there should be no costs on this appeal.

While I concur in allowing the appeal on the conditions named, I wish carefully to guard against the possibility of having the decision of the Court cited in the future as an authority for the contention that an assignment of an administration bond can be made, although the administrators have not been called upon by citation to file an account. My view is entirely opposed to this idea, for, apart from the fact that it is contrary to the practice that has hitherto prevailed in this

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Province, such a practice, I agree with my brother Barry, would be unfair to the sureties, and particularly would this be so in a case like the present, where the intestate had been dead for 9 years, and 6 of those years have elapsed before the administration was granted. While having some doubt, therefore, as to whether the facts that were admitted before the Judge of Probate were not sufficient to justify him in exercising his discretion in the way he did, I concur in the conclusion arrived at by my brother Barry.

BARRY, J.:—This is an appeal from the judgment or decree of the Probate Court for the County of Queens, dismissing the application of the appellant to have the administration bond in the estate of David J. Thorne assigned to him, which bond was made and signed by the three respondents, under the authority of the Probate Courts Act, 1915 (N.B.), ch. 23, sec. 92, and for an order authorising the bond to be put in suit, and resting in the appellant the right to bring an action on the bond in his own name.

The undisputed facts necessary to a consideration of the questions arising for determination of this appeal may be stated, shortly, as follows. In November, 1913, David J. Thorne died intestate. The widow, now Etta May Patterson, without taking out administration immediately realised on what few personal assets there were belonging to her deceased husband, amounting to something over $400. With this money she paid the funeral expenses, and some other claims which she herself knew to be owing by her late husband, but she did not, however, before paying those claims require that the same be certified and attested by affidavit in conformity with the provisions of the Probate Courts Act.

It was not until nearly 6 years after the death of David J. Thorne that application was made to the Probate Court of the County of Queens for administration upon his estate. The present appellant petitioned for administration to be granted to himself, but upon the return of the citation which was issued upon the petition, the Judge of Probate appointed the erstwhile widow of the deceased, who had then become E. M. Patterson, administratrix of the estate, upon her entering into the usual administration bond in the sum of $1,000, with the respondents Worden and Ellsworth as sureties. The letters of administration were issued on November 5, 1919.

The administration bond which, as I have said, was in the usual form prescribed by law, obligated the administratrix, (a) to make a true and perfect inventory of the real estate, goods,

chattels and credits of the deceased and exhibit the same unto the Registrar of the Probate Court on or before December 5, 1919; (b) the same, with all other goods, chattels and credits of the deceased which should come into the hands of the administratrix, to well and truly administer according to law; and (c) to render a just and true account of her administration within 18 months, that is, on or before May 5, 1921.

It appears that the administratrix has done none of those things; she has neither made and filed an inventory, administered the estate coming to her hands, nor rendered an account of her administration. Two appraisers filed an appraisement, at what time it does not appear, of what property belonging to the estate they were able to find, valuing the real estate at $600 and the personal property at $352.

It appears that on October 22, 1921, the appellant in his dual capacity of surviving administrator of the estate of Michael B. Thorne, deceased, and administrator of the estate of Elizabeth H. Thorne, deceased, recovered and signed in the Supreme Court a judgment against the respondent E. M. Patterson as administratrix of the estate of David J. Thorne, for $1,373.05, i.e., for $900 as debt and $473.05 costs. Upon this judgment, an execution was issued to the sheriff of the County of Queens, that being the county in which the intestate resided at the time of his death, which execution was returned by the sheriff *nulla bona*.

The applicant then by his petition dated December 8, 1921, made application to the Probate Court of the County of Queens, praying that the administration bond might be assigned to him, and that an order might be made authorising him to bring an action thereon in his own name. The application was based upon the three specific grounds: (1) That no inventory had been filed. (2) No accounts had been filed or passed. (3) The administratrix had not administered the goods, chattels and credits of the estate according to law, or in other words had been guilty of a devastavit.

On the return of the citation which was thereupon issued, the three respondents were present in person and were also represented by Mr. Freeze as their proctor and advocate. Mr. Freeze took the objection that because the administratrix had not been first cited to file an inventory or file and pass her accounts, the appellant was not entitled to have the bond assigned to him; that the appellant was not entitled to sue on the administration bond for his own debt; and that the appellant was not entitled to an assignment of the bond as a matter of absolute

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right, but that the Judge of Probate had a discretion in the matter.

Evidently the grounds taken by Mr. Freeze, or some of them, at all events, must have prevailed, for without entering upon any inquiry or hearing any evidence, except the evidence of the affidavits of Mr. Teed and Annie Dickie in verification of the allegations contained in the petition, the Judge of Probate made an order dismissing, without costs, the application and citation. From that order the appeal is taken on the following grounds:—1. That the Judge of Probate was in error in dismissing the application for the assignment of the bond where the applicant had made out a *prima facie* case which was unanswered. 2. That he erred in dismissing the application when, admittedly, the administratrix at the time of the application was made: (a) had not filed her accounts; (b) had not filed an inventory; (c) had not administered the estate according to law. 3. The Judge erred in holding that the applicant, a judgment creditor of the intestate's estate, had no right to an assignment of the bond where the evidence before the Probate Court shewed a devastavit by the administratrix, and such evidence was not met or answered in any way. 4. That he erred in holding that, although the condition of the bond had not been complied with, he had a discretion to refuse the order asked for and to dismiss the application. 5. There was no evidence before the Probate Court upon which he could exercise a judicial discretion. 6. The Judge erred in taking into consideration the fact that after citation issued, the administratrix filed an inventory, because the same was filed after the lapse of the time allowed by law, and without any order from the Court enlarging the time for filing, the inventory was improperly on file.

As an administration bond is intended for the benefit and protection of all persons interested in the estate and the proper application of its assets, an action thereon may be maintained by any person so interested, who has sustained an injury by any breach of its conditions. A creditor of the estate may, therefore, sue on the bond for a breach of its conditions by which he has been injured, but one creditor cannot sue for his individual debt and recover the full amount thereof to the prejudice of other creditors equally entitled.

The Court has, I think, a discretion in making the order under sec. 92, and will order the assignment of a bond when it is satisfied that the application is made *bona fide;* that a *prima facie* case of a breach of the condition has been made out; and

that the applicant is the proper person to sue; *Re Goods of Jones* (1862), 3 Sw. & Tr. 28, (8 L.T. 90, 32 L.J. (P.) 26); *Baker and Marshman* v. *Brooks* (1863), 3 Sw. & Tr. 32, (32 L.J. (P.) 25, 8 L.T. 89.) *Re the Goods of Young* (1866), 35 L.J. (P.) 126, 14 L.T. 634; Coote's Prob. Prac. 12th ed. 105; but may refuse to assign on a frivolous or vexatious ground; *Baker* v. *Brooks, supra.* In that case Sir C. Cresswell said at p. 34: "The administratrix has not furnished such an inventory and account as the Court called for; that was part of the condition of the bond; if that is broken must not the bond be assigned? I had some doubt, under the terms of the statute, whether I should have called the surety before the Court; all that the Court really does by assigning the bond is to put the plaintiff in the position of a person who has a right to sue. Now that the surety is before the Court, I think I am bound to assign the bond, if a *primâ facie* case of a breach of it is made out, as there is in this case. On the other hand, I will not say that if, on cause shewn, the proceeding appeared to be merely frivolous and vexatious, I would assign the bond."

In an application to put an administration bond in suit, *In re Hunter,* 12 N.B.R. 233 at 234-5 it was said by Allen, J.: "If a *primâ facie* right to sue on the bond is made out by the creditor, I think he ought to be allowed to bring his action, and try the question of the liability of the sureties. In *Archbishop of Canterbury* v. *House* (1774), 1 Cowp. 140, 98 E.R. 1010, Lord Mansfield, said it was *ex debito justiciae* to allow a creditor to put an administration bond in suit; but it was afterwards held that the Court had a discretion in the matter, and might decline to make an order though there had been a breach of the bond. (*Crowley and Sharman* v. *Chipp* (1836), 1 Curt. 458): *Murray and Maling* v. *McInerheny* (1837), 1 Curt. 576."

In both of the cases cited by Allen, J., the alleged breach was the non-delivery of an inventory at the time specified in the bond, but the administrator had not been cited to bring in an inventory, and it was on that ground that the Court refused to order the bond to be put in suit. In the case of *In re Hunter, supra,* also, the administrator had been cited to file both an inventory and an account of his administration, and had, in fact, done so.

The practice as to requiring a citation before putting the administration bond in suit is not uniform. In some jurisdictions an action on the bond for failure to account cannot be maintained until there has been a citation or order for an accounting and failure to comply therewith, but, in others, no

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citation or order is necessary. And in the Courts of Great Britain, the decisions are divergent. In *Archbishop of Canterbury* v. *Wills* (1708), 1 Salk. 315, 91 E.R. 278, it was laid down by Holt, C.J., that the condition of the administration bond being that the administrator account at a day certain, he must account accordingly at his peril, and that without citation or suit. This case was followed in Ontario by Draper, C.J., in *Neill* v. *McLaughlin* (1868), 4 P.R. (Ont.), 312. See further as to the practice in Ontario, Howell's Probate Practice 169, note (e).

There would, therefore, seem to be authority of undoubted weight to justify the Court in holding that, before putting an administration bond in suit, a citation calling upon an administratrix to file and pass her accounts is unnecessary. For myself, I hesitate about expressing such an opinion, for I confess my own mind turns rather the other way. The statute is silent upon the point, and so far as I have been able to discover, the Courts of this Province have never pronounced upon the matter. The better practice, in my judgment, would be to cite the administratrix to pass her accounts before applying to have the bond put in suit: without first doing so would seem to me to be unfair to the sureties, and especially would this be so where, in a case like the present, the intestate has been dead 9 years, and 6 of those years elapsed before the administration was granted.

Inasmuch, however, as the parties are now before the Court, and no useful purpose would be served by wasting the proceedings which have already been taken in the Probate Court, and putting this small estate to the expense of proceedings *de novo*, the administratrix and her sureties can be protected against the hardship—if hardship there be—of being obliged to answer on the administration bond without having been first cited to pass her accounts, by now giving her the necessary time in which to do so.

It appears to be well settled by authority both old and modern that if an administrator confess judgment, or suffer it to go by default against him, he thereby admits assets in his hands, and is estopped from saying the contrary in an action on such judgment, suggesting a *devastavit*. *Skelton* v. *Hawling* (1749), 1 Wils. 258, 95 E.R. 605; *Rock* v. *Leighton* (1701), 1 Salk. 310, 91 E.R. 273; *In re Higgins's Trusts* (1861), 2 Giff. 562, 66 E.R. 236; *Ruttle* v. *Rowe* (1920), 50 D.L.R. 346, 13 S.L.R. 79; *Langstaff* v. *Langstaff* (1920), 55 D.L.R. 429, 13 S.L.R. 265.

There are some feaures of this case which are somewhat unusual and deserving more than a passing notice. Although David J. Thorne died in November, 1913, it was not until November, 1919, that administration was granted to his widow, who had in the meantime remarried. It is stated in the factum filed by the respondents, although I do not find the statement verified by any of the proofs or affidavits sent here with the case on appeal, that administration was granted to her only on her entering into an agreement not to plead the Statute of Limitations against any claim which the original petitioner, the present appellant, might have against the estate of the deceased intestate, David Thorne. This, presumably, was the very claim upon which the appellant afterwards obtained the judgment on which was based his application to the Probate Court to have the bond assigned to him. It was optional with the administratrix to plead the statute as a defence. She might do so if she wished but was not obliged to do so. It was, therefore, wrong, in my opinion, for the Judge of Probate to impose or permit to be imposed any such condition as a condition precedent to the granting of administration. In exercising the discretion entrusted to it, the Court is not guided by the wishes of the parties. The primary object is the interest of the estate. The first duty is to place the administration in the hands of that person who is likely best to convert it to the advantage of those who have claims, either as creditors or as entitled in distribution. In general, the widow is preferred to the next of kin, and if E. M. Patterson on account of her legal priority, was entitled to administration, then she was entitled to it unconditionally, excepting, of course, the conditions to which she was bound by the administration bond.

It is alleged also that Elizabeth H. Thorne, the mother of the deceased intestate, with the appellant, after the death of David Thorne, brought an action of ejectment against the respondent E. M. Patterson, and on October 20, 1915, recovered judgment for the possession of certain lands and premises of which, as I understand it, the deceased David Thorne died seized and possessed, and under a writ of possession she was ejected from these lands and premises by the sheriff. Whether these were the same lands of which she gives account in the inventory filed after the commencement of these proceedings we do not know.

It is also asserted that the action in which the appellant recovered judgment against the respondent E. M. Patterson, the plaintiff sought to recover $950 for the support of Michael B.

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Thorne and Elizabeth H. Thorne for 9 years; and in the alternative sought to recover $1350 for 9 years use and occupation of certain lands; and in the alternative for 9 years *mesne* profits. And it is alleged that the respondent employed a solicitor who, after having put in an appearance, died; that she then retained another solicitor; that the action was noticed for trial at several circuits and was adjourned, sometimes at the instance of one of the parties, sometimes at the instance of the other; finally, it came down to trial at a time when the respondent was ill and unable to attend. In the absence of affidavit satisfactorily accounting for her absence, the judgment was entered against her in her absence.

Now these, I think, all are matters which, if true—and in the absence of evidence, we cannot say whether they are true or not, and I am not to be understood as questioning their correctness—must, necessarily, have some influence upon the mind of the Judge of Probate, when he comes to determine whether or not he will order the bond put in suit. They are all, I presume, matters susceptible of legal proof or disproof, and it would seem to me to be but fair to the sureties on the bond that these matters should be thoroughly sifted and inquired into before they are called upon to answer an action on the bond.

That the Judge of Probate has a discretion in the matter of putting the bond in suit, there would seem to me to be no doubt; but that does not mean an arbitrary, vague or fanciful discretion, but one not to be exercised capriciously, but on judicial grounds and for substantial reasons, based upon the facts and surrounding circumstances as disclosed by evidence taken under oath. On such material the Judge of Probate could exercise his discretion, and on cause shewn, determine whether the proceedings are frivolous, vexatious, or, in the circumstances of the case, improper; and if wrong in his conclusions, a Court of Review could correct him, which it cannot do when there is no evidence before it to shew whether the Judge of Probate exercised his discretion improperly or not.

The appeal must, therefore, be allowed. The order dismissing the application before the Probate Court will be vacated, and the cause remitted to the Judge of Probate to resume cognisance of and jurisdiction over the citation, and to adjourn the hearing for 3 months. In the meantime, the sureties being before the Court, the administratrix is to be allowed the period of 3 months in which to file an inventory and file and pass her accounts, if she is able and desirous to do so. This time having elapsed, the Judge of Probate after a proper hearing, and the

taking of such evidence as may be produced on both sides, can determine whether the bond should be assigned to the appellant, and an order made allowing him to bring an action thereon in his own name.

In view of the fact that there is a doubt as to whether the appellant should have commenced these proceedings without first citing the administratrix to file and pass her accounts, there should, I think, be no costs on this appeal.

GRIMMER, J.:—I agree.

Appeal allowed.

Re REGINA WINE & SPIRIT, Ltd.

Saskatchewan King's Bench, MacDonald, J. December 20, 1921.

INTOXICATING LIQUORS (§ IIIA—55)—OFFENCES UNDER TEMPERANCE ACT —SEIZURE—WAREHOUSEMAN—OWNER.

Liquor seized in a warehouse for a violation of the Temperance Act cannot be claimed by an owner thereof, who has failed to meet the statutory onus that "no violation has been committed or intended to be committed in respect of such liquor."

[See also 60 D.L.R. 461; 65 D.L.R. 258, 649.]

APPEAL from an order of a Justice of the Peace forfeiting to His Majesty certain liquors seized in the warehouse of the Northern Warehousing Co., at Moosomin, Saskatchewan.

A. J. Andrews, K.C., and *D.A. McNiven*, for appellant.
H. F. Thomson, for Director of Prosecutions.

MACDONALD, J.:—On the appeal before me it was agreed that instead of taking the evidence of the witnesses over again, the depositions taken before the Justice should be used, and these were supplemented by some *viva voce* testimony.

The facts as they appear to be are briefly as follows:—The Regina Wine & Spirit, Ltd., is a body corporate, incorporated under the Companies Act of Saskatchewan, and authorized among other things to carry on the business of an export and import dealer in and warehouse man of spirituous, fermented and malt liquors, wines, beers and combinations thereof, and to sell and dispose of such goods in accordance with the provisions of the Saskatchewan Temperance Act, R.S.S., 1920, ch. 194.

The Yorkton Distributing Co. is a partnership, apparently, also engaged in the liquor business. The Dominion Distributors is also a partnership and acts as manager for both the Regina Wine & Spirit Ltd., and the Yorkton Distributing Co. The Northern Warehousing Co. is also a partnership, apparently, owning and controlling warehouses at Macklin and Moosomin, Saskatchewan.

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On or about August 31, 1921, the Regina Wine & Spirit Ltd. and the Northern Warehousing Co. entered into an agreement, whereby the Regina Wine & Spirit Ltd. agreed to ship to the Northern Warehousing Co., such liquors, wines and beers as it might deem advisable, the same to remain the exclusive property of the Regina Wine & Spirit Ltd., and the Northern Warehousing Co. agreed to store and keep the said goods in its warehouse at Macklin and Moosomin, and to reship the same to persons, firms or corporations outside the Province of Saskatchewan as orders therefor might be obtained by the Northern Warehousing Co. in pursuance of its business of exporting liquors outside the Province of Saskatchewan, and the Northern Warehousing further agreed not to take any of the goods out of the said warehouse until the proper order for export was received, and to mail to the Regina Wine & Spirit Ltd. the original orders so received. The Northern Warehousing Co. was to be paid by the Regina Wine & Spirit Ltd., a commission of 10% on the total amount of orders for goods exported.

On or about September 23, 1921, the Regina Wine & Spirit Ltd., sent a carload of liquor consigned to itself at Moosomin with instructions to the railway company to advise the Northern Warehousing Co. The bill of lading and all necessary documents were apparently transferred by the Regina Wine & Spirit Ltd., to the Northern Warehousing Co., and the latter received the liquor from the railway company and stored the same in its warehouse. The mode of doing business was as follows: When the Northern Warehousing Co. received an order for liquor to be exported, it filled said order out of the said goods in the warehouse, then sent the order back with an invoice of the goods sold to the Dominion Distributors at Regina, acting as manager for the Regina Wine & Spirit Ltd., as aforesaid.

On or about October 29, 1921, the Northern Warehousing Co. made 3 or 4 sales of liquor to parties in Moosomin, contrary to the provisions of the Saskatchewan Temperance Act. The Northern Warehousing Co., as before stated, is a partnership consisting of 3 persons, namely, Gordon Chechik, Harry Colish, and M. A. Gray, and the sales in question were made by Chechik and Colish.

On October 30, the Provincial Police seized all the liquor in the said warehouse. Thereupon the Regina Wine & Spirit Ltd., under sec. 69 (9) of the Saskatchewan Temperance Act, claiming to be the owner of the liquor, lodged with the Liquor Commission a notice setting forth the facts upon which its claim was based. The Commission thereupon caused a summons to be issued by a Justice directed to the claimant, calling upon it to

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show cause why the liquor should not be forfeited to His Majesty. A hearing was had before A. C. Sarvis, Justice of the Peace, who made an order that the liquor and all vessels containing the same be forfeited to His Majesty. From such order the present appeal is taken.

Section 69 (13) of the Saskatchewan Temperance Act as amended by 1920, ch. 70, sec. 37, reads as follows:—

"If the Justice is satisfied by evidence, the onus as to which shall be upon the claimant, that no violation of this Act has been committed or was intended to be committed in respect of such liquor and finds that the claim of the claimant is established, he shall order that the liquor be restored to the owner or other person entitled thereto."

From the evidence, it is abundantly clear that the Northern Warehousing Co. committed a violation of the Saskatchewan Temperance Act by selling liquor out of its warehouse on or about October 29, 1921. There is no evidence that the liquor so sold was a portion of the liquor forwarded by the appellant herein to be placed in said warehouse. But there is no evidence that the Northern Warehousing Co. received any other liquor, and it seems to me that the fair and reasonable inference is that the liquor so sold was part of the liquor shipped by the appellant. Moreover, the evidence, to my mind, leads to the irresistible inference that the Northern Warehousing Co. intended to commit further violations of the Act in respect to the liquor in question. At any rate, the burden of proof is on the claimant that no violation of the Act has been committed or was intended to be committed in respect of such liquor, and that burden was most certainly not discharged. Counsel for the appellant, however, claims that sub.-sec. (13) is to be read as though the words "by the claimant" were inserted after the words "such liquor", and that the evidence does not show that the appellant committed or intended to commit any violation of the Act in respect to such liquor. I am, however, of the opinion that such is not the proper construction of said sub.-sec. (13). No such express limitation appears, and it seems to me that the whole intention of the Act is that when there is found liquor which is the subject matter of an actual or intended violation of the Act that liquor shall be liable to be forfeited.

Under said sec. 69 (3) it is provided that in the event of liquor being found on any premises the occupant thereof and also the owner of the liquor shall, until contrary is proved, be deemed to have kept such liquor for sale contrary to the provisions of the Act. Here, there is a clear distinction drawn between the occupants of the premises and the owner of the liquor, and, if the

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occupant of the premises were found guilty under said sub.-sec. (3) of having kept the liquor in question for sale contrary to the provisions of the Act, then it would be established that an offence had been committed in respect of the liquor, and surely, it was never the intention of the Legislature that notwithstanding such facts the owner of the liquor could discharge the burden placed upon him by sub.-sec. (13).

I am, therefore, clearly of the opinion that the evidence establishes that an offence was committed and was intended to be committed in respect to the liquor in question by the Northern Warehousing Co., and that in the face of such facts the appellant does not discharge the duty cast upon it by said sub.-sec. (13), even if it establishes that it is the owner of the liquor, and that as such owner the appellant itself has not committed or intended to commit any violation of the Act.

The appeal will therefore be dismissed with costs.

Appeal dismissed.

DE COTRET v. LEFEBVRE.

Quebec Court of Review, Archibald, A.C.J., Demers and Weir, JJ. February 19, 1921.

WARRANTY (§ I—1)—SALE AND PURCHASE OF MOTOR BOAT—DEFECTS—PURCHASER HAVING REPAIRS MADE AND SELLING TO THIRD PARTY—THIRD PARTY SUING FOR RESILIATION OF CONTRACT—RIGHT OF PURCHASER AGAINST HIS VENDOR.

