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ANNOTATED

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VOL. 37

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT *and*

I. FREEMAN

CONSULTING EDITORS

E. DOUGLAS ARMOUR, K.C.

ALFRED B. MORINE, K.C.

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CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 37 INCLUSIVE.

LEA v. CITY OF MEDICINE HAT.

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Alberta Supreme Court, McCarthy, J. September 17, 1917.

ENGINEER (§ I—5)—PROFESSIONAL SERVICES—ESTIMATES—NEGLIGENCE.

A consulting engineer, admittedly skilled and competent, who is called upon in a professional capacity to render an estimate of the cost of a work, is only liable, in the event of error, for negligence, and the onus of proving this negligence is upon his employer; his failure to test the bearing capacity of soil, to sustain a plant to be erected thereon, is not of itself negligence, if he was in fact familiar with the character of the soil.

Statement.

ACTION by a consulting engineer to recover 5% commission on the total cost of the installation of the water works plant of the defendant.

H. P. O. Savary and *S. G. Bannon*, for defendant.

McCarthy, J.

McCARTHY, J.:—The plaintiff contends that the total cost is disclosed in exhibit 19, filed by the plaintiff. In column 1 the several contracts relating to the construction of the plant are set out, amounting to $648,764.08. From this is deducted the amount appearing as the total of the last column in exhibit 19, namely, $34,363.06, less the amount appearing in said column for sedimentation basin repairs, viz., $10,334.35, leaving a balance of $624,735.37 of which 5% is $14,236.76. The plaintiff also claims the sum of $2,500 for preparation of the preliminary plans and report on the proposed further extensions of the plant. This latter sum the defendants do not dispute except insofar as it may be affected by their counterclaim. Adding these two sums together, the plaintiff's claim is arrived at, viz., $16,736.76. The figures above set out do not agree with the figures submitted by counsel for plaintiff at the trial, but I am unable to see how he arrives at the amount claimed in the argument, viz., $17,786.75. However, the correct amount with what I have to say hereafter upon the question of interest, can, if need be, be spoken to again by the parties before the minutes of judgment are finally settled, if they are unable to agree as to the correct amount.

The statement of defence raises many defences and claims by way of counterclaim, which it is unnecessary to enumerate here as many of them were abandoned at the trial.

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The contract was entered into in the year 1912. There was no formal contract but it was consummated by correspondence with and resolution and by-laws passed by the city council.

The defendants contended, at the trial of the action, by way of defence and counterclaim, that the plaintiff, by reason of his failure to use reasonable care in informing himself of the cost of the plant furnished them with an estimate which was 35% below the actual cost and say that the estimate furnished amounted to $411,177.50, whereas the actual cost amounted to $624,735.37, and that by reason of such carelessness the plaintiff is not entitled to succeed, and further (*b*) that by reason of the faulty design of the plant the plaintiff is not entitled to recover. The fault found with the design by the defendants is that before the preparation of the plans the plaintiff did not familiarize himself with the bearing capacity of the soil on the site where the plant was to be constructed; that no proper tests were made and in consequence a structure was placed upon the soil heavier than it was capable of sustaining, the evidence of the defendants in this regard being that the maximum weight should not be greater than 2,500 pounds per sq. ft., whereas the actual weight at some places is 4,000 per sq. ft., with the result, the defendants say, that by reason of placing upon the soil a weight that it was not capable of sustaining the building has sagged, the walls have cracked, the boilers have settled, the columns supporting the roof have settled, the turbine engines have settled, the west sedimention basin leaks and has settled, and that this has all been caused by such defective design and that the damages sustained and the costs of putting the plant in shape are far in excess of the plaintiff's claim, and these amongst other grounds were relied on by the defendants at the trial in support of their counterclaim.

From the evidence, it would appear that the work on the plant was commenced in September, 1912, and completed in October, 1913. It would also appear that on August 9, 1913, there was a break in the supply main to the reservoir, where a large volume of water escaped and entered the plant, and the question for me to determine is whether the sagging of the building and the damage consequent thereto was occasioned by the overloading of the soil or the flooding of the building from the broken water main.

During the course of the trial I viewed the *locus in quo* in the

presence of the parties or their representatives and there is no doubt from what I then saw and the evidence I have heard that considerable damage has been occasioned to the plant from some cause or other. It occurred to me then and still does, that the question to be decided in this judgment could have been more effectually dealt with by a board of engineers and I regret that the parties to the action did not endeavour to have it so decided, as there is in this case, as usual, the usual conflict of expert testimony.

The grounds relied on by the defendants at the trial by way of defence and counterclaim, therefore, being as I take it (1) Negligence on the part of the plaintiff in furnishing an estimate far below the actual cost; (2) Negligence on the part of the plaintiff in not familiarizing himself with the bearing power of the soil and allowing a building to be placed thereon too heavy for it to sustain. The defendants rely on the case *Moneypenny* v. *Hartland*, 1 Car. & P. 352; 2 Car. & P. 377; 31 Rev. Rep. 672, cited with approval in Hudson on Building Contracts and other text books. The law to be gathered from the decided cases seems to be clearly summarized in Wait on Engineering and Architectural Jurisprudence, 1904 ed., at p. 758, citing amongst others the authority relied on by the defendants.