The purchaser of a motor boat, who upon discovering defects in the boat, instead of notifying his vendor of the defects, has the boat repaired and sells it at an advanced price to a third party and makes no demand upon his vendor until sued by his vendee for resiliation of the sale, loses any right of warranty against his vendor.

APPEAL from the judgment of the Quebec Circuit Court in an action arising from the sale of a motor boat.

The facts are fully set out in the judgments delivered.

The judgment of the Circuit Court of the District of Joliette was rendered by Loranger, J., on December 19, 1919.

De Cotret bought a motor boat from Lefebvre and paid $35 on account of the purchase price. He tried the boat out and found that it was in a bad state of repair. He had it repaired and sold it again to a certain Gladu with an increase of $35. When the latter discovered the defects in the boat he sued De Cotret in rescission of sale. The latter sued Lefebvre in warranty.

Lefebvre contested the action in warranty for the following reasons: (a) De Cotret knew the boat and had examined and tried it out before the sale; (b) when he discovered the defects

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in question he had them repaired at his own expense, instead of notifying the vendor; (c) the action in warranty is tardy; (d) the offer to return the boat is irregular since the plaintiff in warranty was not in possession of the boat at the time.

The Circuit Court annulled the contract of sale and condemned Lefebvre to return the $35 to Gladu with costs against the first vendor. This judgment is reversed.

Brossard and *Pépin*, for plaintiff.

Lamarre and *Monet*, for defendant and plaintiff in warranty.

Gaston Allard, for defendant in warranty.

WEIR, J.:—It appears that, with his action, Gladu tendered back the gasoline yacht to De Cotret and this tender is ratified by the judgment in that case; but it does not appear that De Cotret had taken possession of the yacht in question prior to the action in warranty; so that his tender thereof with his action in warranty is informal and invalid.

There also arises the question whether, under the circumstances, De Cotret has not deprived himself of the right to ask for the cancellation of the sale. When the accident happened to the yacht on the day of the sale thereof from Lefebvre to De Cotret, it was the latter's duty, if he intended to make a claim on Lefebvre, to notify Lefebvre at once of the accident. But instead of so doing, he gave orders to have the yacht repaired, which was done; and then proceeded on his way to Lavaltrie and sold the yacht to Gladu. The absence of complaint to Lefebvre seems to indicate that, in his opinion, at the time there was no breach of the warranty by Lefebvre. In fact, De Cotret made no demand at all upon Lefebvre until after his vendee Gladu had sued him in resiliation of the sale of the yacht. In these proceedings there is an entire waiver and abandonment of his right of warranty against Lefebvre.

By article 1526 of the Civil Code, "A buyer has an option of returning the thing and recovering the price of it, or of keeping the thing and recovering a part of the price according to the estimation of its value."

De Cotret did not return the yacht and ask for the price thereof, and, keeping the yacht, did not take the action *quanti minoris*, but satisfied himself by selling it at an advanced price to a third party.

I have no hesitation in coming to the conclusion that the action in warranty is unfounded, and the judgment *a quo* should be reversed and plaintiff in warranty's action dismissed with costs.

Judgment:—Considering that Gladu's principal action was maintained because DeCotret had given Gladu a special guaran-

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tee; that it is for this reason that the judgment on the principal action declared that Gladu's action was not tardy; that a guarantee given by DeCotret cannot affect Lefebvre, since the latter did not make any special guarantee, and in consequence Lefebvre is right in maintaining that the action is tardy.

Considering furthermore that after delivery of the said boat by defendant in warranty to the plaintiff in warranty, the latter discovered the defects and instead of returning the boat to the defendant in warranty, DeCotret had it repaired and then sold it again under guarantee to Gladu. Reverses the said judgment with costs and, proceeding to render the judgment which the Circuit Court should have rendered, dismisses the action of the plaintiff in warranty with costs.

Action dismissed.

ROESKE v. SENERIUS.

APPEAL (§IB—5)—FINAL OR INTERLOCUTORY ORDER — ORDER REFUSING LEAVE TO ADD CO-DEFENDANT.

APPEAL (§ IB—5)—FINAL OR INTERLOCUTORY ORDER—ORDER REFUSING LEAVE TO ADD CO-DEFENDANT.

An order dismissing an application by plaintiff for leave to add a co-defendant alleged to be jointly or alternatively liable to the plaintiff is not a final order from which an appeal may be taken.

APPEAL by the plaintiff from an order made in a District Court action dismissing an application by the plaintiff to add as a defendant a person alleged to be jointly or alternatively liable to the plaintiff in respect of the matters in question in the action. Quashed.

J. K. Macdonald, for appellant.

K. C. Mackenzie, for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—Objection is taken on behalf of the defendant that no appeal lies on the ground that the order complained of is not in its nature final but merely interlocutory.

If the order be merely interlocutory, I think the Court is bound by authority to give effect to the objection.

The appeal lies if at all, under the authority of sec. 48 of the District Courts Act, 1907 (Alta.) ch. 4, which contains this qualification "providing always that the decision or order is in its nature final and not merely interlocutory." This section was considered by this Court in *Herman* v. *McConnell* (1910), 3 Alta. L.R. 136, and in *Bennefield* v. *Knox* (1914), 17 D.L.R. 398, 7 Alta. L.R. 346, and it was expressly held in the latter case that the words quoted applied to the whole section and reference was made to a similar decision by the Ontario Court of Appeal (*Baby*

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v. *Ross* (1892), 14 P.R. (Ont.) 440), upon a section of the Ontario County Courts Act, R.S.O. 1914, ch. 59, identical in language with sec. 48.

In my opinion, the order in question is merely interlocutory.

In *Bozson* v. *Altrincham Urban District Council*, [1903] 1 K. B. 547 at 548, 19 Times L.R. 266, 72 L.J. (K.B.) 271, 51 W.R. 337, Lord Alverstone, C.J., is reported to have said: "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

Adopting this test I cannot see that the order in any way disposes of the plaintiff's rights against the defendant or against the party sought to be added.

I would, therefore, quash the appeal with costs as of a motion to quash.

Appeal quashed.

CANADIAN BANK OF COMMERCE v. CUDWORTH RURAL TELEPHONE Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon, and McKay, JJ.A. June 29, 1922.

COMPANIES (§IVD—60)—COMPANY CREATED UNDER AUTHORITY OF THE RURAL TELEPHONE ACT, R.S.S. 1920, CH. 96—SECTION 14 OF THE COMPANIES ACT, R.S.S. 1920, CH. 76, NOT APPLICABLE TO— LIABILITY ON NOTE GIVEN IN PAYMENT FOR CONSTRUCTION OF TELEPHONE SYSTEM.

Section 14 of the Companies' Act, R.S.S. 1920, ch. 76, does not apply to companies created under the authority of the Rural Telephone Act, R.S.S. 1920, ch. 96, and a company so formed, being a non-trading corporation with no express or implied power to make promissory notes, is not liable on a note given in settlement of the amount due for the construction of the company's telephone system.

[See Annotation, 63 D.L.R. 1.]

APPEAL by defendant, from the trial judgment (1921), 62 D.L.R. 678, 15 S.L.R. 67, in an action on a promissory note. Reversed.

J. F. Frame, K.C., for appellant.

F. F. MacDermid, for respondent.

HAULTAIN, C.J.S.:—This was an action on a promissory note for $5,407.50 made by the appellant company, payable on demand to one Foley, and endorsed by him to the respondent bank.

The company was organized under the provisions of the Rural Telephone Act, R.S.S., 1920, ch. 96, and pursuant to those provisions was duly registered and incorporated under the Companies' Act, R.S.S., 1920, ch. 76.

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In August, 1918, the company and Foley entered into a written agreement for the construction by Foley of the company's telephone system, and in 1919 a further arrangement was made with Foley for an extension of the system. In June, 1920, the work being then completed, Foley had an interview with the directors of the company with a view to getting settlement of the amount due to him. At this interview Foley claimed that there was a balance of $6,407.50 due to him. There was some discussion as to the correctness of his figures, and the directors were not willing at first to make any payment until the work had been inspected and the amount due determined by the departmental inspector. They finally agreed to make a cash payment of $1,000, which was done, and to give the note which is the subject of this action. It is also established by uncontradicted evidence that it was agreed at the time that the note should be held by Foley and not negotiated for 2 weeks, at the end of which time the exact amount due to him was to be ascertained, and that, if that amount proved to be less than the amount of the note, credit for the difference should be properly endorsed. Three days later Foley discounted the note with the respondent bank. It was later ascertained that at the time the note was given the amount actually due to Foley was $1,794.02, instead of $5,407.50, the amount of the note.

On the trial of the action, the principal defence raised on behalf of the company was that making the promissory note was beyond the powers of the company. On this point the trial Judge (1921), 62 D.L.R. 678, 15 S.L.R. 67, held against the company, and that is the only question with which the present appeal is concerned.

In his reasons for judgment, the trial Judge said at p. 679:—

"The second defence is that the company had no power to make the note. It is a common impression that a non-trading corporation, such as this was, has not the power to make notes, and this proposition is established by abundance of authorities."

The Judge went on to hold, however, that that proposition did not supply to the present company by reason of the provisions of sec. 14 of the Companies' Act, which is as follows:—

"14. Every company heretofore or hereafter created: (a) by or under the authority of any general or special Ordinance of the North-West Territories; or (b) under any general or special Act of this Legislature; shall, unless a contrary intention is expressed in a special Act or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to ac-

cept extra provincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the great seal."

He held that the effect of this section was: "to give every company the same powers as a company incorporated by Letters Patent under the Great Seal and that such a company now has power to make notes."

He adopted, as an authority for this finding, the decision of the Appellate Division of the Supreme Court of Ontario, in the case of *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280, 42 O.L.R. 105, which turned on the construction and effect of a somewhat similar provision in the Ontario Companies' Act, 1916 (Ont.), ch. 35, sec. 6.

In my opinion sec. 14 of the Companies' Act does not apply to a company organized under the provisions of the Rural Telephone Act. By sec. 46 of the last named Act, the provisions of the Companies' Act apply to every rural telephone company except in so far as they are varied by the special Act. Except with the approval of the Lieutenant-Governor in Council, no telephone company can be incorporated under the Companies' Act except under the provisions of the special Act.

By sec. 3, permission of the minister "to organise a company for the construction, maintenance and operation of a rural telephone system" must first be obtained.

With the permission of the minister the applicants take the necessary steps to secure the organisation, incorporation and registration of the company under the Companies' Act (sec. 5). The petition for the minister's permission must be accompanied by certain statements (sec. 4). The requirements of 4 (a) practically define the area within which the operations of the proposed company are to be carried on. No extension of the system approved of in the first instance can be undertaken without the approval of the minister (sec. 12). Section 13 provides that the minister may determine and define the area within which the system of any rural company may be constructed. Under the general heading of "Additional Powers", sec. 20 enacts as follows:—

"20. In addition to all other powers conferred upon companies by this Act every company may subject to the approval

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of the minister: (a) acquire by purchase, lease or otherwise any private or rural telephone system; (b) dispose by sale, lease or otherwise of the whole or any portion of its system; (c) make such rules and regulations for the maintenance, operation and management of its system as it deems advisable."

The provision of the Act relating to loans and debentures (secs. 23 to 37), to executions for non-payment (sec. 39), and to levy and assessment (secs. 40 to 45), are a further indication of the necessity, as well as of the intention to restrict the area of operation. In view of these provisions, I am of opinion that the area of operation of a rural telephone company is limited by the special Act to the area as originally approved by the minister or extended with his approval, and that the provisions of the first part of sec. 14 of the Companies' Act, do not and cannot apply to such a company.

I am further of opinion that the objects of the company are limited by the Act to those for which permission to organise is given by the minister under secs. 3 and 5, and such further objects as are expressly provided for in the Act. The language of sec. 20 which, subject to the approval of the minister, confers powers "in addition to all other powers conferred upon companies by this Act" (as well as the general scope and object of the Act), is exclusive, and makes the second part of sec. 14 of the Companies' Act equally inapplicable to a rural telephone company.

It now remains to be considered whether the company, or rather the directors of the company, had the power to make the promissory note in question.

The company was not organised for the purpose of trade, but merely and exclusively for the purpose of supplying the people living within a certain area with a telephone service. There is, in my opinion, nothing in a business of this sort to necessitate the making of notes. There is also nothing in the Act which enables the company to bind itself except by debentures, or from which to imply the power to make promissory notes. Power to make a promissory note must be either expressly or impliedly given to a corporation. Even a corporation created by charter has no general power to incur liability on a bill of exchange or promissory note, and a non-trading corporation such as, in my opinion, the appellant company is, has no such power unless its instrument of incorporation expressly or by clear implication confers the power.

Re Peruvian Ry. Co., Peruvian Ry. Co. v. *Thames & Mersey Marine Ins. Co.* (1867), L.R. 2 Ch. 617, 36 L.J. (Ch.) 864, 15 W.R. 1002.

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Broughton v. *Manchester Water-works Co.* (1819), 3 B. & Ald. 1, 106 E.R. 564; *Bramah* v. *Roberts* (1837), 3 Bing. (N.C.) 963, 132 E.R. 682, 6 L.J. (C.P.) 346; *Bateman* v. *Mid-Wales Ry. Co.* (1866), L.R. 1 C.P. 499, 35 L.J. (C.P.) 205, 14 W.R. 672. See also *Ashbury Railway Carriage & Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653, 44 L.J. (Ex.) 185, 24 W.R. 794; *Att'y.-Gen'l.* v. *Great Eastern Ry. Co.* (1880), 5 App. Cas. 473, 49 L.J. (Ch.) 545, 28 W.R. 769; *Att'y.-Gen'l.* v. *Manchester Corp.*, [1906] 1 Ch. 643, 75 L.J. (Ch.) 330, 54 W.R. 307.

From the foregoing authorities I draw the conclusion that sec. 14 of the Companies' Act does not apply to companies created under the authority of the Rural Telephone Act, and that the appellant company, being a non-trading corporation with no express or implied power to make promissory notes, is not liable on the note in question.

I would also express the opinion that, even if that section applies to Rural Telephone companies, the provisions of the general Act must be held to be subject to the special limitations, restrictions and provisions of the Rural Telephone Act.

I would therefore allow the appeal with costs. The judgment below should accordingly be set aside and judgment entered for the appellant, dismissing the action with costs.

LAMONT, J.A.:—I concur in the view that the defendants had no power to make the note.

TURGEON and MCKAY, JJ.A., concur with HAULTAIN, C.J.S.

Appeal allowed.

BUCKLEY v. FITZGELBON (WARDEN).

Quebec Court of King's Bench, Appeal Side, Martin, Howard, Allard, Bernier, and Rivard, JJ. June 21, 1921.

HABEAS CORPUS (§IA—1)—LIMITATIONS—APPEAL PROPERLY THE REMEDY —CR. CODE, SEC. 1013—CONVICTION AND COMMITMENT ON SUMMARY TRIAL UNDER CR. CODE, SEC. 777.

The remedy of appeal under Cr. Code, sec. 1013, is available to the accused in respect of his conviction upon summary trial under Cr. Code, sec. 777, by a Judge of Sessions of the Peace in the Province of Quebec sitting as a "Magistrate" under Cr. Code, sec. 771. If the conviction and commitment set forth the fact of consent to summary trial and an adjudication for an offence triable by consent and the punishment is not illegal, *habeas corpus* is not the proper remedy under which to review mere errors or irregularities at the trial.

SUMMARY TRIAL (§I—10)—ELECTION — MAGISTRATES WITH CONCURRENT JURISDICTION — TRIAL BY ONE ON ELECTION MADE BEFORE THE OTHER—CR. CODE, SECS. 771, 777.

An election of summary trial under Part XVI. of the Cr. Code before a Judge of Sessions of the Peace in Quebec operates as an election for trial before either of two Judges of the same Sessions of the Peace having concurrent jurisdiction.

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PETITION on behalf of one Buckley for his discharge on *habeas corpus*. Dismissed.

Alleyn Taschereau, K.C., for petitioner.

N. K. Laflamme, K.C., for the Crown.

The following opinions were handed down:—

MARTIN, J.:—The petitioner, William Buckley, was on February 12 last, at Quebec, arraigned before P.A. Choquette, one of the Judges of the Sessions of the Peace for the District of Quebec, on two charges: one of highway robbery (Cr. Code art. 446), and the other of shop-breaking (Cr. Code art. 460). One Joseph Caulfield was also charged with the same shop-breaking.

After being remanded from time to time, the accused was on March 7, 1921, tried and convicted on both charges by the Court of Sessions of the Peace then presided over by Arthur Lachance, a Judge of the Court of Sessions of the Peace, and sentenced on the charge of highway robbery to 15 years in the penitentiary and on the charge of shop-breaking to 5 years in the penitentiary.

Buckley, while detained in the common jail for the District of Quebec, applied to and obtained from Dorion, J., a Judge of this Court, the issue of a writ of *habaes corpus*, and the latter upon return of said writ and examining into the cause of detention, held that a legal cause of detention was shewn to exist and that petitioner's recourse, if any, to quash the conviction was by way of appeal and not upon the proceedings of *habeas corpus*, and he quashed the writ of March 11.

On March 30 the petitioner applied to this Court and, upon order of this Court, obtained the issue of another writ of *habaes corpus* in order that this Court might entertain, hear and determine the cause of detention.

It was urged that this consent to be tried summarily for these offences had been irregularly obtained, and that the Judge of Sessions did not inform him when and where the Court having criminal jurisdiction would sit, or that, if he did not consent to be tried summarily, he might be admitted to bail.

I have examined the record of proceedings before Choquette, J., by the light of the statutory information directed to be given the accused under art. 778, Cr. Code, and have reached the conclusion that there was no literal and substantial fulfilment of the provisions of the law and procedure set forth in said art. 778.

The directions of law and procedure as to what should be stated to the accused in order that he may optate for a summary trial should no doubt be strictly followed in the statutory form of that section, and if there was omission to state to the accused that he might obtain bail, he would have just cause to complain and his consent obtained without full statutory information

might be vitiated; but here he was told that if he did not consent to a summary trial he would remain in custody or under bail to be tried in the ordinary way by the Court having criminal jurisdiction.

There was only one Court having criminal jurisdiction, the Assizes, and it was impossible for the prisoner to be misled as to where or before whom he would be tried if he did not consent to be tried summarily. The date of the sittings of that Court is fixed by law and the prisoner, in theory at least, knows it as well as the magistrate.

It was also urged that as the prisoner consented to be tried before Judge of Sessions Choquette, he could not be forced to take his trial before Judge of Sessions Lachance. It is sufficient to dispose of this objection to say that these two magistrates have concurrent jurisdiction to sit as a Court of Sessions and the accused acquired no statutory or other right to insist upon being tried by a Court presided over by Judge of Sessions Choquette in lieu of a Court of Sessions presided over by Judge of Sessions Lachance. "Magistrate" means any Judge of the Sessions: Cr. Code art. 771. The case of *Re Bain* (1919), 31 Can. Cr. Cas. 206, 29 Man. L.R. 467, is not in point. There the case was one of transfer for trial before a magistrate of another city. [Note (a)].

It was urged that the record must shew jurisdiction; that it does not clearly disclose jurisdiction of the Court of Sessions to try the accused by virtue of his own consent. The fact of such consent appears in the conviction, and the conviction is substantially in the terms of form No. 55. [Cr. Code sec. 1152].

The *procès-verbal* of proceedings shews that the accused was allowed to make full answer and defence and, through his attorney, declared that he had no witnesses to be heard. It was urged that the magistrate had not transmitted the depositions of witnesses to the Clerk of the Peace as required by the provisions of art. 793 Cr. Code, but the failure to comply with this formality will not justify the release of the prisoner from the penitentiary on *habeas corpus* proceedings.

The commitment meets all the requirements of secs. 44 and 46 of the Penitentiary Act, R.S.C. 1906, ch. 147, and a legal

(a) In *Re Bain* 31 Can. Cr. Cas. 206, 29 Man. L.R. 467, the Court of Appeal for Manitoba held that where an election of summary trial for an indictable offence has been taken and plea made to the charge under Code ss. 777 and 778, the magistrate who has accepted such election has no jurisdiction to transfer the case for trial before the magistrate of another city of the same Province by reason of the fact that the offence is charged to have taken place in such other city. Mandamus will lie to compel the magistrate before whom the option was made to appoint a time for the trial and to proceed therewith.

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cause of the detention is shewn by the return of the Acting-Warden of the penitentiary to the writ of *habeas corpus*.

The conviction ought not to be quashed by way of *habeas corpus*. If the accused has any grounds to quash the conviction, he should have exercised that recourse by way of appeal or stated case, under the provisions of art. 1013 *et seq.* (Cr. Code).

Where a Court having tried an accused person on a charge which was within its power to try, has made an adjudication of guilt and of punishment and it is set forth in the adjudication that an offence triable by that Court has been committed and the punishment imposed is such as that Court has power to adjudge, this Court is without jurisdiction in proceedings by way of *habeas corpus* to enquire into the legality of such adjudication.

The petitioner has been tried and convicted of a felony before a Court of competent jurisdiction, and no Judge of this Court has any right, authority or jurisdiction to release him under a writ of *habeas corpus*. As was remarked by Strong, J., in the *Sproule* case (1886), 12 Can. S.C.R. 140 at p. 204:—

"If any proposition is conclusively established by authorities having the support of the soundest reasons, it is that, after a conviction for felony by a Court having general jurisdiction over the offence charged, a *habeas corpus* is an inappropriate remedy, the proper course to be adopted in such a case being that to which the prisoner in the present case first had recourse, viz., a writ of error. The anomalous character of such an interference with due course of justice, in intercepting the execution of the judgment of a Court of competent jurisdiction, and by which a single Judge in Chambers might reduce to a dead letter the considered judgment of the highest Court of error, would to my mind be itself sufficient, even without authority, to induce a strong presumption that such a state of the law could not possibly exist."

And Ritchie, C.J., in that case said, at pp. 200-201:—

"So soon then as it appeared by the record of a superior court of general criminal jurisdiction that the prisoner had been tried, convicted of a felony and sentenced by such a court, the jurisdiction of the Judge, that is to say, the right of the Judge to issue the writ, or discharge the prisoner, ceased. If, in the administration of the criminal jurisprudence of the Dominion, the judgments of the superior courts of the provinces, and of this the Supreme Court of the Dominion, can be paralysed by a single judge of either of those courts in chambers, the practical effect of what is now contended for, and if, as contended, there is no redress in this or any other court of the Dominion of Canada, is it

too much to say that to allow single judges by virtue of the writ of *habeas corpus* to review, control, and, in effect, nullify the judgments of these high courts of criminal jurisdiction, is subversive of all law and order?"

21 Cyc. p. 285 says:—

"The writ of *habeas corpus* is not designed to fulfill the functions of an appeal or a writ of error. It is not intended to bring in review mere errors or irregularities whether relating to substantive rights or to the law of procedure committed by a court having jurisdiction over person and subject-matter. Such errors and irregularities do not affect the jurisdiction of the court or render its judgment void, and the remedy is therefore by appeal exceptions, or writ of error."

The judgment of a Court of competent jurisdiction is binding until reversed, and another Court cannot by means of the writ of *habeas corpus* re-examine the charges and proceedings, and after final judgment and conviction in a criminal case, this Court in a *habeas corpus* proceeding cannot re-try the case.

10 Hals. p. 47, secs. 102, 103.

"The writ [of *habeas corpus*] will not be granted to persons committed for felony or treason plainly expressed in the warrant of commitment or to persons convicted or in execution under legal process including persons in execution of a legal sentence after conviction on indictment in the usual course." (Sec. 102.)

"The writ of *habeas corpus* will not be granted where the effect of it would be to review the judgment of one of the Superior Courts which might have been reviewed on writ of error," (sec. 103.)

In the case of *O'Neil* v. *Carbonneau* (1918), 29 Can. Cr. Cas. 340, 54 Que. S.C. 417, the late Pelletier, J., cited with approval at p. 346, the opinion of Lord Campbell, where he says, in the case of *Ex parte Lees* (1860), 1 E.B.& E. 828, 120 E.R.718, 27 L.J. (Q.B.) 403, 6 W.R. 660.

"A writ of *habeas corpus* to the expediency of granting which we have also directed our attention is not grantable in general where the party is in execution on a criminal charge after judgment."

And the late Cross, J., in the case of *Rex* v. *Therrien*, (1915), 28 D.L.R. 57, 25 Can. Cr. Cas. 275, 17 Que. P.R. 285, remarked (28 D.L.R. at 62):

"Where applicants are undergoing sentence in execution of convictions for criminal offences, the resort to the writ of *habeas corpus*, to the Superior Court in many, if not in most cases, is misconceived. The idea given effect to in the Criminal Code is that mistakes may be corrected, and very wide powers are

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accordingly given to the appellate courts. Where that machinery exists, there is good reason for not permitting resort to a form of remedy like *habeas corpus*, when, if there has been a mistake, the result must often be, not correction of the mistake, but immunity for the applicant, whether he be guilty or not."

Jurisdiction is shewn and the commission of a criminal offence is disclosed and after conviction by a Court having general jurisdiction over the offence charged, the writ of *habeas corpus* is an inappropriate remedy. The Criminal Code affords a remedy and protection to accused parties by way of appeal to this Court and to the Supreme Court of Canada, and if the conviction is affirmed on appeal to this Court, to the Supreme Court or by the Privy Council, can a Judge of this Court review these judgments and reverse them? In other words, we would have the astonishing proposition that a Judge of this Court has authority and jurisdiction to reverse a judgment of the highest Appellate Court in the land.

The writ of *habeas corpus* is an effective safeguard of the liberty of the subject, but it was never intended that its provisions could or should be invoked by convicts and felons to obtain their release from custody after trial, conviction and sentence by a Court of competent jurisdiction. If such a dangerous doctrine were sanctioned, it would mean that the doors of our penitentiaries could be opened and convicts go at large upon their *ex parte* application and averment that some irregularity had occurred in their trial.

I have had occasion to express my views on this matter in the cases of *Rex* v. *Goldberg* (1919), 54 D.L.R. 559, 29 Que. K.B. 47, 33 Can. Cr. Cas. 320; *Rex* v. *Labrie* (1920), 61 D.L.R. 299, 31 Que. K.B. 47, 35 Can. Cr. Cas. 325, and I affirm all that I there said. The writ of *habeas corpus* herein issued should be quashed and annulled and the prisoner's demand to be liberated refused, and he should be ordered to be detained in the penitentiary to satisfy the conviction and sentence or until otherwise legally discharged.

HOWARD, J.:—I concur on all points in the opinion expressed by Martin, J., in his notes of judgment herein and agree with him that the said writ of *habeas corpus ad subjiciendum* should be quashed.

The only question properly raised on *habeas corpus* proceedings is whether the prisoner is being held under proper authority. In other words, the inquiry on such proceedings has to do with the legality of the detention and with nothing else. The respondent, warden of St. Vincent de Paul Penitentiary, by his return shews that he is detaining the accused under a com-

mitment in due form of a Court of competent jurisdiction, after due trial and conviction for an offence within the jurisdiction of that Court and under a sentence which the Court had authority to impose. That would seem to be a sufficient answer to the writ.

Discharge refused.

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*ZORNES v. THE KING.
HAMILTON v. THE KING.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman, and Clarke, JJ.A. June 29, 1922.

CROWN (§ II—20)—LIABILITY FOR TORTS—COMMON LAW RULE—PUBLIC UTILITIES ACT, 1915 (ALTA.), CH. 6, SEC. 31 (2)—LOOSE WIRE ON GOVERNMENT TELEPHONE SYSTEM—INJURY TO TRAVELLER—LIABILITY.

Section 31 of the Public Utilities Act of Alberta, 1915 (Alta.), ch. 6, expressly changes the common law rule that the Crown is not liable for a tort and makes it liable for damages to a traveller on the highway caused by coming into contact with a loose wire on a Government telephone system.

[See *Zornes* v. *The King* (1922), 63 D.L.R. 478, in which the Appellate Division reversed the judgment of Ives, J.A., holding that the Crown was not liable in an action on tort and ordering a new trial.]

APPEAL by the Crown from the trial judgment in an action for damages for injuries received by coming into contact with a live wire on a Government telephone system. Affirmed.

R. A. Smith, for appellant.

J. A. Clarke and *S. R. Wallace*, for respondents.

SCOTT, C.J., concurs with STUART, J.A.

STUART, J.A.:—I have carefully read the evidence in these cases and I have come to the conclusion that the appeals should be dismissed with costs.

It is admitted that the accident was caused by a fallen telephone wire which was lying on the public highway and that this telephone wire was part of the system of wires erected and maintained by the Provincial Department of Railways and Telephones. I think this was a violation of the provisions of sec. 31, sub-sec. 1, (a), (b) and (c), and sub-sec. 2, of the Public Utilities Act, 1915 (Alta.), ch. 6. Having broken a statutory duty I think the public utility is liable for the damages caused by the breach. If it had been proven, which in this case it was not, that the damages were an inevitable and necessary consequence of the exercise of statutory powers there would then, of course, have been no breach of a statutory duty.

Even if the public utility could have relieved itself from lia-

* Appeal pending.

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bility by showing that it used every reasonable care I think the defendant failed to prove that it had exercised such care.

But more than that, I think there was ample evidence, if he believed it, as he certainly did, to justify the trial Judge's finding of negligence.

It is, of course, improper to treat it as a case of common law liability, because that would open a door which this Court refused to open in the previous appeal (1922), 63 D.L.R. 478, although we did not say absolutely that it could not be opened. But we do not need to deal with that question now. The facts as found by the trial Judge, in my opinion, clearly bring the case within sec. 31 of the Act, and that according to our former decision is sufficient to establish liability.

With respect to the contention that under the Public Utilities Act the only remedy for what happened here is the imposition of a penalty and an order of the Board. I am unable to agree with it. The two cases cited in the appellant's factum are clearly distinguishable. One was an action for a mandamus to compel a sanitary authority to fulfil its duty of providing a drainage system and there was a special method of making them perform that duty, provided by the Act. The other case in which the plaintiff did claim damages and an injunction was a case in which a sanitary authority was sought to be made liable in damages because sewage had been allowed to fall into a stream. But the action failed because under the peculiar facts of the case the defendants had not been really the persons who had committed the act complained of.

The question of the proportion of costs should be left to the taxing officer.

I think the appeals should be dismissed with costs.

BECK, J.A., concurs with STUART, J.A.

HYNDMAN, J.A. (dissenting):—As I understand it the controlling judgment delivered in this division on March 16, 1922, 63 D.L.R. 478, did not decide that the Crown was liable in damages for tort, but only, that if the facts as shewn by the evidence brought the case within the provisions of sec. 31 of the Public Utilities Act, that then the Crown would be liable.

A careful perusal of the appeal book including the trial Judge's reasons for judgment leaves me still unconvinced that the action properly falls within said section.

I adhere to the dissenting judgment which I delivered on the former appeal herein and would therefore allow the appeal with costs and dismiss the action with costs.

CLARKE, J.A. concurs with STUART, J.A.

Appeal dismissed.

O'HEARN v. YORKSHIRE INSURANCE Co.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 21, 1921.

INSURANCE (§VIB—315) — ACCIDENT — INDEMNITY — MOTOR DRIVER—PEDESTRIAN—COLLISION—INJURIES—DEATH — ASSURED DRIVING CAR WHILE INTOXICATED — CRIMINAL NEGLIGENCE — RIGHT TO INDEMNITY UNDER POLICY.

An insured cannot maintain an action on a policy of insurance to indemnify him from the civil consequences of his own criminal act in driving an automobile while in a drunken condition as a result of which he ran down a pedestrian and injured him to such an extent that he subsequently died as a result of such injuries.

[*Burrows* v. *Rhodes*, [1891] 1 Q.B. 816; *Lundy v. Lundy* (1890), 24 Can. S.C.R. 650, referred to; *Tinline* v. *White Cross Ins. Co.* (1921), 37 Times L.R. 733, distinguished.]

APPEAL by the plaintiff from the judgment of Middleton, J. (1921), 64 D.L.R. 437. Affirmed.

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

T. N. Phelan, for respondent.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 9th May, 1921, which was directed to be entered by Middleton, J., after the trial before him, at Toronto, without a jury, on that day and the previous 28th April.

The respondent, by its policy No. 33974, agreed to indemnify the appellant against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries accidentally sustained, including death at any time resulting therefrom. The duration of the policy was for one year from the 18th December, 1918, and the liability of the respondent was limited to $5,000 for one person injured, and subject to that limit to $10,000 on account of any one accident injuring more persons than one.

On the 11th September, 1919, the appellant, while driving his automobile on King street, in Toronto, struck and injured a man named Plum, who subsequently died as the result of his injuries. Plum was an employee of the Toronto Railway Company, and his dependents received from that company, under the Workmen's Compensation Act, $6,133.51. The company, being subrogated to the rights of the dependants of Plum, brought an action in their names against the appellant, and recovered judgment against him for $6,275 and costs, and that judgment has been satisfied by payment—$1,275 having been paid on the 9th April, 1920, and the balance on the 8th April

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of this year; and it is in respect of tsese damages that the appellant sues.

While driving the automobile, the appellant was drunk, and when he struck Plum he was driving at the rate of about 40 miles an hour. He was convicted of an offence under sec. 285 of the Criminal Code, and sentenced to two years' imprisonment.

The learned Judge found as a fact that the appellant was guilty of the offence of which he was convicted, and this finding is not questioned.

The respondent contests the claim on the ground that it is contrary to public policy that the appellant should be indemnified against his own criminal act, and the learned Judge so held.

It was very properly conceded by Mr. McCarthy that, if the respondent had in terms contracted to indemnify against damages recovered for injuries caused by a criminal act of the insured, there could be no recovery; but he argued that, as that is not the form of contract of the respondent, recovery may be had unless the act of the appellant which caused the injury was an intentional act.

I am unable to agree with that contention. It cannot, I think, be supported on principle or by authority, but what authority there is is the other way.

In *Amicable Society* v. *Bolland* (1830), 4 Bligth N.S. 194, the action was by the assignee in bankruptcy of Fauntleroy, on a policy of insurance on his life. He had been convicted of forgery and executed, and it was held that there could be no recovery because the law will not enforce contracts and agreements which are against public policy and therefore forbidden by public policy.

In his speech, the Lord Chancellor said (pp. 211, 212):—

"It appears to me that this resolves itself into a very plain and simple consideration, suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes? namely, the

interest we have in the welfare and prosperity of our connexions. Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?"

That case was referred to, with approval, in *Ritter* v. *Mutual Life Insurance Co. of New York*, 169 U.S. 139, 158, 159, and the same conclusion was reached by the Court.

In *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, the action was by the executors of the insured, who had effected an insurance on his life for the benefit of his wife. His death was caused by the felonious act of his wife, and the defendant company resisted payment on that ground, invoking the doctrine of public policy to which reference has been made, but it was held liable, the view of the Court being that, the trust in favour of the wife having been incapable of performance by reason of her crime, the insurance money formed part of the estate of the insured, and that as between his representations and the defendant company no question of public policy arose to afford a defence to the action.

In *Burrows* v. *Rhodes*, [1890] 1 Q.B. 816, 828, it was said by Kennedy, J.:—

"It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or indemnity against the liability which results to him therefrom."

The question was considered by the Supreme Court of Canada in *Lundy* v. *Lundy*, 24 Can. S.C.R. 650. In that case land was claimed by the plaintiff as grantee of his brother to whom his wife had devised it. The brother had killed his wife and was found guilty of manslaughter. It was contended that, his crime having been manslaughter, the rule which, if he had murdered his wife, would have precluded him from taking, was not applicable, but this contention was rejected by the trial Judge and by the Supreme Court, though it had been given effect to in the Court of Appeal. Stating his opinion, the Chief Justice of

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Canada (pp. 652, 653), referring to the principle which he said was the ground of the decision of Lord Justice Fry in the *Cleaver* case, said it was a principle "which would include all wrongful acts, not merely felonies but misdemeanours;" and, speaking of it as a sound principle of industrial jurisprudence, he quoted the following passage from the opinion of the Lord Justice:—

"No system of jurisprudence can with reason include among rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible that it can arise from felony or misdemeanour."

Tinline v. *White Cross Insurance Co.*, 37 Times L.R. 733, if rightly decided, which may be open to question, is, I think, distinguishable. The *ratio decidendi*, as I understand it, was that the plaintiff was insured against accident, that negligence must therefore have been contemplated, as without negligence there could be no liability (*i.e.*, to the person injured), that the defence depended on the degree of negligence, that that was impossible—and that although in the result the person injured had died as the result of his injuries.

I gather from what was said that there was no legislation similar to that in sec. 285 of the Criminal Code, and therefore the negligence of the plaintiff did not constitute a crime, although in the result it was a criminal offence—manslaughter—which was committed. In the case at Bar, the appellant's negligence, apart from it resulting in the death of the injured man, was a crime; and, according to the cases to which I have referred, the appellant cannot maintain an action to indemnify him against the injury caused by that act.

If it had been necessary for the defence to establish an intentional act on the part of the appellant, I am not at all sure that his act was not intentional in the sense that it was done recklessly, not caring for what the consequnces of it might be.

In my opinion, the action was rightly dismissed, and I would therefore dismiss the appeal with costs.

As I have reached that conclusion, I have not found it necessary to consider the question raised as to the action having been begun too late.

MACLAREN, MAGEE and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—The insurance taken out by the appellant covered any loss by reason of the liability imposed upon him by

law for damages on account of bodily injuries accidentally sustained, including death at any time resulting therefrom. The injury in this case resulted in the death of a man lawfully engaged on work in a public street at night, properly protected by signals on the road.

The appellant was convicted of an offence under sec. 285 of the Criminal Code, and the trial Judge has held that he was guilty of the offence of which he was convicted. In that I agree.

The argument before us was that his unlawful act was not due to negligence, although he might well be convicted of culpable homicide not amounting to murder. The basis of this argument is that, being incapacitated by drink, he could not while in that condition be wilfully negligent. In the case chiefly relied on by the appellant, *Tinline* v. *White Cross Insurance Co.*, 37 Times L.R. 733, Mr. Justice Bailhache says, "if the act had been intentional the policy would not cover the insured." The policy in this case is "on account of bodily injuries accidentally sustained," and so would not cover the case of harm caused by wilful neglect. The appellant in his evidence denies that he was operating his car east of Sherbourne street at a high rate of speed, 35 miles an hour. So that while he remembers nothing west of Sherbourne street, he is not shewn to have been incapacitated at a point within a few blocks of where the fatality happened. He was in charge of his car and was driving it, necessitating some degree of volition on his part. His drunkenness is a circumstance to be considered, but it is not established that the appellant was so drunk as to have been incapable of wilful neglect. The learned trial Judge does find that he was intoxicated; but, if he had meant that the appellant was so incapacitated thereby as to be incapable of any intent in the matter, he would not have been able to find that an offence under sec. 285 had been committed. If, as Mr. Justice Bailhache says, negligence was contemplated, but not wilful negligence, I would agree with him that the degree of negligence, whether ordinary or gross, would not affect the question. But the crime committed was not merely the killing of the workman but the wanton or furious driving within sec. 285, previous thereto, which caused the death. It was while so driving that this neglect, criminal within the statute, arose, and to hold that he can be indemnified against its consequences would be contrary to public policy.

Appeal dismissed.

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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.

BENJAMIN v. BOIVIN.

Alberta Supreme Court, Scott, J. March 26, 1921.

PLEADING (§IK—75)—*Practice—Application for judgment—Delivery of reply—Effect—Joinder of issue—Leave of Court.*]

APPEAL from the Master at Edmonton upon an application under R. 287, directing that judgment be entered for the plaintiff for the amount found due upon a reference to the clerk.

F. J. Richardson, for plaintiff; *S. W. Field*, for defendant.

SCOTT, J.:—The only ground of appeal raised before me was that, as the pleadings were closed, it is too late for the plaintiff to apply for judgment under that rule except by leave of a Judge (see R. 225, "3").

The defendant filed a statement of defence and the pleadings were closed by the failure of the plaintiff to deliver a reply within the time limited.

In *Rutherford* v. *Taylor* (1915), 24 D.L.R. 882, 9 Alta. L.R. 129, the plaintiff had delivered a reply and it was held that he had thereby forfeited his right to apply for judgment under R. 287.

In *Cushing* v. *Horner* (1915), 25 D.L.R. 824, the plaintiff had not delivered a reply within the time limited, and the pleadings were closed by lapse of time. The Chief Justice, upon an appeal from the Master upon an application under R. 287 directing the entry of judgment for the plaintiff, points out that the cases which followed in *Rutherford* v. *Taylor* were based upon the ground that a plaintiff, by delivering a reply, elected to proceed to the trial of the issue joined and that the practice laid down in *Rutherford* v. *Taylor* was not applicable to cases where issue was joined by the failure of the plaintiff to deliver a reply.

I agree with the view expressed by the Chief Justice in *Cushing* v. *Horner* and I therefore dismiss the appeal with costs.

Appeal dismissed.

BRASSETH v. THE ROYAL BANK OF CANADA.

Alberta Supreme Court, Scott, J. April 6, 1921.

BANKS (§IIIB—25)—*Acts of manager—Bills and notes—Fraudulent representations—Using funds to pay overdraft—*

Ultra vires—Receiving benefits—Authority of agent.]—Application by the plaintiff for judgment against the defendant for the amount claimed with costs, upon the admission contained in the pleadings and in the examination for discovery of John M. Campbell, an officer of the defendant selected by it for examination for discovery.

J. E. Varley, for plaintiff.

A. McL. Sinclair, K.C., for defendant.

SCOTT, J.:—The plaintiff in his statement of claim charges that on January 17, 1920, he and one Farleigh were, and still are, customers of the defendant's west end branch at Calgary, that on that date the defendant, by one Kelly who was then its duly authorised agent and its local manager of that branch, through the medium of a certain promissory note for $2,500 then drawn up by him as manager and signed by Farleigh, payable to the order of the plaintiff on demand, by fraud and fraudulent representations and by fraudulent disclosures of the fact that Farleigh was indebted to said branch in a large sum, induced the plaintiff to advance the $2,500 which the defendant bank received by the plaintiff's cheque payable to the order of Farleigh and endorsed by him, which sum was then used by the defendant to liquidate the past due debt then due to it by Farleigh; that the defendant, by said Kelly as its manager, represented that said note would be paid when demanded and wrote upon same the words "This note will be paid when demanded" and signed his name thereto; that at the time of said advance the plaintiff informed the defendant, through Kelly, its agent, that he would advance money to Farleigh only upon the direct undertaking of the defendant to repay the same with interest upon demand, and thereupon Kelly, as defendant's manager, represented that the defendant would take care of and pay the note; that the fraudulent representations made by Kelly as such manager induced the plaintiff to rely upon the defendant as his debtor and that it procured the $2,500 for its own direct benefit; that such representations were made by Kelly within the scope of his authority as manager of the said branch, and that the defendant has accepted the benefit of the transaction referred to with knowledge of the fraud; and by its fraud and wrongful acts, and those of its agent, the plaintiff has suffered damage and the defendant has profited thereby.

Alternatively the plaintiff charges that the transaction referred to was *ultra vires* of the defendant and, having received benefit therefrom, is not entitled to hold the same as against the plaintiff.

It appears that on the date referred to the plaintiff advanced

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$2,500 to Farleigh by way of a loan, giving him his cheque therefor, which he deposited to his credit in defendant's west end branch, where he was then overdrawn to the extent of $2,093.36, the defendant thereby receiving the benefit of that portion of the loan. On the same day Farleigh gave the defendant his promissory note for the $2,500 with interest at 8% *per annum* payable on demand. Upon this note Kelly wrote the words "This will be paid when demanded" and signed his name thereto. It is not shewn that he had any authority to give this undertaking on behalf of the defendant and, in the absence of any direct authority to that effect, I doubt whether the defendant would be liable upon such an undertaking by him.

It is apparent from Campbell's examination for discovery that the only knowledge he has of the transaction was such as he was enabled to obtain from an examination of the records of the west end branch of which he is now the manager, Kelly having been dismissed from the service of the defendant shortly after the transaction.

There is no evidence before me of any representations, fraudulent or otherwise, having been made by him to the plaintiff or of his having concealed from him the fact that Farleigh was indebted to the defendant. In the absence of evidence to the contrary it may be that Kelly may not have made any representations to the plaintiff and the latter may have been aware of the state of Farleigh's account with the defendant, and that it was the intention to apply a sufficient portion of the loan to pay his overdraft and also that it was the intention of the plaintiff to require and of Kelly to give, merely his own personal undertaking for the payment of the note. The fact that he did not add the word "manager" to his signature points to the conclusion that that was his intention.

I cannot find any admission in the statement of defence which would entitle the plaintiff to succeed on this application.

I dismiss the application with costs in the cause to the defendant. *Application dismissed.*

***BENNETT v. SHAW.**

Alberta Supreme Court, Stuart, and Ives, JJ. March 28, 1922.

ELECTIONS (§IIC—72)—*Return of candidate—Disputed ballots.*]—Petition under the Dominion Controverted Elections Act R.S.C 1906 ch. 7.

A. McL. Sinclair, K.C., for petitioner.

G. H. Ross, K.C., for respondent.

The judgment of the Court was delivered by

*Affirmed by the Supreme Court of Canada: to be published later.

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STUART, J.:—The petitioner who was a candidate at the Dominion election held on December 6, 1921, for the Electoral District of West Calgary complains of the return of the respondent as the member elected for that district. There are no charges of fraud, bribery or undue influence made nor is there any suggestion of wilful misconduct on the part of any of the election officials.

On Wednesday, December 14, the returning officer having added up the return made by the various deputy returning officers had declared the petitioner Bennett elected and that the candidates had received the following number of votes, Bennett 7372, Shaw 7366 and Ryan (a third candidate) 1354.

The respondent Shaw thereupon in pursuance of the provisions of the Dominion Elections Act 1920, ch. 46, applied for a recount of the ballots. This recount was held by Winter, D.C.J. of the Judicial District of Calgary, and was completed on December 23. On that date the district Judge certified to the returning officer that the result of the recount and final addition of the votes cast at the election was as follows: Bennett 7353, Shaw 7369, and Ryan 1351. The returning officer thereupon declared Shaw to be duly elected and made his return accordingly. Shaw was gazetted as the member elected on January 3, 1922, and on January 31, Bennett filed his petition.

The petitioner alleges that the district Judge "did (a) disallow and refuse to count, as legal and lawful, ballots which had been counted and allowed by the deputy returning officers at the close of the polls and allow and count ballots which had been rejected by the deputy returning officers at the close of the polls and in regard to each of which no objection had been taken to the rejection or counting thereof as the case may be before the deputy returning officer at any polling division by any candidate or his agent or any elector present and (or) in regard to each of which no objection was numbered and no corresponding number was placed on the back of any of the said ballot papers or initialled by the deputy returning officer as required by the provisions of sec. 66 of the Dominion Elections Act and (b) reject certain ballots for reasons other than the reasons set forth in sub-sec. 2 of sec. 66 of the Dominion Elections Act.

Then followed a number of particulars referring to different polling divisions and to the specific errors with respect to particular ballots which were alleged to have been made by reason of which certain ballots had not been counted for the petitioner which should have been so counted and certain other ballots had been counted for the respondent which should not have been so counted.

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It is to be observed that by being drawn in this way the petition did not seem to leave it open to the respondent to raise the question of errors of a reverse nature having been made by reason of which ballots had not been counted for the respondent which should have been counted for him and ballots had been counted for the petitioner which should not have been so counted.

The petition concluded by a prayer that the roll books and the "aforesaid ballots" should be examined and scrutinised and that it should be determined that the petitioner Bennett and not the respondent Shaw should have been returned as elected. In other words the petitioner did not ask for a general scrutiny of all the ballots nor even of all those that had been in dispute before the district Judge but merely of those with respect to which an error was alleged to have been made contrary to the petitioner's interest.

The respondent Shaw, however, in his answer to the petition, after making general denials alleged that additional errors, of which particulars were given, had been made by the district Judge whereby ballots had been rejected which should have been counted for him and other ballots allowed and counted for the petitioner Bennett which should not have been so counted.

At the opening of the trial counsel for the respondent raised the preliminary objection that the petition did not allege that a majority of the lawful votes cast had been cast for the petitioner. The case of *Grant* v *McLennan* (1913), 12 D. L. R. 464, a decision of Macaulay, J. of the Yukon Supreme Court was cited in support of this contention. That Judge did undoubtedly so decide although the only authority quoted is a text book, Macpherson Election Law p. 603, where the rule is stated although without any reference to any decided case.

I am not prepared to say that Macaulay, J. was wrong. Technically speaking I think the rule is sound. In *Grant* v *McLennan* the point was raised before the trial on preliminary objection, a procedure which has now been abolished in so far as a general objection in the nature of a demurrer is concerned, although there is still a right to object to the sufficiency of the particulars. But in my opinion the allegation, the omission of which is complained of, is made at least inferentially in the petition. It is there alleged that the returning officer had first declared Bennett elected by a majority of 6 votes and that by reason of certain errors made by the district Judge in holding the recount of the ballots the respondent Shaw had been improperly, unduly and illegally declared to be elected. These

statements taken with the prayer of the petition that it may be declared that the petitioner Bennett was duly elected seem to me to be tantamount to an allegation that the majority of the good votes cast had been marked for the petitioner. I think threfore the preliminary objection should be overruled.

The petitioner by his counsel also objected to the respondent being allowed to go into an examination of any ballots other than those the decision in respect of which had been complained of in the petition and he contended that to get anything more the respondent should file a cross petition and make the deposit to secure costs prescribed by the Act.

In my opinion this contention is also unsound. I see nothing in the Act (R.S.C. 1906, ch. 7,) which could justify a petitioner in asking that a portion only of the ballots be scrutinised. By sec. 11 it is enacted that the petition must complain "of the undue election or return of a member or that no return has been made or that a double return has been made or of some unlawful or corrupt act or acts &c." What this present petition really complains of is the undue return of Shaw and the only ground alleged therefor is error in the recount of the district Judge. I cannot understand how that issue could be decided without an examination of all the ballots or at least of all about which there might be any possible dispute.

Petitioner's counsel in his argument alleged that the petitioner was asking for a scrutiny. I do not see how there could be any such thing as a partial scrutiny. If the Court is to examine any of the ballots I think it must examine them all or at least all about which there is or was any dispute.

Moreover, sec. 49 of the Act says: "On the trial of a petition under this Act complaining of an undue return and claiming the seat for any person the respondent may give evidence to shew that the election of such person was undue in the same manner as if he had presented a petition complaining of such election." I do not think the meaning of this section is confined to evidence of corrupt acts. No reference is made in the section to any such limitition. No doubt the section would have read more sensibly if the words had been "would have been undue" instead of "was undue" because there could have been no election of the person for whom the seat was claimed until there had been a count of the lawful ballots shewing a result in his favor. There had, indeed, in this case, been such a count by the deputy returning officers whose returns had been summed up by the returning officer and the petitioner had been declared elected by a majority of 6. I think therefore the

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section plainly opened the door for the respondent Shaw to raise questions as to ballots other than those referred to in the petition.

I may add that when a petitioner confines his complaints to questions relating to the valid marking of ballot papers and asks in substance for a scrutiny I think that the method of pleading and adducing evidence which was attempted to be pursued in this case upon the analogy of a trial of an action was rather out of place. This I think the parties eventually recognised before the case had proceeded very far. Ultimately it was admitted I think by both parties that what the Court had to do was simply to scrutinise all the ballots about which there was any question, to review the decisions given with respect thereto by the district Judge and to re-calculate the totals after allowing for the cases in which our decision varied from that of the district Judge.

Before proceeding to examine all the different classes of ballots it is necessary to deal first with the contention put forward in the petition and urged upon us in argument by counsel for the petitioner that the district Judge had no authority or jurisdiction to examine any ballots other than those to which objection had been taken at the initial count before the deputy returning officers when the ballot boxes were first opened.

In my opinion there is nothing in this contention. Sec. 70 sub-sec. (3), 1920, (Can.) ch. 46, one of the sections dealing with a recount, enacts that "the judge shall proceed . . . . to recount all the votes or ballot papers returned by the several deputy returning officers . . . and shall open the sealed packets containing (a) the used and counted ballots &c." It is clear that the duty and authority of the district Judge was to count over again all the ballots cast at all the polling stations.

I come now to the contested ballot papers, and shall deal first with the question of ballots marked with a pen and ink.

It is useful, I think, to trace the history of the Dominion legislation upon the question of the method of marking ballots at elections.

Voting by ballot was introduced in 1874, ch. 9, sec. 45. The statute of that year merely said that the elector shall "there mark his ballot paper making a cross on the right-hand side opposite the name of the candidate . . . for whom he intends to vote." Nothing was said as to the instrument to be used in doing this.

In 1878 ch. 6, sec. 6, the Act was amended making refer-

ence to "a pencil." It read: "there mark his ballot paper making a cross with a pencil on any part of the ballot paper within the division . . . containing the name . . . of the candidate . . . for whom he intends to vote." This was continued in the Revised Statutes of 1886, ch. 8, sec. 46.

In 1894 ch. 13, sec. 4, the amended section read "there mark his ballot paper making a cross with a pencil on the white portion of the ballot paper opposite to or within the division . . . containing the name . . . of the candidate . . . for whom he intends to vote." This change related to a change in the form of the ballot paper.

In 1895 ch. 13, sec. 4, the same words were repeated with respect to the method of marking but the provision as to the place of marking was amended.

In 1900 ch. 12, sec. 72, the kind of pencil to be used was first specified. The Act that year read "The elector on receiving his ballot paper shall forthwith proceed into one of the compartments of the polling station and there mark his ballot paper making a cross with a black lead pencil within the white space containing the name of the candidate . . . for whom he intends to vote, etc." This wording was retained in the Revised Statutes of 1906 and has been continued unchanged up to the present time and is now found in sec. 62 (3) of the Act of 1920 except that instead of the words "making a cross &c." we have the words "*by* making a cross &c.", possibly a significant change.

The Act of 1920 makes also other references to the material or instrument to be used in marking a ballot. Section 55 which deals with "Polls and Polling Stations" reads in sub-sec. 4 thus "In such compartment there shall be provided for the use of voters in marking their ballots a table or desk with a hard and smooth surface and a suitable black lead pencil which shall be kept properly sharpened throughout the hours of polling." Section 45 directs the returning officer to furnish in time to each deputy returning officer "(c) the necessary material for voters to mark their ballots" and (d) at least 10 copies of printed directions in Form No. 24 for the guidance of voters in voting. This form contains the following paragraph:— "The voter will go into one of the compartments and with a black lead pencil there provided place a cross within the white space containing the name of the candidate for whom he votes, thus X."

I think the district Judge was right, in view of this legislation, in refusing to count ballot papers marked with a pen and ink.

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It is of course regrettable that Parliament could not have used language that would have settled the matter without leaving it to Judges to cudgel their brains over. It was perfectly easy to say that a ballot paper not marked with a black lead pencil should not be good and to direct the deputy returning officer not to count it, by adding another clause to sec. 66 subsec. (2) which states what ballots that officer is to reject.

It was also perfectly easy to say that the omission to use a black lead pencil would not be fatal but that the reference to it was merely directory. The distinction between mandatory and directory legislation has been known for years and the English language is quite capable of expressing the one idea or the other.

In other words, Parliament could very easily have used language which would shew beyond possibility of cavil that the use of the black lead pencil was obligatory or that, in referring to it, the intention was merely to give some kindly advice to the voter.

I am criticising Parliament purposely because I am sure that Parliament would answer that it always means what it says. I am unable to say that that would not be a good answer. I think Parliament just meant what it said and I do not think that it was merely giving kindly advice to the voters that it would be better if they would mark their ballots with a black lead pencil but that it would be all right even if they did not do so and instead used a pen or a colored pencil or a paint brush, a piece of coal or a piece of red chalk.

There are authorities binding upon us which say that a cross is obligatory. *Jenkins* v. *Brecken* (1883), 7 Can. S.C.R. 247, at p. 254. In that case the Supreme Court of Canada confirmed the disallowance of a ballot marked thus X. The decided cases clearly hold that the mark made must be susceptible, by at least a generous opinion of it, of being called a cross. That is to say, a cross in some form is held to be obligatory.

If therefore the form of the mark to be made is obligatory I see no reason for thinking that the words laying down the material to be used should be treated as at all less stringent. The use of a pencil was directed in 1878. The reason will be apparent when we consider the fact that ink will generally cause a blot when the ballot is folded. This in fact happened in the cases of several of the ballots before us so that in these cases resort to the Courts would probably have been necessary to decide the validity of the ballots even if a pen and ink had been expressly permitted by the statute. Parliament ob-

viously thought the simpler plan would be to enforce the use of a black lead pencil rather than permit blotting to go on. It is worthy of note that the materials to be provided in the booth do not include a piece of blotting paper.

Then it is to be observed that sec. 62 sub-sec. 2 of the Act of 1920 says "The deputy returning officer shall instruct the voter how and where to affix his mark." There is no evidence before us that any deputy returning officer failed to perform this duty of his office. I think therefore that we must assume that it was properly performed. If therefore in the face of this instruction a voter instead of using the black lead pencil provided uses a fountain pen either out of a consciousness of excessive intelligence, or through carelessness, I do not see that he can complain if his vote is held to be invalid. And even if he never was so instructed I am inclined to think that we should not worry about a man being deprived of his vote who has so weak an appreciation of the seriousness of the duty which he is about to perform (instead of the right which he is about to exercise) that he has no consciousness that there may be something about the procedure of which he is ignorant and ought to enquire. Cocksureness is not always an evidence of intelligence.

It was contended that there was no decided case in which a ballot marked in ink had been rejected. That is admittedly the case. But I do not think there is any case where the language of the enactment is as imperative as that now found in sec. 62 (3) of the present Dominion Elections Act. In the *South Oxford case* (1914), 20 D.L.R. 752, 32 O.L.R. 1, Clute, J. had under consideration the Ontario Election Act, R.S.O. 1914, ch. 8. Referring to the corresponding section (sec. 102) in that Act he said, at p. 753, "It does not say that he *shall* make a cross with a black lead pencil." The section he was dealing with read as the Dominion section read up to 1920, that is, it said "shall mark his ballot, *making* a cross with a black lead pencil within the white space &c." Therefore Clute, J. said, as just quoted, that the statute does not say that he *shall* make the cross with a black lead pencil. However that may be, it is to be observed that our statute says "shall . . . . there mark his ballot *by* making a cross with a black lead pencil &c." If those words as they now stand after the insertion of the word "by" are not imperative then all I can say is that I do not know what imperative means and I do not understand the English language. I do not propose to indulge in hair splitting and cheese paring nor to fly in the face of a positive enactment of Parliament and to repeal it by my wiser judicial

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interpretation. The English cases such as *Wigtown* (1874), 2 O'M. & H. 215 and *Berwick on Tweed* (1880), 3 O'M. & H. 178, were based upon statutes containing far milder and more ambiguous language. I do not propose to take the time to shew the distinctions because I have not the time to take. In the *Moose Jaw* case (1921), 62 D.L.R. 286, 14 S.L.R. 430, the statute was not the same. It specifically referred to "directions" in the forms instead of enacting the provision in the statute itself.

It was further contended that on account of the provisions of sec. 66 (2) a ballot marked with ink can not be rejected. That section reads thus:—"(2) In counting the ballots the deputy returning officer shall reject all ballot papers (a) which have not been supplied by him, or (b) by which votes have been given for more candidates than are to be elected, or (c) upon which there is any writing or mark by which the voter could be identified other than the numbering by the deputy returning officer in the cases hereinbefore referred to but no ballot paper shall be rejected on account of any writing number or mark placed thereon by any deputy returning officer."

Now it is argued that because there is in that section nothing saying that the deputy returning officer shall reject a ballot marked in ink, therefore he is obliged to accept it. But I cannot accede to this argument. It is to my mind perfectly obvious that in enacting that section Parliament had in mind ballots which bore a proper mark for a candidate and yet were open to these specified objections. It means (1) that though a ballot paper is properly marked for a candidate it shall be rejected if the deputy returning officer has not supplied to any voter the particular ballot paper in question; (2) that although the ballot paper is properly marked for a candidate yet if it is also properly marked for another candidate when there is only one to be elected or for two additional candidates when there are only two to be elected the officer shall reject it; and (3) if, although properly marked for a candidate it bears any writing or mark by which the voter could be identified it shall be rejected.

Throughout the whole section a proper marking for a candidate is obviously presumed. If it were otherwise then no matter what the form of mark might be as long as the ballot did not violate one of these three provisions above quoted, it would have to be counted. Ballots marked with a circle or a parallelogram or any numeral or form of mark whatever would

have to be counted by the deputy returning officer. The obligation to make a cross of some kind would disappear. Yet this is clearly contrary to the decisions.

The decided cases no doubt lay great stress upon the intention of the voter as being the governing principle. Within certain limits I think that is correct although I rather suspect that some of that stress is borrowed from principles relating to the interpretation of contracts where the minds of two parties must meet. Moreover we have here also to do with a statute and above all question of the intention of the voter there lies the question of the intention of Parliament. For the Court that is the paramount consideration. From 1874 onward we see an increasing particularity in the enactments as to the manner of voting as well as an increasing stringency in the words used. Parliament now has said that the voter "shall mark his ballot paper by making a cross with a black lead pencil," the deputy returning officer doing his statutory duty has presumably told the voter to go into a compartment and there mark his ballot by making a cross with a black lead pencil. The black lead pencil is there provided. In the face of this the voter uses a blue pencil or a yellow pencil or a fountain pen which he has brought with him. He has failed to mark his ballot in the manner prescribed and explained to him and either deliberately or through carelessness has disregarded the law and the directions given. In those circumstances I do not see why his ballot paper should be counted as being validly marked.

It was contended that if the provisions as to the method of marking is to be treated as mandatory then the remainder of the section must also be so treated. But I do not think this follows. The remainder of the section deals with matters that the deputy returning officer can, and must indeed, examine and correct before receiving the vote, with the method of folding the ballot paper so as to conceal the cross, but to shew the stamp and the initials of the official, and also with the official's duty in regard to the removal of the counterfoil. But the provision in question deals with the essential act of voting, which is done in secret and whose nature is not to be revealed. The decision in *Jenkins* v. *Breckin*, 7 Can. S.C.R. 247 referred to the acts of the government officials. Their errors in that case were held not to invalidate the votes as the voters were not responsible. In the present instance the voters, and no one else, are themselves responsible for the errors committed.

What I have said will also apply fully to ballot papers marked with colored pencils.

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Next there are a number of ballot papers marked with what is apparently intended to be the figure 1. I think these were properly rejected by the district Judge.

Evidence was adduced at the trial to describe the method of voting at municipal elections in vogue in the city of Calgary, the purpose of which was to shew that by that system a voter at municipal elections must indicate a first, second, third and fourth choice for alderman by making the figures 1, 2, 3, and 4 after the names of the candidates of his first, second &c. choice. And it was argued that obviously a number of voters had been thus led into error and had assumed that the same system existed in elections to the Dominion Parliament. I think this evidence was all irrelevant and inadmissible. It applied in any case only to a part of the electoral district. To give any effect to it we should have to hold that a ballot paper marked one way in Hamilton or Ottawa would be bad but that a ballot paper marked the same way in Calgary would be good, and even that a vote good at one polling station would be bad at another polling station in the same constituency. It is impossible to give a decision which would have such a result.

I have held the making of a cross to be obligatory and upon this principle these ballot papers which I am now discussing were properly rejected by the district Judge. But I may perhaps add without impertinence that it does not say much for the intelligence of a voter who does not know the difference, or even that there may be a difference, between a Dominion and a municipal election. Possibly these people thought they were voting on the mayoralty election which I believe occurred about the same time in Calgary.

For the foregoing reasons I think that the district Judge was right in rejecting the ballots which have been marked as Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11, 21, 22, 23, 24, 25, 30, 49, 50 and 104 being all marked in ink for the petitioner, and also in rejecting the ballots which have been marked as Exs. 63, 67, 86, 91, 93, being all marked in ink for the respondent.

Also the district Judge was right in rejecting the ballots marked as Exs. 12 (marked with a green pencil) 13 (marked with a blue pencil) 14 (marked with a so called indelible pencil colored purple) 28 (marked with red pencil) 29 (marked with a blue pencil) which ballots were all marked for the petitioner; and also right in rejecting the ballots marked as Exs. 64 (marked with a blue pencil) 66 (marked with a green pencil) 76 (marked with a brown pencil) and 87 (marked with

purple indelible pencil) which ballots were all marked for the respondent.

Also the district Judge was right in rejecting the ballot papers which were marked as Exs. 15, 16, 17, 18, 26, 27, 31, 45, 46, 48, 94, 95, 96, 97, 98, 99, 100, 101, 108 and 109 all of which were marked with the figure 1 for the petitioner, (for I reserve 77 for special consideration), also in rejecting the ballots marked as Exs. 51, 61, 52, 68, 71, 82, 81, 83, 84, all of which were marked with the figure 1 for the respondent although in two cases other figures were added.

This covers 61 of the ballot papers in dispute.

I have now to deal with a number of ballots as to which the reasons I have given may not fully apply.

The ballots marked as Exs. 70, 79, 88, 89 and 90 were marked on the back instead of the front where the candidates' names were printed. The first was apparently intended for Bennett and the other four for Shaw as the cross was made directly opposite, though on the reverse side, to the place where those candidates' names were printed. The district Judge disallowed all of these and I think properly so. There is no doubt that when the Act says "within the white space containing the name of the candidate" the reference is to the front of the ballot. It appears that Ex. 70 marked for Bennett has the word "allowed" written on the back and the initials of the district Judge in his handwriting but it was admitted by the respondent that this was an error and that the ballot had not in fact been counted for the petitioner.

Exhibit 32 has only a horizontal line thus — opposite the name of the petitioner. I think it was properly rejected as not being marked with a cross.

Exhibit 33 is properly marked on its face for the petitioner but on the back in addition to the initials of the deputy returning officer it bears the initials A V B in lead pencil. In the absence of evidence that this was done by any official I think I must assume that it was done by the voter. In my opinion it violates the rule as to identification and it was properly rejected. The same result follows with respect to Ex. 80 which was marked for Shaw but had on its back the additional initials M E R and also with respect to Ex. 106 which was marked for Bennett but had on its face the additional initials E G A. These were properly rejected.

Exhibit 34 has a cross properly made for Shaw but beneath the name of each of the other two candidates there are two strokes in lead pencil evidently made in a hurry. Exhibit 35

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is properly marked for Shaw but there are several dashes in lead pencil, evidently hurriedly made, through the name of each of the other candidates. Exhibits 36 and 37 are the same as Ex. 35 except that there is just one dash with the lead pencil through the other two names. Exhibit 38 is the same, except the marks through the other names are wider. Exhibit 39 is the same practically as Ex. 35. Exhibit 52 is somewhat the same being properly marked for Bennett but in addition to horizontal strokes through the other two names there is, across each, a nearly vertical stroke so that the two names have a sort of cross over them. Possibly a strict construction would make this ballot one which has a cross for all three candidates. But I do not so interpret the act of the voter.

These Exhibits 34, 35, 36, 37, 38, 39 and 52 were all allowed by the district Judge. The only ground upon which they could be disallowed except 52 would be that these additional marks might be said to be marks by which the voter could be identified. I think it is exceedingly difficult to apply section 66 (2) (c) of the Act. It is obvious that you do not need to have the testimony of a witness as to the existence of an agreement by the voter to mark his ballot in a particular way because the deputy returning officer, who has no power to take evidence, is bound to apply the section and the same rule must be observed in this Court as would be proper for him to apply, although of course we might hear such evidence on wider grounds upon a petition if it were adduced.

In my opinion the deputy returning officer must simply do his best, take a reasonable view of the ballot and try and decide whether the voter has apparently been merely acting in haste, nervousness, ignorance or carelessness in making the marking in question without any intention of making an identifying mark. If he so decides I think he should count the vote. If on the other hand he is able to conclude that a secret sign has purposely been made he ought to reject it. This decision will I admit be often a very difficult one to make. For that very reason I think he ought to be very slow to discover an improper purpose, particularly when the possibility of actual evidence being taken is open upon petition under the Contraverted Election Act. My impression on looking at these ballots is that the voters were simply emphasising their vote by striking out the names of the candidates they rejected and were not intending to make any identifying mark. Evidently the deputy returning officer and the district Judge both took

the same view. Their decision I think should therefore not be interfered with.

Certainly if these ballots are to be rejected for the reason suggested then all the ballots marked in ink and in colored pencils should also be rejected on the same ground—a ground which I would hesitate to adopt in the case of those ballots. But to this subject I will return.

Exhibit 40 was obviously mutilated by the deputy returning officer when he tore off the counterfoil by tearing off more of the paper than he should. The last two letters of the Christian names of the candidates and their middle and surnames are all remaining and the ballot is properly marked with a cross for Shaw. It bears the returning officer's stamp but the initials of the deputy returning officer were evidently removed in the mutilation. I think the district Judge did right in counting this ballot. The mistake was that of the official, not of the voter. *Jenkins* v. *Brecken, supra.*

Exhibit 41 is marked with a cross for Shaw but after the cross there is a short straight line or dash. This was allowed by the district Judge. I can see no difference in principle between this case and the case of a ballot allowed by the Supreme Court of Canada in *Jenkins* v. *Breckin*, 7 Can. S.C.R. 247, at p. 253 which had been properly marked for one candidate and had a nearly vertical mark after the name of another candidate.

Exhibit 42 is marked for Shaw with a cross but in making the cross the voter, evidently in haste or carelessness, made the second stroke twice without removing his pencil. I see no suggestion of an attempt to make a mark which would serve to identify. The vote was properly allowed.

Exhibits 43 and 44 were both properly marked by the voter for Bennett but they do not bear on the back the stamp of the returning officer Mr. Crandall. It was admitted however that they bore the initials of the deputy. There is no suggestion that those initials were placed there after the voters had handed the ballots to the deputy. The inference therefore is that they were proper ballot papers issued to the voters. The votes were I think properly allowed.

Exhibit 47 was marked with a straight horizontal line for Bennett and was properly rejected as not having a cross.

Exhibit 53 bears a cross in pencil for Bennett but the voter joined the ends of the two strokes with two horizontal lines so that the figure takes the form of an hour-glass. This seems a little deliberate but on the whole my impression is that no

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conscious attempt to leave a means of identification is apparent. I would not disturb the action of the district Judge in counting the vote. It is obvious that the voter never tried or intended to make a cross. Perhaps the decision in *Hawkins* v. *Smith* (1884), 8 Can. S.C.R. 676, is in favor of the ballot, but if so this Exhibit 102 must also be counted and the result would be the same.

Exhibit 54 bears merely a "tick" with a lead pencil for Shaw. It cannot in any view be treated as a cross and was therefore properly disallowed.

Exhibit 55 bears a proper cross for Bennett but a horizontal stroke opposite the name of each of the other candidates. These were evidently hastily made as the marks are not heavy and at the outer end they become gradually fainter. Here too it is obvious that we have merely an indication of rejection of the other two candidates carelessly made. The vote was properly allowed.

Exhibit 56 is the same as 55 except that the stroke is opposite Ryan's name only. Properly allowed for Bennett.

Exhibit 57 bears a proper cross for Bennett but also three distinct strokes under his name. This, too, is obviously mere emphasis and nothing more. The vote was properly allowed.

Exhibit 58. This ballot has a cross properly made not after but before the name of Bennett and after the name there is the figure 1. The statute does not say where within the white space the cross must be made. It may therefore be made anywhere within that space. This therefore brings the case into the same category as a number of others above decided upon. I see no indication of any attempt to leave a means of identification. Obviously this voter wavered between the cross and the figure one required in the municipal elections. The vote was I think properly allowed.

Exhibit 59. Here the voter obviously first either intentionally or by mistake made a cross for Shaw then changed his mind or corrected his error, ran his pencil repeatedly over the cross in an attempt to delete it and then made a cross for Bennett. This is obviously what happened and there is nothing to suggest to me any attempt at identification. The vote was in my opinion properly allowed. But I think it is perhaps the nearest to the line of disallowance of any that have so far been allowed. Moreover since the cross after Shaw's name is still absolutely plain the ballot would appear to violate sec. 66 (2) (b) as to voting for two candidates. But the intention is, I think, fairly apparent.

Exhibit 65. I take next because it presents some aspects corresponding to those existing in the case of Ex. 59. Here there is a faint cross opposite Ryan's name which clearly appears to me to have been rubbed in an attempt to erase it and also a heavy well defined cross for Shaw. The original cross on Ex. 59 is just as apparent as that on Ex. 65. Each ballot has plainly a cross opposite the names of the two candidates but in 59 the deletion is obvious and done with a pencil while in 65 it is not perhaps so obvious but to my mind seems clearly to have been done by means of rubbing with the finger. In my opinion if 59 stands so should 65. If one is disallowed they should both be disallowed. In either case this would make a gain of one vote for Shaw. I allow it for Shaw.

Exhibit 60. This bears a well defined cross for Bennett and also a fainter cross whose strokes are close and parallel to the strokes of the first cross. Apparently the voter either made the faint cross first and decided to go over it again to make it clearer and did not succeed in superimposing his second markings upon the first or else all was made at once with a jagged pencil whose point would make two parallel strokes. The vote was properly allowed for Bennett.

Exhibit 69. This bears merely a very heavy nearly horizontal stroke under and, on both sides beyond, the name "Shaw." There is no cross even attempted. The vote was properly disallowed.

Exhibit 72. This ballot was apparently wrongly torn in removing the counterfoil. A piece is torn off the right hand end all across the ballot. Opposite the name of Shaw there are left two slight pencil marks which one might presume were the left hand ends of the two strokes of a cross, the one upper and the other lower. But whether the strokes ever met or made a cross we have no means of knowing. The great probability here is that the Deputy has deprived Shaw of a vote but we simply cannot know this. The district Judge rejected the ballot and I do not see how he could do anything else.

Exhibit 74. The same thing exactly happened to this ballot as happened to Ex. 72, except that there remained after the mutilation the complete left hand part of a cross opposite the name of Bennett. The district Judge counted the ballot for Bennett and I cannot say he was wrong because there seems to be at least some faint indication that the lines actually crossed before the mutilation, although on a cursory examination one might say that nothing more was left than a heavy tick thus ❯ similar to that rejected in the case of Ex. 54 for Shaw.

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Here I do not feel disposed to reverse the decision of the district Judge although it does seem to me to be very near the line.

Exhibit 75 is marked with a cross for Bennett but about an eighth of an inch to the left of the vertical stroke of the cross there is a second vertical stroke so that the figure has the appearance of a roughly made capital H. I see here nothing to suggest a conscious attempt to leave a mark of identification. I think the second vertical stroke was made out of nervousness or from forgetfulness of the fact that one had already been made. I think the vote was properly allowed.

Exhibit 78 has in poor writing the letters "Kood," perhaps intended for "good," opposite the name of Shaw. This vote was properly disallowed.

Exhibit 85 has a cross over Shaw's name. It was apparently allowed by the district Judge although there was at first some doubt raised as to what he had done. But it was practically admitted that he had counted it and I think he was right.

Exhibit 92. Here the voter obviously placed a proper cross nearly below the first letter of the first name of Shaw but well within the white space and then thought he had made it in the wrong place marked it over with his pencil as a deletion and then made a proper cross at the end of Shaw's name. I see nothing more to be inferred than this and no suggestion of an attempt to leave a mark of identification. The vote was rejected by the district Judge but should I think be allowed for the same reason as I allow Ex. 103 for Bennett.

Exhibit 102. In this case the ballot is mutilated by having a piece torn off the upper left hand corner opposite the name of Bennett. Unfortunately the voter had here made his mark instead of at the usual place at the other end. The strong presumption is that there was originally a cross but the tear passes down the middle of one stroke leaving only part of it discernible, although throughout its length, and so leaving discernible the lower half only of the other stroke. This ballot the district Judge disallowed. Apparently the reason was that there was nothing to indicate that the half stroke left ever passed across the longer stroke so as to make a cross. The case is hardly to be distinguished from Ex. 74 which was allowed. But inasmuch as there is not the faintest thing to indicate that the strokes ever crossed even to the slightest degree I do not feel disposed to change the decision. The case does not come within the decision made by the Supreme Court of Canada in the case of the ballot shewn on p. 252 of the report in *Jen-*

kins v. *Brecken, supra*, because there one of the strokes is shewn to have passed, though only slightly, beyond the other.

Exhibit 103. Here there are two strongly made crosses one just below the name "Bennett" but well within the white space and the other opposite the end of that name. The district Judge rejected this ballot. I am bound to say that the line of distinction between this ballot and Ex. 92 referred to above is rather fine. There too the voter had made two crosses but he deleted one with his pencil. Here there is no attempt at deletion. I cannot, however, infer an attempt to make a mark of identification. I think it is fairly obvious that the voter thought he had made one cross in the wrong place and so made another. I would reverse the decision and allow the vote for Bennett.

Exhibit 105. Here the voter wrote the words "for Mr. Bentt" opposite Bennett's name and made a dash opposite the name of the other two candidates. The district Judge disallowed this ballot and I think properly so. There is no cross made at all and this is essential.

Exhibit 107. Here the voter erased in heavy black pencil marks the names of Ryan and Shaw but made no other mark. The ballot was properly disallowed.

Exhibit 110. Here there is a proper cross to the left of Shaw's name, but a nearly upright stroke between but below the names Tweed and Shaw. I think here too the voter obviously changed his mind as to where he should make his cross after making half of one in what he decided was the wrong place. I can see nothing more probable than this and no apparent effort to leave a mark of identification. I think the ballot was properly allowed.

Exhibit 114. This ballot was allowed for Bennett but I think it should have been rejected. There is a faint long single mark slanting upward from left to right. No doubt this mark was more discernible before the deputy as the ballot has, of course, been much handled. But I cannot see the slightest indication of a cross stroke. The deputy returning officer was sworn. He said this ballot was the subject of much discussion at the first counting. He said that at that time he thought he saw another faint mark across as if the pencil had been broken. But he said that in attempting to point this out to the scrutineer he used his own lead pencil and inadvertently made a slight mark himself and then erased it. He said that if there is now to be seen a lead pencil mark across it, it would be one made by his pencil. In these circumstances I

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think it is impossible to count the ballot. Even if we saw a faint sign of a cross mark, which I do not, it will upon the evidence certainly be that made by the deputy inadvertently. It was counted by the deputy but I think should be rejected.

Recurring now finally to the ballot paper marked Ex. 77. This was one of the ballots treated as having been marked with the figure 1 only. But on examination it will appear that the voter made a line horizontally across the bottom of the upright stroke but so that the lower portion of the upright stroke extended very perceptibly below the horizontal line. This may reasonably be held to constitute a cross as on p. 252 of *Jenkins* v. *Brecken*, and I allow the vote for Bennett.

In the result therefore I have changed the decision of the district Judge in only 5 cases and these very doubtful ones. I give Ex. 103 to Bennett but take Ex. 114 away from him. I give Ex. 77 to Bennett and Exs. 65 and 92 to Shaw. In the result there is a change of one in Shaw's favor, making his majority 17.

But it is desirable to sum up generally the true situation. Bennett had 18 ballots marked in ink and 5 ballots marked in colored pencils. That makes 23 in all not marked in lead pencil. Shaw had 5 ballots marked in ink and 4 ballots marked in colored pencil which makes 9 in all not marked with a lead pencil. All these I think must stand or fall together. I can see no difference in principle between ink and a colored pencil. Therefore if we allowed them all Bennett would make a gain of 14 and thus still be in a minority of 3.

To overcome this minority the petitioner would have either to secure the ballots marked with the figure 1 to be counted, by which means he would gain 11 votes because he has 20 so marked and rejected (for I accepted Ex. 77) and Shaw has 9 so marked; or, if this fails, he must make gains from among the other scattered ballots on the ground that they have marks on them by which the voter could be identified or for other reasons.

Ballots marked with merely a stroke or a figure 1 without any approach to a cross have never so far as I can discover been counted. There are 106 ballots disputed. Deducting those with ink, colored pencil, and the figure 1 there are left 45 ballots. Of these 14 have already been allowed to the petitioner Bennett and 13 have been allowed for the respondent Shaw. Of the 18 remaining 9 were marked for Bennett but rejected, 2 because they had a mere horizontal line, 1 because it was marked on the back, 1 because it was mutilated so the cross

could not be seen, 1 because the name was written on it, and no cross at all, 1 because only the names of the other 2 candidates were deleted and nothing at all was marked in the space containing the petitioner's name, 1 because there was a faint single stroke and nothing more, and 2 because they bore the voter's initials. The remaining 9 were marked for Shaw and rejected, 1 because it had a mere tick and not a cross, 1 because it had merely a horizontal line, 1 because what had possibly but not surely been a cross had been torn off by the deputy, 1 because it was marked "Kood" for Shaw only with no cross, 4 because the cross was on the back and 1 because the voter has placed his initials upon it.

Of the 13 above mentioned allowed for Shaw 1, Ex. 92, if disallowed must carry with it also Ex. 103 allowed for Bennett; 5 being Exs. 40, 41 and 42 and 85 and 110 are beyond question good; 7, being Exs. 34 to 39 inclusive could only be rejected because of the deleting strokes through or below the other names and one Ex. 65 is perhaps rather doubtful. I do not see how any of the Exs. 92, 40, 41, 42, 85, 110, 34, 35, 36, 37, 38 and 39 could be disallowed on the ground that they bear marks by which the voter could be identified unless all those marked in ink or colored pencil were disallowed for the same reason. I can see no more reason for thinking that a dash through other names or an additional stroke of some kind would be any more a means of identification of the voter than the fact that the actual cross by which the voter indicated his choice is made with a colored pencil or with pen and ink. The number of persons who happened to have made the additional marks or used the colored pencil or the pen is considerable in both cases and can I think have no bearing on the matter. Nor do I think that the words "writing or mark" as contained in sec. 66 (2) (c) should be interpreted as meaning an additional writing or mark beyond the voter's cross. They cover the actual cross itself if made with a peculiar material because, that, for example a red cross, could be made a means of identification just as easily as an additional mark.

The decision I have arrived at therefore really turns upon the rejection of the ballots marked only with the figure 1, and, as I have said, I think such ballots have never before been counted and no conditions merely local to Calgary can have any effect upon the matter.

I think therefore the petitioner fails and that his petition should be dismissed. The parties have agreed that there be no costs awarded.

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I have overlooked referring to the cases of Beatrice Baird. The voter testified that she voted twice, and both times for Shaw, but at different polling divisions. The second polling division at which she voted was not identified. The proclamation shews no polling place called Killarney School. For all we know her second vote may be disallowed already or it may have been a spoiled ballot. I do not think we have a right to assume that both of her votes were properly marked and counted and therefore deduct one vote from Shaw's total. We cannot deal with such a case unless we have the ballots before us. Possibly if the result was almost even and her votes may have decided the election the Court could on proper pleading in the petition avoid the election. But that is not the situation and as the matter stands there can be no change in the result even if one vote is taken off Shaw's total.

TUCKER v. TUCKER.

Alberta Supreme Court, Scott, J. March 31, 1921.

HUSBAND AND WIFE (§IIE—80)—*Transactions between—Sale of land—Consideration—Fraudulent conveyance—Creditors—Counterclaim—Lien for purchase money.*] Action for purchase price of land, or cancellation of deed.

G. R. Porte, for plaintiff; *P. G. Thomson*, for defendant.

SCOTT, J.:—The plaintiff, who is the wife of the defendant, charges that she is the registered owner of the lands mentioned in the statement of claim, that in 1918 she transferred them to the defendant for the consideration of $1,600 then agreed upon and that he has not paid any portion of the purchase-money. She claims payment thereof with interest, and in the alternative an order cancelling the transaction and the delivery up of the transfer.

The defendant denies that there was any consideration for the transfer and alleges that the lands were formerly his property and that in 1916, being in financial difficulties and being afraid that they might be seized by the creditors, he transferred them to the plaintiff without consideration and on the understanding that, when so required by him, she would re-transfer them to him. By way of counterclaim he alleges that on November 3, 1916, he transferred the lands to her for the consideration of $1,600, no part of which has yet been paid by her. He claims payment thereof with interest.

In her evidence the plaintiff states that at the time of their marriage she advanced the defendant a sum of about $250 which he promised to repay her out of his share of the estate of

his deceased father; that he suggested that she should invest the money in live stock and that he bought for her in 1913 three heifers and a cow which had increased to eleven head at the time of the transfer to her and that the transfer was made to her in consideration of that stock.

The defendant states that the amount he received from the plaintiff did not exceed $100, that with it he bought for her three yearling calves for which he paid $75 or $80, that he has no recollection of having bought a cow for her; that one of the calves died when calving; that her stock could not have increased to eleven head at the time of the transfer to her; that the transfer to her was made without consideration; that he was having some trouble over some land he had bought from the C.P.R. Co. and the transfer was made for the purpose of protecting the lands in question from that company. He admits that the money he received from the sale of her stock went into the property and that she is entitled to something for her stock.

One White, who prepared the transfer to the plaintiff, states that he believes that both the parties were present when instructions were given to him for the preparation of the transfer to the plaintiff and that, in conversations with both the parties, he gathered from them that it was on account of some former land deal and the obligation they had incurred respecting it and that its object was that, in case of any difficulty over it, the lands transferred would not be tied up.

In my view it is immaterial whether the defendant transferred the lands to the plaintiff in exchange for her live stock, or with intent to defeat or delay his creditors. In either case she became the absolute owner with the right to dispose of it as she should see fit and she was not bound by any promise or undertaking she may have given to transfer it back to him upon his request.

The plaintiff states that the transfer by her was in pursuance of a sale to the defendant for $1,600. The defendant states that it was without consideration and was made in fulfilment of her promise, which he claims she gave him, to transfer it back to him upon his request. If it had been made in fulfilment of such a promise it is reasonable to assume that the consideration expressed in it would have been merely a nominal one. The fact that the expressed consideration was $1,600 bears out her contention that it was made pursuant to a sale for that amount and, as he accepted it, he must be held to have accepted it upon the terms stated in it.

The plaintiff states that she sold the lands to the defendant for $1,600. That implies that she was to give him a clear title

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on payment of that amount, and, if there are any incumbrances thereon, the amount thereof must be deducted from the purchase-money.

The plaintiff will take judgment for the purchase-money and interest less the amount of any such incumbrances. If the parties cannot agree upon the amount there will be a reference to the clerk to ascertain it.

I dismiss defendant's counterclaim with costs.

I hold that the plaintiff is entitled to a lien upon the lands for the unpaid purchase-money, with interest and costs.

Judgment for plaintiff.

WARREN AND MacDONALD v. GALLAGHER.

Alberta Supreme Court, Simmons, J. May 14, 1921.

PARTNERSHIP (§I—1)—*Oral agreement to form—Purpose—Coal mining lease—Statute of Frauds—Resulting trust.*]—Action for declaration of partnership and specific performance.

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

W. H. Patterson, for defendant.

SIMMONS, J.:—The defendant is the owner of a lease for coal berth, No. 193 S.F., covering certain lands in sect. 11, Tp. 29, R. 23, west of the 4th meridian.

The plaintiffs allege that on or about April 24, 1920, the plaintiffs and the defendant agreed to become partners for the purpose of exploiting the said coal mining property. The plaintiffs allege that the plaintiff Warren was to apply for coal lease on legal subdivisions 11 and 12 in said sect. 11 and that the same should accrue for the benefit of the partnership. The plaintiffs allege that the plaintiff Warren was to attend to the financing of the partnership, procuring parties with capital to finance the same, and the plaintiff Warren was to assist in the management of the business and the promotion thereof, and that the plaintiff MacDonald was to do the legal work for the partnership.

The plaintiffs allege that at a subsequent date, namely about May 1st, the partners agreed to convert the said partnership into a limited company, which latter agreement was reduced to writing and executed by the parties to this action. The plaintiffs also allege that under the said alleged agreement to convert the partnership into a limited company, it was understood and agreed that the defendant Gallagher and the plaintiff Warren should transfer their rights to the aforesaid property to the said contemplated company for 60% of the capital of the said company. The plaintiffs further allege that it was understood

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and agreed that the defendant and the plaintiffs should share equally 60% of the capital of the said proposed company.

The plaintiffs allege further that they visited the said property, which is located near the town of Carbon, in the interests of the said partnership.

The plaintiffs further allege that on June 4, 1920, the defendant repudiated the said agreement.

The plaintiffs ask for a declaration that there was a partnership agreement entered into by the parties to the action, as alleged in the statement of claim, and for specific performance of the defendant's agreement and also for reformation, if necessary, of the written agreement and in the alternative, damages.

The plaintiffs Warren and MacDonald gave evidence to the fact that there was an oral agreement to form a partnership for the development and operation of the lease owned by the defendant and that in pursuance to the same the plaintiff Warren obtained a lease for said legal subdivisions 11 and 12 in sect. 11.

The defendant denies in substance the evidence of the plaintiffs. I am not able to accept the defendant's denial and I conclude that the evidence of the plaintiffs Warren and MacDonald substantially discloses what did take place. The defendant, however, pleads the Statute of Frauds, as a bar to the plaintiff's action.

Caddick v. *Skidmore*, (1857), 2 De G. & J. 52, 44 E.R. 907, is a direct authority to the effect that such an agreement is not an enforceable one unless supported by a writing sufficient to satisfy the Statute of Frauds. *Dale* v. *Hamilton*, (1847), 2 Ph. 266, 41 E.R. 945, and *Forster* v. *Hale* (1798), 3 Ves. 695, 30 E.R. 1226, are authorities, however, for the opposite view and support a resulting trust for the partnership of lands that may be necessary for the business of a partnership evidenced by a parol agreement. Prendergast, J. accepted this view in *MacKissock* v. *Brown* (1913), 10 D.L.R. 472, 23 Man. L.R. 348.

Lindley's Law of Partnership, 8th ed., p. 100, discusses the two views and suggests that it is difficult to reconcile them and prefers the principle of *Caddick* v. *Skidmore*.

The plaintiffs did not ask for specific performance of the agreement in writing of Gallagher and Warren to sell their rights in the aforesaid property to a certain contemplated company for 60% of the capital of the said contemplated company but the plaintiffs cite the said written memorandum, however, for the purpose of establishing the parol partnership agreement.

The whole issue narrows down to the sole question of whether or not a parol agreement to form a partnership in a leasehold

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of a mine is enforceable against the owner of the leasehold, who is one of the proposed partners. *Caddick* v. *Skidmore* seems to be a very direct authority upon this point and while it is difficult to reconcile *Dale* v. *Hamilton* and *Forster* v. *Hale* with it, these are later decisions upon the same question, and supports the claim of the plaintiff for a declaration that a partnership agreement was made for the purpose of exploiting the leasehold in question and that said leasehold become partnership property held in trust by defendant for the purpose of the partnership;

Judgment accordingly and costs to the plaintiff.

PORTER v. MARIOTT.

Alberta Supreme Court, Simmons, J. June 30, 1921.

VENDOR AND PURCHASER (§IE—25)—*Misrepresentation—Lane according to plan of survey—Mistake—Rescission—Return of purchase money.*]—Action for specific performance of an agreement between the plaintiff and defendant for sale to the plaintiff of Lot 6 in Block 5, Strathspey sub-division of South Edmonton, or in the alternative rescission and damages.

H. C. Macdonald, K.C., for plaintiff,
C. H. Grant for defendant.

SIMMONS, J.:—The plaintiff alleges that McDonnell, defendant's agent, who made the bargain represented that there was a lane at the rear of said premises according to a plan of survey. This allegation McDonnell denies. The agreement was made in September 1912.

Counsel for both parties admit that the evidence of the opposite party is honest, but probably mistaken.

I am of opinion that there was a mutual mistake in regard to the existence of a lane at the rear of said property. Plaintiff refuses to accept title unless such a lane is in existence. Defendant is not able to provide a title with lane at the rear. This would appear to furnish good ground for a declaration that the defendant should return to the plaintiff the moneys paid on account of the purchase-price as the parties were not *ad idem*, and no contract was made between them.

As the mistake was mutual I think there should be no costs to either party.

Judgment accordingly.

FRASER v. CUMMINGS AND LEOPOLD.

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Saskatchewan King's Bench, Bigelow, J. April 25, 1921.

BILLS AND NOTES (§IIIB—75)—*Liability of signer—Indorser—Principal and surety—Discharge of surety—Extension of time—Counterclaim—Provisions in farm lease—Extra work—Assignment of debt—Validity.*]—Action on a promissory note.

J. M. Hanbidge, for plaintiff.

W. M. Aseltine, for defendants.

BIGELOW, J.:—Plaintiff, the owner of certain land, leased it to the defendant Cummings and one McQuaig for 3 years from April 1, 1917. The lessor furnished certain feed and seed; the lessees agreeing to leave the same quantities at the end of the term. This they were not able to do on account of poor crops and on October 25, 1915, the three parties met and agreed that Cummings and McQuaig owed plaintiff $1,280 for feed and seed. For Cumming's half the plaintiff took a note for $640, and the plaintiff wanting security, Cummings got Leopold to sign a note which reads as follows:—

"$640. Due Oct. 25—1920.
Oct. 25—1919.

Twelve months after date we promise to pay to John K. Fraser or order at Stranraer, Saskatchewan, six hundred and forty dollars with interest at the rate of 8% per annum until due and 10% per annum after till paid value received.

(Sgd.) A. Leopold.
(Sgd.) V. Cummings."

This is the note sued on. Defendant Leopold contends that he is an endorser, and that as the note was not presented for payment, and no notice of dishonour given, he is not liable. It is quite true that he was asked to sign the note as "a backer," but, in my opinion, he signed as a maker and not as an endorser.

Leopold also contends that as he was a surety he was discharged by the plaintiff extending the time for payment to Cummings. There is no doubt that Leopold was a surety for Cummings. After the due date of the note, the plaintiff saw Cummings about payment, and Cummings told him he expected some money about November 15, 1920, and promised to pay $200 of the principal and interest by November 15. There was no binding agreement however to extend the time to bring the case within the law cited in 15 Hals. para. 1036, p. 552:—

"A binding agreement between the creditor and the principal debtor to give time to the latter, as distinguished from mere passive inactivity on the part of the former (not resulting

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from any contract with the principal debtor), will discharge the surety from liability, if made without his consent, whether he be prejudiced thereby or not."

Further, our King's Bench Act, R.S.S. 1920, ch. 39, sec. 26 (19) provides:—

"Giving time to a principal debtor, or dealing with or altering the security held by the principal creditor, shall not of itself discharge a surety or guarantor; in such cases a surety or guarantor shall be entitled to set up such giving of time or dealing with or alteration of the security as a defence, but the same shall be allowed in so far only as it shall be shewn that the surety has thereby been prejudiced."

There is no evidence here that the surety has been in any way prejudiced so that even if there had been a binding agreement to give time that defence would not avail here.

Plaintiff is therefore entitled to recover on the note against both defendants.

The defendant Cummings sets up a counterclaim. I find that the work described in items 1, 2, 3 and 4 of the counterclaim amounting to $681.50 was done by McQuaig and Cummings for the plaintiff and at his request in the last year of the lease. This was extra work not required by the lease and was done to put the land in good condition for the plaintiff for the following year. Plaintiff got the benefit of it in crops the next year, and plaintiff promised to pay for it. McQuaig's evidence about the contents of the letter is corroborated by Cummings and also by Leopold who had a conversation with the plaintiff about it. I find that the letter did not refer to plowing only but referred to any necessary work McQuaig and Cummings deemed advisable to put the land in good condition for the following year. Plaintiff says that all claims were settled between them on October 25, 1919 when defendant signed the note. To my mind, the evidence does not support this. At that time Cummings and McQuaig were urging payment for this work which plaintiff would not agree to, and the note was signed for the payment of the seed and feed which defendant Cummings and McQuaig owed plaintiff. McQuaig, who is a relative of the plaintiff, does state that he thought when he and Cummings gave the note that everything was settled, but on re-examination he says he meant that he had given up the idea of collecting it. The fact that he made out a statement of the account for the work on the land and gave it to Cummings in the spring of 1920 would seem to indicate otherwise. I find that this account was not included in the settlement

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made October 25. Cummings obtained an absolute assignment of the debt from McQuaig which plaintiff attacks on the ground of fraud because McQuaig thought he was signing a dissolution of the partnership. I find that McQuaig read the document before he signed it. He is an intelligent man, and he knew what he was signing. It is an absolute assignment under seal, and the further question occurs to me whether it is any concern of the plaintiff how the document was obtained. No authorities were cited to me on this point, and I have not gone into it.

Items 9 and 10 of the counterclaim were settled between plaintiff and McQuaig.

As to the other items of the counterclaim, I am of the opinion that Cummings and McQuaig never intended to charge plaintiff for them. Plaintiff and his wife did considerable work around the farm. Plaintiff and Cummings and McQuaig had settlements every fall of their grain. These items were never mentioned. When the parties got together on October 25 these items were never mentioned. Cummings asked for payment for the work on the farm—items 1, 2, 3 and 4; he never asked for payment for these other items. Cummings says he never intended to claim for these items until he got the assignment from McQuaig. There was just as much reason for claiming for these items as there was for claiming for items 1, 2, 3 and 4 without McQuaig's assignment if Cummings thought they were justly due. I find there was never any intention of Cummings or McQuaig to charge for these items until this action was begun. The items are not even mentioned in the assignment from McQuaig to Cummings. I disallow these items.

Plaintiff is entitled against both defendants to $701.80 and interest at 10% per annum from December 28, 1920 and costs of the action. The defendant Cummings is entitled to $681.50 and interest at 8% per annum from January 26, 1921, and costs of the counterclaim. One amount to be off-set against the other and judgment to be entered for the difference.

Judgment accordingly.

REX v. McPHERSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. January 16, 1922.

APPEAL (§XI—720)—*Granting leave—Criminal case—Debatable questions of law.*]—Motion for leave to appeal from a refusal of Mr. Justice Bigelow to state a case for the opinion of this Court with regard to certain questions of law arising out

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of the trial of the prisoner on a charge under sub-sec. 2 of sec. 301 of the Criminal Code (1920 Can., ch. 43, sec. 8).

H. E. Sampson, K.C., for Attorney-General.

HAULTAIN, C.J.S.:—We have not all the evidence before us, but from the material before us I think that the prisoner is entitled to have a case stated on the following grounds:—

The offence is alleged to have been committed on or about the 31st July, 1920. The evidence with regard to the actual date of the alleged offence is very indefinite, and in view of that fact and of the charge of the learned trial Judge on that point, the question of the rejection of evidence establishing an alibi for the prisoner during a considerable part, at least, of the period within which the offence must have been committed (if at all) is sufficiently debatable to entitle the prisoner to a stated case on the point. The rejection of evidence to negative the previous chastity of the prosecutrix, and the charge to the jury on that point, also, in my opinion, raise questions which may reasonably be discussed on a stated case. The onus of proof of previous chaste character is on the prosecution in charges under this section of the Code. Cross-examination of the prosecutrix as to previous admissions of unchastity, it may be argued, is conducted not so much as affecting the credibility as for establishing a positive ground for defence. The statutory rules with regard to foundation may, therefore, not apply. This point is also fairly open to argument.

I am therefore of opinion that leave to appeal should be granted, and a case stated for the opinion of the Court of Appeal.

LAMONT, TURGEON, and MCKAY, JJ.A., concur with HAULTAIN, C.J.S.

Leave to appeal granted.

MARLOW v. YAGER AND C.P.R. Co.

Saskatchewan King's Bench, Taylor, J. April 1, 1922.

GARNISHMENT (§ID—30)—*Attachment of moneys earned and payable in another Province—Wages—Exemption—Constitutionality of statute—Attachment of Debts Act—Powers of Province.*]—Appeal from a refusal of the local Master at Swift Current to make an order on the application of a defendant made presumably under sec. 7 of the Attachment of Debts Act, R.S.S., 1920, ch. 59, to set aside a garnishee summons. Reversed.

P. G. Hodges, for the motion.

P. H. Gordon, contra.

TAYLOR, J.:—The plaintiffs carry on business and reside at

Swift Current in Saskatchewan. The defendant Yager is employed by the railway company at Crow's Nest in British Columbia and resides outside this Province, and the affidavits shew that he has resided there continuously since the fall of 1917 and is employed as an operator there for the Canadian Pacific Railway Co. It is also deposed that Crow's Nest is not within any division of the Canadian Pacific Railway situate in the Province of Saskatchewan.

The railway company appeared to the garnishee in an appearance in the following ambiguous terms:—"Will you kindly note the garnishees were not indebted to the defendant at the date of service of the garnishing order. In the event of any wages becoming due to the defendant which are attached under the said order, such wages will be paid into Court in due course by the garnishee."

It is stated by counsel that the railway company have, since the motion was launched, paid into Court $72.

In my opinion, the local Master erred in refusing to set aside the garnishee summons.

The Attachment of Debts Act, sec. 3, provides that a garnishee summons shall be issued upon the plaintiff filing an affidavit, (a) "shewing the nature and amount of the claim, etc."; and (b) "stating that to the best of the dependent's information and belief the proposed garnishee is indebted to such defendant or judgment debtor, and, if the debt is in respect of wages or salary, stating where and in what capacity the judgment debtor was or is employed by the said garnishee." The affidavit filed under the said section stated that the occupation of the defendant in the employ of the garnishee is (or was) that of agent at Crow's Nest in the Province of British Columbia. The garnishee summons was served on the garnishees in Saskatchewan and not in British Columbia. It, therefore, appears, as it is admitted by counsel, that the purpose of the garnishment proceeding is to endeavour to attach moneys earned by the defendant as an employee of the railway company in British Columbia, entirely outside the Province of Saskatchewan and which moneys would, it follows, be payable in British Columbia, and the law relating to the payment thereof be the law not of this Province but of British Columbia. Not only is it subject to the law of British Columbia but it is exclusively so subject. The sovereign legislative authority to legislate in regard to this debt is vested in the Province of British Columbia, as it is put in Story, Conflict of Laws, 8th ed., sec. 20, quoted in Craies' Hardcastle, 5th ed., p. 410:—

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"Every nation possesses an exclusive sovereignty and jurisdiction within its own territory. . . . . For it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate . . . things not within its own territory. It would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations, that each could legislate for all."

Whatever may be said as to the rights of the Dominion to pass overriding legislation affecting civil rights within a Province in a concurrent field of legislation, I am unable to discover any suggestion of such concurrent fields between the Provinces, and it seems to me that the rule of law referred to in Story is undoubtedly applicable as between the Provinces of Canada.

In sec. 5 of the Attachment of Debts Act it is provided that:—"Service of such summons on the garnishee shall bind any debt due or accruing due from the garnishee to the defendant of the judgment debtor."

Now, with much respect for those who have expressed a contrary opinion (see *McMulkin* v. *Traders Bank of Canada* (1912), 6 D.L.R. 184, 26 O.L.R. 1) I hold a very clear opinion that the Province of Saskatchewan would have no power to enact legislation binding a debt due and payable by one resident in British Columbia to another resident in British Columbia. That would be to invade a field of legislation assigned to British Columbia and, so far as any other Province can contend, exclusively so assigned. Therefore, the ordinary rule that legislation is to be construed as applying only to matters within the jurisdiction of the legislative authority, *MacLeod* v. *Att'y-Gen'l for New South Wales*, [1891] A.C. 455, 60 L.J. (P.C.) 55, is applicable and sec. 5 of the Act limited accordingly. That the Legislature had in mind to legislate only with regard to debts payable in the Province of Saskatchewan may also be inferred from sec. 4 providing that debts owing from a firm carrying on business within Saskatchewan may be attached, although one or more members of such firm may be resident abroad. If the other conclusion were accepted and there were power to attach this debt, which law as to exemption of salary or wages from attachment would apply? In this Province, a debt due or accruing to a mechanic, workman, labourer, servant, clerk or employee, for or in respect of his wages or salary is exempted from attachment, unless such debt exceeds the sum

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of $75 and then only to the extent of the excess. In British Columbia I understand the amount exempted is different.

In *R. ex rel Henderson* v. *C.P.R.* (1916), 30 D.L.R. 62, 9 S.L.R. 344, the Court *en banc* had under consideration the effect of a garnishee order *nisi* issued out of the Supreme Court of Ontario in a winding-up matter under the Winding-up Act, R.S.C., 1906, ch. 144, in which it was sought to attach a debt due from a railway employee working for the Canadian Pacific Railway Co. and residing in Saskatchewan and due and payable in Saskatchewan. It was held that the garnishee order *nisi* was no answer to the claim for wages, and it was held further by Haultain, C.J. and McKay, J. that, under the provisions of the Winding-up Act under which the Courts of the one Province are made ancillary to the other, it was competent for the Ontario Court to issue an order attaching the debt, and this special legislation made it unnecessary to consider the question which had arisen about the service in Ontario of the garnishee proceedings on the railway company in Ontario.

Newlands, J. at p. 67 (30 D.L.R.) however adopting the language in *Royal Bank of Canada* v. *The King*, (Annotated), 9 D.L.R. 337, [1913] A.C. 283, 82 L.J. (P.C.) 33, says:—"The same language would apply to this case. Henderson's right to collect his wages was a civil right which had arisen and remained enforceable outside the Province of Ontario, and any legislation of that province to attach such a debt would be *ultra vires*, as it would neither be confined to property and civil rights within that Province, nor directed solely to matters of merely local or private nature within it."

What is there stated is squarely in point here. Yager's right to collect his wages is a civil right which has arisen and remains enforceable outside the Province of Saskatchewan and any legislation of this Province to attach such a debt would be *ultra vires* for the reasons already quoted.

In my opinion, therefore, it should not be held that the Legislature intended in the enactment of the Attachment of Debts Act to do that which they had no power to do.

The appeal is allowed with costs and the garnishee summons set aside.

Appeal allowed.

TINANT v. SIMON.

Saskatchewan King's Bench, McKay, J. July 20, 1921.

CHATTELL MORTGAGE (§V—50)—*Repossession of property by mortgagee as accord and satisfaction—Security clause— Statu-*

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tory mode of seizure—Damages—Animals—Restoration of security instruments.]—Action by a mortgagee for damages to property covered by a chattel mortgage, and, in the alternative, for amount due on a promissory note given for the first instalment due under the chattel mortgage. Dismissed.

D. A. McNiven, for plaintiff.

A. E. Vrooman, for the defendant.

MCKAY, J.:—The defendant pleads accord and satisfaction in defence.

The evidence shews that on November 6, 1919, the plaintiff took possession of the chattels covered by the chattel mortgage except a mare and colt which had died after giving of the chattel mortgage. The defendant contends that the plaintiff then took these mortgaged chattels in satisfaction of the chattel mortgage. The plaintiff on the other hand contends that he took them to protect them because the defendant had abandoned them.

It appears from the evidence that at the time the defendant gave the notes and chattel mortgage sued on, the plaintiff leased the north west quarter of section 2 and the south half of section 11 in township 7, in range 31 west of the principal meridian to the defendant for a term of 3 years from April 1, 1919, and sold certain goods and chattels to defendant to secure the payment of which the defendant gave the chattel mortgage and note sued on.

The plaintiff also furnished certain seed grain to defendant for which plaintiff took a seed grain mortgage.

The defendant had a poor crop in 1919 and contemplated moving off the leased premises. The plaintiff hearing of his contemplated move, and after defendant had already moved most of his household effects, came to the leased premises with Edmund Lartigan and Floriot Bleriot where they found the defendant.

The plaintiff and defendant then settled the accounts between them for the seed grain, threshing bill and taxes, the plaintiff taking in payment wheat and oats and allowing defendant a credit of $192.50 for some ploughing, leaving a balance of some $25 in favour of plaintiff, which balance defendant paid in cash to plaintiff later on the same day in Lartigan's office or store. On this same day, while on the leased farm, the above referred to lease was cancelled by mutual consent, and the defendant surrendered to plaintiff all the goods and chattels covered by the chattel mortgage. When they went into town while in Lartigan's office or store, the defendant paid the bal-

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ance of $25 in cash above referred to, and while there plaintiff asked about the dead mare and colt, and defendant said he was giving the 4 colts (born since the chattel mortgage was given) for the dead mare.

The plaintiff expressed some dissatisfaction as to this, and did not expressly agree to take the chattels back and the 4 colts in satisfaction of the chattel mortgage. But on the other hand the defendant surrendered them with that understanding. And, in my opinion, the legal effect of what the plaintiff did was a taking of the goods and chattels in satisfaction of the mortgage. He either took them in satisfaction or seized them. If he took them in satisfaction, the notes and chattel mortgage are satisfied, and he cannot now sue on them. If he seized, he had no right to do so. Section 6, (1) of ch. 25 of the Statutes of Saskatchewan 1918-19 states as follows:—

"6. (1). No chattels covered by a chattel mortgage shall be seized or sold except by the sheriff of the judicial district within which such chattels are situated or some other person duly authorised by him for the purpose."

Plaintiff was not the sheriff and he had no authority from the sheriff to seize, and, in my opinion, the taking and holding the said chattels since November 6, 1919, was a taking in satisfaction of the chattel mortgage and notes.

The evidence does not shew that the mare and colt died from the negligence of the defendant, and the plaintiff did not prove any of the damages he claimed. There was nothing to shew the horse was sweenied through the negligence of the defendant or that any of the chattels were damaged owing to his negligence.

There was no evidence to support the defendant's counterclaim.

The result is that there will be judgment for defendant dismissing plaintiff's action and ordering the plaintiff to return to defendant the promissory notes and chattel mortgage given by defendant to plaintiff for the purchase price of the said chattels. The defendant's counterclaim is dismissed.

Under the circumstances of this case there will be no costs to either party.

Judgment for defendant.

TINANT v. RIPERT.

Saskatchewan King's Bench, McKay, J. July 20, 1921.

SALE (§IIIA—50)—*Agreement to deliver hay—Time of delivery—Extension of time—Conduct of parties—Unreasonable-*

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ness.]—Action for damages for the alleged breach of contract to sell and deliver to the plaintiff 40 tons of hay at $7 per ton scale weight.

D. A. McNiven, for plaintiff.

E. W. F. Harris, for defendant.

MCKAY, J.:—The evidence shews that on September 10, 1919, plaintiff agreed to buy 2 stacks of hay from defendant estimated at 40 tons at $7 per ton. The plaintiff at the time paid to defendant $25 on account, and the defendant signed a receipt therefor. There is nothing in this receipt shewing when plaintiff was to take delivery of the hay. The plaintiff says he did not mention any time when he would take the hay.

The defendant on the other hand says on the said September 10, 1919, plaintiff agreed to take the hay within 3 weeks at the latest. The defendant says he was selling his hay cheap because he wanted the money, and he was to be paid for it in full when plaintiff took delivery within the 3 weeks.

I find from the evidence that plaintiff was to take and pay for the hay within 3 weeks from said September 10, 1919. But defendant extended this time by his actions.

On November 28, 1919, the plaintiff again saw defendant and paid him $100. The defendant took this money on condition that plaintiff would take and pay in full for the hay within 3 or 4 days from that time. Plaintiff did not come for the hay within the time agreed and defendant wrote a number of letters to him, the last of which dated February 3, 1920, is as follows:—

"Mr. Tinant.

You must have received my letters dated January 24th to which Mr. Renard had added a few words; telling you to come or to send him the money; you did not answer. The hay is baled. You must know what you have to do. As for me, if between today and Saturday, the 17th instant, I do not receive word from you, I will sell my hay. Do not reckon on the hay after that date.

(Sgd.) Fortune Ripert."

The plaintiff did not come or send the money by February 7, 1920, and on February 16, 1920, when the plaintiff did come he wanted delivery of 40 tons at $7 per ton which defendant refused to deliver.

The hay in question was cut and stacked during the haying season of 1919. The defendant sold cheaply because delivery was to be taken and he was to be paid within 3 weeks, before the hay would get very dry, and there would be considerable

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shrinkage. If the money was not to be paid at once, defendant would have waited for the better prices later in the winter, when, as the evidence shews, the price of hay always advances.

I think the plaintiff's conduct in requiring the defendant to wait from September 10, 1919 to February 16, 1920, for plaintiff to take delivery of and pay for the hay was unreasonable, and defendant was justified in writing the letter of February 3, 1920, and refusing delivery on February 16, 1920. *Lasby* v. *Walsh* (1920), 13 S.L.R. 201.

The evidence shews that the defendant returned to plaintiff the $125 and offered to pay Renard for baling the hay, but the plaintiff had already paid Renard $203.05 for baling it and there is no evidence that defendant offered to repay plaintiff this sum. The defendant kept the hay and got the benefit of the baling. The defence pleads payment into Court, but there was no evidence adduced at the trial that the money was paid in.

Under these circumstances there will be judgment for the plaintiff for the $203.05, with costs on the District Court scale. Rule of Court 721 to apply.

Judgment accordingly.

HUNT v. WEIBERG.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. August 5, 1921.

CONTRACTS (§IID—180)—*Farm Lease—Covenant to summerfallow—"Under cultivation"—Impossibility of performance—Water on land—Damages—Crops—Evidence.*]—Appeal from judgment of trial Judge in action for breach of covenants in lease. Varied.

C. E. Gregory, K.C., and *E. M. Miller*, for appellant.

A. Casey, K.C., for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—On March 18, 1915, the appellant leased from Charles Johnson the west half of sec. 22 in tp. 10 and r. 12, west of the third meridian, for a term called in the lease a three-year term, to be computed from January 1, 1915, to January 1, 1918. The lease provided that the appellant would deliver to Johnson each year one-half of the crop; that he would summerfallow each year at least one-third of all land under cultivation at the time he took possession, or which might subsequently be brought under cultivation; that in each year he would put under crop such of the cultivated land as he did not summerfallow; that in case of his failure to summer-

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fallow the required acreage in any year he would pay Johnson $3 for each acre he was in default; and that he would use his best endeavours to destroy noxious weeds. Johnson agreed to pay the appellant $3 for each acre of summerfallow, in excess of 30 acres, which the appellant might do during the year 1917, the last year of the lease.

By a verbal arrangement between Johnson and the appellant made after the execution of the lease, the appellant put 100 acres of the land in crop in 1915 and summerfallowed only 30 acres. Subsequently, on June 11, 1915, the respondent purchased the land from Johnson and acquired his rights as lessor under the lease.

After the expiration of the lease, the respondent brought this action against the appellant for various breaches of covenant which he alleged the appellant had committed during each of the years 1915, 1916 and 1917. He estimated his damages at $5,870.50, and asked for judgment for that amount. The trial Judge, who tried the case without a jury, allowed nothing to the respondent on account of his claim in reference to the year 1915, but he found that the appellant failed to summerfallow more than 20 acres in 1916, and that he did not do any summerfallowing in 1917. He allowed the respondent $130 damages for the appellant's failure to summerfallow, and also $440 for loss to his crop in 1918 and 1919, due to the appellant's failure to leave the land in proper condition at the end of 1917. The appellant in his defence alleged, among other things, that he was prevented from cultivating and summerfallowing the land in accordance with his agreement by reason of an excessive quantity of water being upon the land in 1916 and 1917, which, he said, made it impossible for him to do the work. The trial Judge finds specifically that no such impossibility of performance was established.

We have to deal with an appeal and a cross-appeal.

In the first place, the respondent asserts that he should have succeeded upon his claim arising out of the operations of the year 1915. In view of the evidence of the appellant and of Johnson upon this point, I think the finding of the trial Judge should not be disturbed. In any event I cannot find that the respondent has established any claim to damages for that year.

In 1916 the appellant, according to his own evidence, put 30 acres in crop and summerfallowed 30 acres. In order to comply strictly with the terms of the lease he should have summerfallowed 1-3 of 130 acres (43 1-3 acres) and put the remaining 2-3 (86 2-3 acres) under crop. He testified that it

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was impossible for him to do this, or to do more than he did, on account of the great quantity of water upon the land. There is a conflict of evidence upon this point, and I think the trial Judge's finding, which is against the appellant, should be allowed to stand. I think, however, that the area which might have been summerfallowed or put in crop in 1916 was about 70 acres, and not about 90 acres as is found in the judgment. In arriving at the figure 90, the trial Judge includes a certain area of 20 acres which, according to all the evidence I can find, was not "under cultivation" within the meaning of the lease when the land was taken over by the appellant in 1915. These 20 acres had been cultivated at one time, but had been allowed to go back to grass. Now, upon that state of facts it would appear that in 1916 there were 130 acres available either for crop or for summerfallow: 60 acres which the appellant admits, and 70 more according to the finding. Out of this 130 acres the appellant summerfallowed only 30, leaving a deficiency of 14 1-3 acres. By the terms of the lease, the respondent is entitled to be compensated for this deficiency at the rate of $3 per acre, making an amount of $43. There remains then an area of 56 2-3 acres, neither cropped nor summerfallowed and which must be dealt with. Under a very literal reading of the lease, it might be said that the appellant was under no obligation to put any of this area in crop, but that he might have elected to summerfallow the whole of it and that, consequently, the question of damages is very involved. I think however, having regard to the whole lease, which provided no other rent than a one-half share of the crop, that the proper interpretation of the contract is that while the appellant might at his option have summerfallowed more than 1-3 of the cultivated land, the fact that he did not do so cast upon him the duty to put all the land not summerfallowed under crop, and that the damages for the first 1-3 having been assessed upon the basis of a failure to summerfallow, the damages as to the remaining 56 2-3 acres, which were entirely neglected, should be based upon an estimate of what crop might have been produced thereon. All we know about the crop of 1916 is the appellant's evidence to the effect that he sowed 30 acres and that it was all destroyed by hail, and the respondent's evidence to the effect that all he received that year was some $20 or $30 for hail insurance, and that he understood the whole crop was destroyed. It is hard to say what the probabilities would have been of this hail covering the remaining 56 2-3 acres. I think, however, that the fact having been established that whatever

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crop was sown was totally destroyed, the onus was cast upon the respondent to shew more than he did as to probable profits during that year lost to him by the appellant's default. I do not think that in the state of the evidence he can be awarded anything in respect of the year 1916, except the above amount of $43 on account of the appellant's failure to summerfallow a sufficient area.

We then come to the year 1917. In that year the appellant put 100 acres under crop and obtained a yield of 1,305 bushels, of which the respondent received his share. In the view I take of the evidence, there remained then 30 acres. In seeding 100 acres out of a total of 130, the appellant did not comply strictly with the lease which provided that he should sow not more than 2-3 of the acreage and summerfallow the rest. He testified, however, that he did this as a result of an understanding with the respondent, and this is not denied. As to the 30 acres remaining, the appellant states that the ground was too wet for summerfallowing. Here again there is a conflict of evidence, and as the trial Judge has found against the appellant I feel constrained to abide by his finding, although I do so, I must say, with great reluctance. Assuming therefore that the appellant was in default in failing to summerfallow these 30 acres, the damages fixed by the lease at $3 per acre would amount to $90.

The trial Judge has also allowed the respondent $440, for loss of crop in 1918 and in 1919, owing to the appellant's failure to live up to his lease. I have gone into the evidence with the utmost care and with all respect, I must say that I do not think the finding of the trial Judge in this particular can be upheld. In my opinion the only damage that can be allowed the respondent are the two items of $43 and $90 for the appellant's failure to summerfallow in 1916 and 1917 respectively.

I think, therefore, that the judgment in the Court below should be varied by reducing the same from $570 to $133, and that the appellant should have his costs of this appeal.

Judgment varied.

VERMETTE v. DESCHAMPS.

Saskatchewan King's Bench, MacDonald, J. June 21, 1922.

COSTS (§II-20)—*Taxation—Witness-fees — When allowed — Translation of evidence—Witness attending but not examined.*]—Appeal by the defendant from the order of the local Master dismissing an appeal to him against the allowance by the taxing officer of two items in the plaintiff's bill of costs.

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P. H. Gordon, for appellant.

C. M. Johnson, for respondent.

MACDONALD, J.:—The first item was for the translation from French into English of the agreement between the parties herein. At the hearing I intimated that, in my opinion, the said fee was a reasonable one, and as to it the appeal would be dismissed. The second item in question is as to the allowance of the fees to witnesses not called at the trial. The plaintiff produced only the usual affidavit of disbursements, in which he swore that the witnesses in question were necessary and material for the plaintiff and did attend at the time and place when the cause was disposed of, etc. Defendant contends that this is not sufficient material to entitle the plaintiff to tax such witness-fees. In *Eastern Townships Bank* v. *Vaughan* (1919), 15 B.C.R. 299, it is stated by Gregory, J. at p. 300, that the rule seems to be "that the party claiming should show 4 things, namely: (1) that the witness was a necessary and material one; (2) that he was in attendance; (3) what he was brought to depose to; (4) the reason why he was not examined." See also *Carlisle* v. *Roblin*, (1894), 16 P.R. (Ont.) 328; Widdifield on Costs, p. 238. The only authority in point cited on behalf of the plaintiff was *Boulton* v. *Switzer* (1849), 1 C.L. Ch. 83, where Macaulay, J., states as follows at p. 86.

"As to the two witnesses not examined, in the absence of anything to show them not material or not *bona fide* in attendance as witnesses in this cause, it was in the discretion of the master, if satisfied they did so attend and was paid, to allow the charge."

It seems to me, however, that the practice is now settled as stated in *Eastern Townships Bank* v. *Vaughan*, *supra*. Technically speaking, the parties subpœnaed, if not examined, were not witnesses at all. A witness is "one who testifies to what he knows. One who testifies under oath something which he knows "first-hand." Bouvier's Law Dictionary, vol. 3, p. 3475. Accordingly, the ordinary affidavit of disbursements does not, strictly speaking, cover the case of parties who are called but not examined, and the burden is on the party claiming costs of such persons to show the four things mentioned in *Eastern Townships Bank* v. *Vaughan*. Counsel for the plaintiff intimated that the practice in the Swift Current District has been as followed in this case, and intimated a desire, if the appeal was allowed, to have the matter referred back to the taxing officer that further material might be produced on behalf of the plaintiff to satisfy the requirements as stated in the decisions mentioned. The appeal will, therefore, be allowed

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with costs, and the item for allowance to witnesses referred back to the taxing officer, with leave to the parties to adduce further evidence before him on the points mentioned.

Appeal allowed.

COPP v. RHINDRESS.

RHINDRESS v. COPP.

Nova Scotia Supreme Court, Harris, C.J., and Russell, and Chisholm, JJ. December 10, 1921.

CONTRACTS (§IIA—125)—*Sale of laths—Breach of contract—Non-delivery — Measure of damages — Construction of contract — "Located on cars" — Place of delivery — Cross-action.*]—Appeal from the judgment of Mellish, J. dismissing the action by the plaintiff, Copp, claiming damages for failure on the part of the defendants, Rhindress, to deliver a quantity of laths in accordance with their contract and to recover moneys advanced by plaintiff to defendants with interest.

F. L. Milner, K.C., for appellant.

C. Guy Black, for respondents.

HARRIS, C.J.:—These two appeals were properly argued together as they involve the same facts and arise out of the same contract. For convenience I will refer to Copp as the buyer and Rhindress and Son as the sellers.

The parties entered into a contract dated March 10, 1920, reading as follows:—

"Angus Rhindress & Son sells and F. E. Copp buys all the sellers' cut of Spruce Laths up to last of June 1920, lath to be cut in size 4' 10" x 1½ x 3/8" to be well tied at both ends and well butted and to be loaded on cars at the request of the buyer for the sum of price $10.00 per M. The seller will agree to get about two cars laths a month or more if possible to do so. All the laths to be cut out of good soundstock free of rots and shakes.

After the end of June the buyer has the option to buy a further amount, price to be agreed on or on the same price, if prices will hold the same in the market.

Sgd. Angus Rhindress & Son, Seller,
F. E. Copp, Buyer."

Owing to difficulties with machinery the sellers were not able to manufacture any laths before the month of May. A carload was from 90 to 100 M. and the correspondence shews that on May 19 the sellers had only 85 M. sawed. The first action is brought by the buyer who alleges that he paid $400 to the sellers on the contract,—that there was a breach of the contract by the sellers and that, in consequnce of the sellers' refusal or

inability to furnish him with a cargo of laths in April which he had sold to a customer, he had to buy in the market at a cost of $10.45 per M. thereby incurring a loss of 45 cents per M., which he claims from the sellers and he also asks for a return of the $400 advanced.

This action was dismissed by the trial Judge.

The other action was brought by the sellers to recover the value of a carload of laths alleged to have been shipped in July to the buyer under the contract of the value of $900 and they claim payment of the $900 less the $400 advanced by the buyer.

In this case the trial Judge gave judgment for the sellers for the amount claimed.

Both judgments are appealed against.

There are two questions involved which turn on different considerations. (1) As to the damages claimed for breach of the contract, and (2) as to whether there was a delivery of the carload of laths by the sellers in July so as to entitle the sellers to sue for the value of it.

There is no dispute as to the $400 having been advanced by the buyer at the time of the contract, nor as to his right to repayment. Whether he should have recovered it in the first action or it should be credited in the second depends upon the correctness of the decisions appealed from.

First, as to the damages claimed for breach of the contract the trial Judge expresses himself as not satisfied with the *bona fides* of the claim. From his comments, I infer that he evidently disbelieved the evidence of the buyer as to the price he says he paid for the carload purchased and as to the necessity of paying more than $10 for the laths. There is much in the evidence to justify such a finding and I am not prepared to reverse the trial Judge on this point where he saw the witness and had the opportunity of forming a conclusion as to his truthfulness. For this reason, and because of the other facts stated by the trial Judge I would affirm the judgment appealed from on this question.

Second, on the other question as to whether or not there was a delivery within the terms of the contract of the carload of laths so as to entitle the sellers to sue for the price, I find myself unable to agree with the trial Judge.

The correspondence shews that the buyer when he failed to get delivery of laths in April under his contract attempted to use the non-delivery by the sellers as a means of getting a reduction in price. Laths had decreased in price on the market in the meantime and the buyer who had advanced $400 to the

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sellers when the contract was made apparently wanted to get the laths which the sellers produced so as to secure his debt but did not want to pay the contract price for them. It is, however, unnecessary to deal with all the correspondence between the parties because there came a time in July when the buyer insisted on delivery of a carload of laths and the sellers agreed to deliver them. The correspondence between the parties shows that the sellers were advised that the buyer was reselling the laths to a purchaser apparently not in Oxford and they were to be shipped direct to the purchaser.

What happened, however, was that the sellers after loading the laths on the car took a bill of lading from the railway requiring delivery of the laths to the buyer at Oxford where he resided, and the car was sent there. At first, the sellers attached a draft to the bill of lading but the buyer refused to accept it and then they sent the bill of lading without the draft and this also the buyer refused to accept. The freight on the carload of laths to Oxford was as much as it would have been to Toronto where the purchaser was and so the freight to Oxford would be absolutely lost.

If we turn to the contract we find that the laths were "to be loaded on cars at the request of the buyers." This, obviously, meant at Batty's Siding where the sellers' mill was situate. The sellers deny that they ordered the car to be sent forward to Oxford, but they had taken a bill of lading from the railway which required the railway to deliver the car at Oxford and they alone were, therefore, responsible for the car being forwarded. If they had been satisfied by loading the car at Batty's Siding as the contract required, I should have been of the opinion that they could have recovered the contract price notwithstanding the statements of the buyer in some previous letters that he would only pay the market price less a commission. I say this because in the end without saying anything about price, he demanded a carload which he could only do on the supposition that he was entitled to it under the contract and he was only entitled to it under the contract if he paid the contract price. But the sending of the car to Oxford under the circumstances, particularly where the sellers knew the buyer wanted it shipped elsewhere to his purchaser, cannot, I think, be regarded as a compliance with the contract.

What the contract required was delivery on the car at Batty's Siding and not at Oxford, with heavy freight charges added, and the buyer cannot be bound to accept the car under these

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circumstances. He never did accept delivery of the car nor of the bill of lading and it is impossible, I think, to say that he can be sued for the price of the goods. I cannot agree that the conduct of the buyer who evidently intended, if he could, to get possession of the laths without paying for them, justified the sellers in sending the car to Oxford. They did not thereby preserve a lien for the price because eventually they sent the bill of lading to the buyer without a draft attached, and if he had accepted it the sellers would have parted with their lien without getting paid for their laths.

I do not see why they could not have retained control of the car at Batty's Siding until they got paid for the laths, but whether this is so or not they cannot under the circumstances say that there was delivery according to the contract, and this they must be able to establish before they can recover the price.

In the result the buyer fails in the first action as to the damages claimed but should have judgment for the $400 advanced to the sellers, with interest; and the second action brought by the sellers to recover the price of the carload of lath fails and must be dismissed.

In the first action the buyer will have the costs of the action less the costs on the issue as to damages, and these latter costs will go to the sellers and be offset against the amount of the judgment.

The second action must be dismissed with costs.

The buyer must, I think, have the costs of the appeal.

RUSSELL, J.:—The plaintiff Copp agreed to purchase laths from the defendant Angus Rhindress and Son under the following agreement in writing:

[See judgment of Harris, C.J., p. 782.]

The clause relating to monthly deliveries is ambiguous. There is no comma in the original and the condition as to possibility may be read either with reference to the two cars per month, or only to the quantity beyond two cars to be delivered "if possible." I think that this clause must be read according to the maxim as having been put forward by the defendants and, therefore, that they undertook definitely or at least without the qualification as to possibility, to deliver about two cars of laths a month. They had been paid $200 in cash and a note at 30 days for the like amount had been given to them to assist them in carrying out the contract of which note they procured discount at the bank and it was retired by the plaintiff at maturity.

The defendants were unable to carry out their agreement be-

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cause of defects in their machinery and plaintiff says that he lost some of his customers for want of the laths which should have been supplied under the contract. He alleges further that he was obliged, in order to retain one of his customers, to purchase a car of laths at $10.45, a thousand, a price reduced from that of $10.50 a thousand at first demanded. This seems to be at first blush a little inconsistent with the statement of the plaintiff that the market for laths had begun to fall, but there is no evidence to discredit his assertion as to the purchase or its necessity, and, as he explains, it is not always possible to buy at what should be the market price. Some inferences adverse to the plaintiff are also drawn from the fact that he did not deliver the laths to his alleged customer till 8 days after he bought them, although he says they were pressing for delivery. But this also is explained by his difficulty in securing a car. In the absence of evidence to rebut these statements of the plaintiff, I do not feel at liberty to speculate as to his good faith or his motives. There is no evidence to show that he did not purchase, as he had a right to do, a carload to replace the laths that the defendants were bound to supply or that he was not obliged to pay the amount which he claims to have paid to secure them. I, therefore, think his claim for damages equal to the difference between the contract price and the price paid must be affirmed.

On April 17 the plaintiff wrote defendant a letter which the trial Judge treats as a repudiation of the contract by the plaintiff such as would entitle the defendants to consider themselves discharged from further performance. I doubt if the letter is quite strong enough for that purpose, though I find it unnecessary to hold that it is not. Plaintiff says, among other things to defendant: "As you could not supply the laths I could not hold my customers. It looks now that we will have to have a new contract signed up." There is no such finality in this expression as to warrant the defendant in treating it as a ground for claiming a discharge. At the end of his letter plaintiff says: "When you are ready to ship a car let me know and I will secure the best market price, less my commission." This, also, it is suggested is not conclusive. It may be read not as applying to the whole contract, but merely to the carload to replace the one as to which the defendants were in default. But the suggestion is of no importance. The plaintiff did, undoubtedly, throughout the subsequent correspondence treat the original contract as discharged by breach, and if as he contends the market was falling, he was no doubt more than willing that it should be discharged. Nevertheless, he is anxious to secure

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further deliveries in order to hold his "second customer." But the defendants continue to be unfortunate. On May 5, which was within 5 days of the time when a second delivery would be due they are still unable to deliver their first carload, and the plaintiff has to be content with their excuses. In this letter, the defendant, W. H. Rhindress asks "By the way, does the contract hold good?" Up to that date, he evidently had not regarded the notification in plaintiff's letter of April 17, as putting an end to the contract; or at least he was not certain about the matter. But there could be no doubt after May 24, that the parties were at arms' length, and whatever sales and purchases were made thereafter would have to be the result of fresh negotiations. The written contract was at an end, and defendants so regard the matter for they write on that date "we should like to know what we are going to get per M. for laths before we start loading your car. Kindly let us know as soon as possible."

On May 29, the defendant writes that he has 90,000 laths manufactured. This would be about a carload and he asks for advice to whom he will bill the car out. No immediate answer comes to this request. But on June 24, and June 29, plaintiff writes with instructions and a request for a carload for a new customer that the plaintiff says he had secured. Defendant replies that as he did not hear from the plaintiff for so long he thought he did not want the laths. Then on July 2, plaintiff writes the following letter:

"Angus Rhindress & Son, July 2, 1920
Wallace, N.S.

Your letter of the 30th to hand and note that you have sold my laths. Now sir, I will give you one week to have the car laths ready. If you do not have them by that time I will take action at once for damages. I will also charge damage for non-delivery for first car. I had to buy and I had to pay 45 cents per M. more to get them from another party to fill my order, remember the date.

F. E. Copp.

The trial Judge treats this letter as if the plaintiff were blowing hot and cold, holding the original contract to be in force after he had all through the correspondence on and after April 17, insisted that the original contract of March 10 had been discharged by breach. It seems to me this is too long an inference to draw from the expression "my laths," in the letter in which it occurs. I should infer that he was claiming the laths because of the trouble he had gone to in securing a customer,

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making inquiries as to his solvency, procuring a report from the bank, writing the freight agent to place a car at Batty's Siding, ordering the defendants to "please have the car rushed soon as it is placed and let me know and I will bill it out."

But if there were nothing in all these circumstances to explain his use of the phrase "my laths" would not the mere fact that he had paid for them in advance and that the defendant had $400 of plaintiff's money in his pocket be sufficient to explain the phrase, if not wholly justify it? The plaintiff could not have been claiming the car by virtue of the original agreement. Under that agreement, he would have been obliged to pay $10 a thousand and he was offering only $9 less commission. Of course, the fact that plaintiff claimed the laths did not make them his laths, and it is not suggested here that he had, in respect to this consignment, any grievance against the defendant.

On July 9, defendant announces his ability to get the laths desired by the plaintiff and his offer is accepted by plaintiff. It is in connection with this offer and acceptance and the execution of the agreement made that the only serious difficulty in this case seems to me to arise. In the plaintiff's letter of acceptance he asks the defendant to let him have the car number so that he can send the bill of lading to the agent at Wallace, where the defendants carried on their business. On July 10, defendant notifies plaintiff that he has that day loaded a car of laths according to his contract and made a sight draft on plaintiff for the amount with the bill of lading attached. "Please honour the draft upon presentation whereupon I will see that the car is immediately ordered out." Plaintiff replies on July 12, in a letter indicating some irritation and which it seems should have operated as a warning to the defendant to exercise care as to the mode of delivery. The intimation is very plain and clear that plaintiff will expect the car to be billed to the customer for whom he is ordering it. The letter is as follows:—

"Angus Rhindress & Son, July 12, 1920
Wallace, N.S.

I am just in receipt of your letter. By your letter you seem to be very smart. I want you to understand that I will order out your car that you have loaded. I would like to know how you know who to bill the car to. You are very smart. When the car is shipped and tallyed out by the consignee then I will pay you balance of what is due you at $9,00 per M. I also have you charged up with the difference I had to pay on first car that you could not fill as per contract. F. E. Copp."

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It appears to be a competition of wits between the parties and the defendant seems to be preparing to make a claim on the plaintiff for the original contract price as he notifies him in his letter of the following day that he is shipping the goods "under our contract of March 10th 1920," apparently, in retaliation for the plaintiff's claim of damages for breach of that contract. The question to be decided is which of the parties is right at this critical point in the transaction. It seems to me to be simply a question whether the defendants have put themselves in a position to claim, as to this carload of merchandise for "goods sold,"—the form now made applicable to the case either of goods sold and delivered or of goods bargained and sold. The authorities show, (indeed no authority is required beyond the words of the statute) that the seller is bound to make and the purchaser to take delivery at the seller's place of business, unless the parties have otherwise agreed. The plaintiff had notified the sellers that he would require the goods to be billed to his customer and the evidence shows that the cost of transportation to Oxford, where the defendant, contrary to the buyer's instructions, sent the car, was as great as the freight to Toronto, where the plaintiff proposed to send it. The defendants, it seems to me, made a misdelivery. They were not bound to deliver the goods until their lien for the price was satisfied and they had a right to reserve a *jus disponendi* by taking the bill of lading in such form as to secure the payment of their draft, but they did not make a good delivery by sending the car to Oxford at an expense of $27 and plaintiff was within his legal rights in refusing to accept the goods at that place or to pay for them.

The trial Judge considered the plaintiff unreasonable in his refusal to take the laths at Oxford, suggesting that he had funds in his hands or would have had them to pay the additional freight. But it is more than doubtful if he would have been entitled to retain this freight if he had accepted the laths under the defendant's tender of delivery at Oxford and if he had accepted them it seems clear that he would have been bound to pay the original contract price. I do not think that, under these circumstances, he can be held to have acted unreasonably in refusing them. If he did so act the complaint comes with doubtful grace from the defendants who are shown by their letter of July 13 and the statement of claim in their counter action to have been insisting in a falling market on the price stipulated in the original contract, which they were themselves

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the first to break, and in the discharge of which by breach they had clearly acquiesced.

I think the appeals in this case as well as in the case of *Rhindress* v. *Copp*, both of which were argued together, must be allowed with costs. Of course the fact that they were argued together should have a material effect on the taxation of the costs.

CHISHOLM, J.:—I concur in the opinion of the Chief Justice.

Appeal allowed.

McPHEE v. McCURDY.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J. and Mellish, J. April 2, 1921.

CONTRACTS (§VIA—410)—*Contract for hauling lumber—Action on—Counterclaim—Credits and offsets—Findings—Evidence—Instructions to Jury—Refusal of new trial—Dismissal of appeal.*]—Appeal from the judgment of Webster, Co. Ct. J. District No. 4, refusing to grant a new trial in an action to recover a balance alleged to be due on a contract for hauling lumber. The case was tried before the Judge with a jury and on the findings of the jury, judgment was ordered for plaintiff.

S. D. McLellan, for appellants.

H. Putnam, for respondent.

LONGLEY, J.:—I have read the evidence over from beginning to end and I am compelled to reach the conclusion that it is impossible to successfully find fault with the jury. They may have produced a different verdict from what we would have rendered under the same circumstances, but they heard all the parties, they saw all the parties, and had a right to form their own conclusions. I think the defendant should have got credit for 36 loads at $1.75. I have no doubt that he hauled them but the jury thought otherwise and they concluded to give a verdict for the amount. The County Court Judge has reduced this verdict from $109 to $88.71. I cannot find that the jury in using the word "ignored" utterly failed in their duty; it is a very necessary provision that such a word should be used; although it might not have been the most happy word possible, yet it explains fully their idea.

Judgment upholding the appeal.

MELLISH, J.:—The plaintiff has brought an action against defendants for work done for defendants in hauling sawn lumber. The action was tried in the County Court with a jury. The jury found that plaintiff hauled 221,293 feet at the fair charge

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of $1.75 per 1,000, amounting to $387.25. They also find that plaintiff got supplies from defendants to the amount of $278.04.

Defendants set up on the trial that the number of feet hauled by the plaintiff should be reduced by the amount of 36,942 feet which at $1.75 per 1,000 would amount to $64.63. They also make a claim for an expenditure of $59.15 which was abandoned before us; and for supplies $278.04. These amounts they claim on the pleadings to set off against plaintiff's claim. They also claim against the plaintiff for damages for breach of contract in that plaintiff did not begin hauling and keep their mill clear according to contract or complete the contract by hauling the whole cut.

Plaintiff in his statement of claim allows a credit of $248.75 for supplies which as above noted the jury has increased to $278.04. Plaintiff also allows a further credit of $20 for 15,000 feet not being hauled the whole of the required distance, which the jury has not considered. The jury expressly "agree that the counterclaim be ignored."

On these findings, the County Court Judge for District No. 4 gave judgment for plaintiff for $88.71 made up as follows:

Amount for hauling, $387.25; less, supplies furnished, $278.04; credit allowed in S1 claim, $20.00; deduction for alleged mistake as to amount hauled in the findings of the jury—which was made I confess I cannot understand why, 50c. Total, $298.54. Balance, $88.71.

The defendant moved to set aside the findings except that as to the supplies amounting to $278.04 and asked for a new trial under the County Court Act which was refused.

This is an appeal from such refusal.

It was argued before us that the trial Judge had not instructed the jury as to the matters they have not dealt with, that the findings are against evidence, that the finding as to the counterclaim shews that the jury did not consider it, and that under the evidence the defendants are clearly entitled to damages for breach of contract and that evidence had been improperly admitted of an agreement on defendants' part to furnish the plaintiff with proper feed for his horses.

As to the non-direction of the trial Judge, I think counsel should have asked him to instruct the jury as to any phase of the case he might have overlooked, and I am not prepared to say that the findings are wrong on the evidence. As to the counterclaim I think the Judge, in effect, told the jury that if they believed the defendants' witnesses they would have to award damages on the counterclaim, and it would appear that

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they followed his implied instructions, to ignore the counter-claim if they disbelieved defendants' witnesses.

Plaintiff swears that before signing the written agreement he, in effect, told defendants that the latter would have to supply him with the necessary feed for his horses if he made such a contract as he could not get it elsewhere, to which defendants agreed. This was not an unreasonable stipulation, and the jury, apparently, believed the plaintiff as to the terms of this agreement and also as to the defendants' failure to carry it out.

It is true that the jury find that the amount of goods claimed for was supplied by defendants but this is not inconsistent with the view as distinctly stated, in effect, by plaintiff that at least at the last the feed was not supplied in sufficient quantity or quality to enable him to carry out the contract. This view is, I think, further strengthened by the circumstance that defendants' conduct throughout until the commencement of this action is apparently inconsistent with any intention on their part to claim that the plaintiff was liable for a breach of contract. I cannot see why evidence could not be given of this prior agreement. It, I think, is a collateral agreement made in contemplation of the written agreement and its non-fulfilment, I think, would excuse the performance of the latter. It would, perhaps, have been better pleading if the plaintiff had alleged that he was induced by the defendants to enter into the written agreement by the representation of defendants that if he did so defendants would furnish the supplies, which defendants failed to do.

Whatever the powers of the trial Judge in this regard, I think this Court has power to draw inferences of fact not inconsistent with the findings of the jury, and as I think substantial justice has been done as between the parties, the appeal should be dismissed with costs.

RUSSELL, J., and RITCHIE, E.J., concurred with MELLISH, J.

Appeal dismissed.

NELSON v. PACIFIC GREAT EASTERN R. Co.
OBLATE ORDER OF MARY IMMACULATE v. PACIFIC GREAT EASTERN R. Co.
LEFEAUX & CARLISLE v. PACIFIC GREAT EASTERN R. Co.

British Columbia Supreme Court, Clement, J. October 3, 1919.

DAMAGES (§III L—267)—*Railway Act—Construction of railway—Compensation—Measure of damages—Access to sea—Foreshore—Sufficiency of arbitrator's award—Damage from operation.*]—Appeal by defendant from the award of arbitrators appointed to determine the amount of compensation to be

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paid by the defendant in pursuance of the judgment in the action of April 28, 1919. The plaintiffs are the owners of certain lots of land abutting on tidal waters in the municipality of West Vancouver. The defendant constructed a railway embankment and built a railway touching the line of and extending below high-water mark in front of said lots and obstructed the plaintiffs' rights of access from the waters of English Bay. The plaintiffs brought action for damages for trespass in respect of said lots. It was held by Macdonald, J., that the plaintiffs were entitled to compensation under the provisions of the Railway Act, (R.S.B.C. 1911, ch. 194) for obstruction of their right of access as such owners to and from the waters of English Bay and for injury caused the said property, and artbitrators (Murphy, J., chairman) were appointed in pursuance of the Railway Act to determine the amount of damages to be paid. The arbitrators, after hearing the evidence and viewing the property, made their award on August 7, 1919, fixing the amount of damages at $25 per foot frontage on tidal waters. The defendant company appealed on the grounds, first, that the arbitrators should only consider evidence of the cost of the construction of passages through the embankment providing access to the sea; and secondly, that in any case the award was excessive, as on the evidence the arbitrators could not reasonably find the plaintiffs entitled to the amount given by the award. In giving evidence at the hearing certain witnesses based their estimate of damage in part on the effect of smoke, noise and the unsightliness of the embankment. Counsel for the plaintiffs requested the arbitrators to disregard such evidence in fixing the amount of damage, and the chairman stated that in making their finding they would disregard it. On the appeal, counsel for the appellant contended that the evidence of damage was insufficient or improper, as it was impossible for the arbitrators to say to what extent the evidence as to smoke, noise and unsightliness influenced the opinion of the witnesses.

W. C. Brown, for appellant.

Dorrell, for Nelson.

D. Smith, for Oblate Order of Mary Immaculate.

Baird, for Lefeaux & Carlisle.

CLEMENT, J.:—Taking Mr. Brown's contentions in order; (1) The cost of providing access to the foreshore and the sea is not the true measure of the damage done. It is a very pertinent piece of evidence, of course, but the question at once arises as to the relative value of the access offered and that which existed before the railway was interposed between the properties

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in question and the sea. I think the arbitrators, under the circumstances, were justified in declaring to be decisively guided by the evidence on this head, and in having regard to the evidence as to values before and after the railway was built. (2) The arbitrators, as I gather, avowedly disregarded the rather vague evidence as to the damage done by smoke of trains, etc., all damage, in fact, incidental to the operation as distinguished from the construction of the railway, and at any rate their award is much below the figure at which the damage was placed by those witnesses who were influenced by these improper elements of damage. In the light of other evidence, I think the arbitrators could arrive at the figure they did agree upon, entirely disregarding the objectionable elements; and, of course I must assume they did so, the award being perfectly good on its face. (3) I have gone through the evidence adduced and am quite unable to say that the arbitrators have erred as to the amount. I would have to arrive at a clear opinion that they were wrong before I could consider the figure I should award. At that point I have not arrived, and the awards, therefore, must stand.

Appeal dismissed and, so far as I have jurisdiction so to determine, with costs. The claimants were entitled to judgment for the amounts respectively awarded them, with costs.

Appeal dismissed.

CORP. OF THE DIST. OF SURREY v. CAINE.

Supreme Court of Canada, Davies, C.J. and Idington, Duff, Anglin, Brodeur and Mignault, JJ. November 2, 1920.

EXPROPRIATION (§IIA—80)—*Proceedings to "resume" land —Public road—"In use as gardens"—Injunction.*]—Appeal from the judgment of the Court of Appeal for British Columbia affirming the judgment of the trial Judge, Clement, J., 27 B.C.R. 23, and granting a perpetual injunction restraining the appellant from proceeding to "resume" land. The trial Court and the Court of Appeal held that certain land proposed to be taken by the municipality from the respondent for part of a public road under a "resumption" by-law pursuant to sec. 325 of the Municipal Act R.S.B.C. 1911 ch. 170 came within the exception of this section as being land "in use as gardens or otherwise for the more convenient occupation of the respondent's buildings, and granted with costs a perpetual injunction restraining the municipality from proceeding to "resume" the land.

S. S. Taylor, for respondent.

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The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal; but the injunction was modified so as to make it clear that the defendant was not thereby precluded from instituting expropriation proceedings as to all the land in question or from asserting a right of resumption in a fresh proceeding as to certain portions of the respondent's land.

Appeal dismissed.

CRISOMALES v. C. W. LINDSAY LTD.

Quebec King's Bench, Lamothe, C.J. and Tellier, JJ. June 28, 1921.

LANDLORD AND TENANT (§IIIE—115)—*Lease — Eviction — Provisional execution—Right to remedy.*]—Appeal from a judgment ordering the vacation of leased premises.

Respondent obtained judgment against appellant condemning the latter to vacate the leased premises or to be ejected if he did not do so.

On appeal from this judgment, the respondent presented a petition before two Judges of the Court of King's Bench in Chambers, asking them to order provisional execution of the judgment on the ground that continued occupation of the leased premises by the appellant would cause considerable damage to respondent.

T. P. Foran, K.C., for appellant.

Devlin & Ste. Marie, for respondent.

This petition was dismissed for the following reasons:—

Considering that plaintiff-appellant has been in possession of the leased premises as lessee for several years;

Considering that his contestation of the present action does not appear frivolous;

Considering that it is not in the interests of justice, in the circumstances revealed in the record, to order provisional execution;

Distinguishing the present case, as regards the facts, from that of *Hyman* v. *Montreal Trust Co.* (1921), 23 Que. P.R. 14, dismisses respondent's petition with costs."

Petition dismissed.

MOISE v. GOSSELIN.

Quebec Court of Review, Archibald, A.C.J., Demers and de Lorimier, JJ. November 19, 1921.

COMPANIES (§VB—175)—*Subscription—Misrepresentation—Shares fully paid-up—Rescission—Liquidator—Contributories.*]—Appeal from the judgment of Lafontaine, J. Affirmed.

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On January 24, 1920, Moise sued the defendants, Gosselin and Gravel, by two separate actions, in rescission of sales made by each of them of 12 fully paid up shares in the Perfect Shoe Co. Ltd., alleging that he paid each defendant a sum of $75 in cash in consideration for each of these sales and gave each of them a note for $225. The shares were sold to him as fully paid up. He claims that they were not paid up, and that the company is now in liquidation. He seeks to recover his $75 and to have the notes returned to him.

The defendants each pleaded by a general denial and brought counter actions to enforce payment of their $225 notes.

Moise contested these latter actions on the same grounds as he urged in support of his own actions. The Court decided in favour of Gosselin and against Moise by the following judgment rendered in both cases.

Pierre Ledieu, for Moise; *Gouin and Perrault,* for Gosselin and Gravel.

Considering that the defendant in the action in rescission (plaintiff in the action in payment of the note of $225) did in fact contribute merchandise to the value of $1,000 to the Perfect Shoe Co. Ltd., just as his partners did, when the company was formed; that this merchandise was accepted in lieu of cash and the said defendant received paid-up shares in return; that later on, in order to strengthen the company, the defendant and his associates subscribed for 5 more shares which were being paid for by a deduction of 8 dollars made each week from the salary of $20 per week which the company paid him, to which weekly reduction was added $10 per month in lieu of director's fees; that this arrangement had been in force for an indefinite time, but sufficiently long to give the defendant reason to believe that the 5 additional shares subscribed for had been paid up like the others, making a total of 15 shares which were regarded as fully paid-up; that therefore, in view of the sale made by the defendant to the plaintiff, a certificate for 12 shares was issued in favour of the plaintiff; that no call was due or had been made in respect of these shares, and they were regarded as fully paid-up, as the plaintiff knew, for he was the secretary of the company, although no mention of payment was made in the share certificate; that a long time afterwards, when a new set of books had been opened after the liquidation of the company, the auditor charged with making a report on the company's affairs discovered that there was still a sum of $197 due by the defendant, but, however that may be, the liqui-

dator does not appear to have taken any notice of the discovery and took no steps to claim payment of that sum, and it is the plaintiff only who appears to have taken action with the evident intention of freeing himself from a debt which he had legitimately contracted;

Considering that the plaintiff became owner of 12 shares which were regarded as fully paid-up by the company itself which accepted the transfer of the shares from the defendant to the plaintiff and signed in favour of the defendant a certificate for 12 shares of which the plaintiff had and still has full ownership and enjoyment without any restriction; that irregularities, or omissions in entries in books of account and especially in a new set of books opened at a later date should not affect the truth of facts stated and recognised; that, in any case, out of the 12 shares given to the plaintiff 10 shares have undoubtedly been paid up, since they were given to the defendant in payment of goods contributed by him to the company to the value of $1,000, and that any doubt as to whether or not the shares delivered were fully paid up could only affect two of the said shares in respect of which only the action could be maintained, that a sum of $40 on each of these shares would be sufficient to pay them up completely, so that the plaintiff's interest would be in the neighbourhood of a sum of $80, that the defendant could only be called upon to pay this sum if the liquidator decided to take steps to have it paid; that no demand has yet been made to put the plaintiff upon the list of contributories and he will very probably never be troubled, the more so as he appears to be the only person now interested in the matter, and his action is an afterthought in order to evade payment of the note;

Considering that an action in rescission based on a tacit resolutory condition in a bilateral contract is judicial and is, consequently, left to the discretion of the Court, which grants or refuses it according to circumstances, having regard to the protection of the rights and interests of each of the parties interested, and that on the whole, in view of the circumstances revealed by the evidence, the plaintiff's action should not be maintained;

Maintains the defence, dismisses the action with costs, reserving to the plaintiff all legal rights in respect of the sum of $80 unpaid on two of the shares. R.S.Q. 1909, secs. 6052, 6055 and 6056 (repealed 1920 (Que.) ch. 72.); Mitchell Companies Act, 1916 ed. p. 543, heading Estoppel; Demolombe, vol. 25.

Judgment confirmed.

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LAMARRE v. COHEN.

Quebec Superior Court in Bankruptcy, Panneton, J. June 29, 1922.

BANKRUPTCY (§IV—36)—*Claims provable against estate.*]—Action by insolvent contesting certain claims filed with the trustee.

I. Popliger, for contestant.

Louis Fitch, for trustee.

PANNETON, J.:—Mrs. Cohen, one of the insolvents is contesting the dividend sheet and alleges that three claims fyled with the trustee to wit, that of the Canadian Binding Co. for $2,000, of Ornstein for $2,000 and Weinstein for $1,500 ought to have been collocated and six claims mentioned below ought not to have been collocated.

It is admitted at the hearing that no proof has been adduced in support of the claim of the Canadian Binding Co. and of the claim of Weinstein, the contestation with regard to these two claims is dismissed.

As to Ornstein, his claim was rejected by the trustee who notified him of the decision. He did not appeal from it. Further he was *mis-en-cause* in the present issue, appeared by attorney but did nothing else.

There being no appeal from the decision of the trustee, he not having joined in this contestation, and the proof not being sufficient to establish that he is entitled to be collocated the money having been loaned to Mrs. Cohen personally and not to the insolvent company, the contestation is so far as said Ornstein is concerned is dismissed.

Contestant claims that the following creditors collocated on the dividend sheet ought not to have been so collocated to wit the claims of S. Isayeff for $178, A. Broodney $1,450, J. Silver $360, R. Vogel for $300, Star Gas & Electric Co. for $302.86, and J. A. Sarvis for $63, as these debts, if they exist, were not due by the insolvents.

The contestation as to trustee's costs has been abandoned at the hearing.

The claim of Isayeff is established by the proof and the collocation in his favor is mentioned.

The claim of Sarvis is also proved and its inclusion on the dividend sheet is maintained.

The claim of Singer, erroneously mentioned as Silver is fyled for $360, based on a note by the insolvent in favor of M. Goldstein and transferred by Goldstein to Singer. The copy of note attached to claim was made from the original which was shown to the trustee. This claim is on the list C.16 under the name of

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Goldstein for $370 and is proved and its collocation maintained.

The claim of Miss R. Vogel for $300 is based on a note given by the insolvent for a loan of money made to it. It is proved that the money was handed to G. Vineberg at the time he bought Fickenstein machinery in July or August 1920—The note given is that of the firm composed of the two Vinebergs and Mrs. Cohen. This insolvent firm carried on business under the same name as was carried on previously by the two Vinebergs to wit: "The Continental Upholstering Co." which had been formed in April previous of the same year. The money was loaned on the credit of the insolvent as well as that of G. Vineberg. The note of the insolvent was given to said C. Vogel at the time of the loan.

As to Broodney's claim for $1,450, the money to the extent of $1,350 has been given by Broodney as follows:—$15 in 1917, $233 in 1918, $600 in September, 1919, and $490 in January, 1920, and making $1,338 and $12, for interest.

G. Vineberg entered into partnership with A. Vineberg under the name of the Continental Upholstering Co. about April, 1919. All moneys loaned before that date were to G. Vineberg personally, and loans amounting to $288. The $600 cheque dated September, 1919, was given during the partnership of the two brothers, payable to G. Vineberg, and so was the $490 cheque dated January 30, 1920. The promissory note attached to the claim is dated May 5, 1920, for all these cheques covering all the money loaned and is signed by the Continental Upholstering Co. per G. Vineberg, during the partnership of the two Vinebergs and Mrs. Cohen.

As to the $248 loaned to G. Vineberg when he was alone, this last had no right to give the note of the partnership composed of the three partners for his personal debt. That $600 cheque was given in September 1919, during the existence of the partnership of the two Vinebergs and the $490 dated January 30, 1920, was also given during the existence of the said partnership, before the partnership of the two Vinebergs and Mrs. Cohen.

Broodney was examined before the Registrar. From his examination the Court comes to the conclusion that all these loans were made upon the credit of and for the benefit of G. Vineberg personally and not upon the credit of the Continental Upholstering Co. at any period of its existence. He says he made the loans because he had confidence in Vineberg and he has no writing whatever from the firm except the note of May, 1920. There was no advance of money made when that note

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was given signed "The Continental Upholstering Co. per G. Vineberg. In his examination before the Court he says that "It was Gustave Vineberg who was owing me." The insolvents cannot be held responsible for these loans of money. The balance of the claim for $100 for work done is maintained.

As to the claim of the Star Gas and Electric Co. for $302.86. This claim is for goods sold to the firm consisting of the two Vinebergs and Mrs. Cohen. This claim is proved and is maintained.

As to costs. The contestation is several distinct claims constituting practically as many different cases, and as contestant failed in many of them but succeeded almost entirely in only one of them, the Court orders that each party pays its own costs.

Judgment accordingly.

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CASES:—Continued.