With regard to (1) the estimates the plaintiff contends and seems to be borne out by the evidence that the over-run was largely due to new work, amounting to, as the plaintiff contends, $156,979, which was not included in the estimate at all, which would made the total over-run about 15% and out of this $20,000 represents the pipe line that was constructed by the city by day labour. When the blow-out occurred on August 9, 1913, during the construction of this pipe line on Noble St., the city was also undertaking some street grading. I am unable to ascertain from the evidence how much of the last mentioned sum was spent in grading, but it might be that when municipal barons take a hand in construction by day labour the cost of construction would over-run the estimate. It invariably does.

During the course of the argument the defendants admitted in effect that the plaintiff was a thoroughly competent and skilled engineer of long experience. They do not suggest want of skill, for defendants' counsel refers to him in the argument as a "high

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class man." The onus is on them, therefore, to shew negligence in the plaintiff in furnishing the estimates. This, I think, they have failed to do, unless it can be inferred from the result. It is to be observed in this case the plaintiff as an engineer was a consultant. The defendants bought his judgment; he sold his talents. He is not an insurer; he is responsible only if he omits to do the work with an ordinary and reasonable degree of care and skill. The defendants have failed to produce evidence of lack of care in the preparation of the estimates. They must go that far to succeed in this action.

In the case of *Moneypenny* v. *Hartland*, relied on by the defendants, Abbott, C.J., says:—"I think it of great importance to the public that gentlemen in the situation of the plaintiff should know that if they make estimates and do not use all reasonable care to make themselves informed they are not entitled to recover anything, and to this I am disposed to add a qualification which is found in my brother Bailey's opinion. His words are: 'The plaintiff claims as much as his services are worth and if he led his employer into a great expense by his want of care his services would be worth nothing. If you think the lowness of the estimate in this case induced the parties to undertake the work then you should find your verdict for the defendants.'" In the course of the argument counsel for the defendant said: "All we are suggesting is that Mr. Lea did not use reasonable care to inform himself as to what the actual cost of this work would be, that he had been guilty of negligence in that respect. That is sufficient for our case." Further on, he says: "I do not suggest that the plaintiff did not possess the necessary skill and knowledge but I do say that he did not act with reasonable care and diligence in rendering these services which he undertook to render in this particular case." The evidence to my mind does not justify any such conclusion and fails to establish lack of care or negligence on the part of the plaintiff in providing the defendants with the estimates that the contract called on him to furnish. With regard to the alleged negligence of the plaintiff, (2) in not familiarizing himself with the bearing power of the soil, to my mind the case before us is distinguishable from the authorities relied on by the defendants. In the case of *Moneypenny* v. *Hartland*, it is to be observed that the work there under construction was a bridge; that no examination of the bearing power of the soil was made at the *spot* where

the bridge was to be constructed. An examination had been previously made forty yards away. There is in the case at bar evidence that the plaintiff was familiar with the soil in question.

The only conclusion to be drawn from this evidence was that the plaintiff was not unfamiliar with the soil upon which the building was constructed, the defendants' contention being, and there is evidence to support such a contention, that the soil was not capable of bearing more than 2,500 pounds per sq. ft., and that because the weight in some places ran as high as 4,000 pounds per sq. ft. that the plaintiff was guilty of lack of reasonable and ordinary care in permitting such a building to be placed upon soil having such power bearing qualities. There is, as I have previously pointed out, considerable subsidence in different parts of the building. It is pointed out by counsel for the defendants that there are three places in which this is easily discernible. In these three places, it is to be observed that in two, at least, considerable water from the breaking of the main had been traced. It is also observed that in other places where a weight far in excess of 2,500 pounds is sustained that no subsidence had been discovered up to the time of the trial. It is to be gathered from the evidence that the structure was not a heavy one, and the evidence of the plaintiff all goes to shew that at the spot where the plant was erected the power bearing quality of the soil was not overtaxed. This is, in effect, the evidence of the plaintiff, his brother, a civil engineer, the evidence of Mr. Grimmer the city engineer, and it appears from the evidence that, during the course of the construction and the examination preparatory to construction, there were at least 4 other competent engineers on the ground, with every opportunity of ascertaining whether or not the bearing capacity of the soil was overtaxed. The witness Edwards, who was produced by the defendants, seems to be of the opinion that tests of the bearing capacity of the soil should only be made when the engineer in charge is not familiar with the character of the soil.

The examination made by the plaintiff, his experience with similar soils and the information acquired by him through the city engineer, to my mind, distinguish the conduct of the plaintiff in this case from the conduct of the engineer in the case of *Moneypenny* v. *Hartland*, relied on by the defendants. The plaintiff in this case, who has had an experience of over 30 years in practising

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his profession, who has had charge of the construction of works in western Canada and in the east, says he never saw a bearing test made in his life before the construction of a building of this character. There is a direct conflict of testimony as to this, and as to the bearing power of the soil between the plaintiff and the witness Bugler, called on behalf of the defendants. The latter also seemed to be a man of wide experience, but the effect of his evidence seems to be at variance with the evidence produced on behalf of the plaintiff, and as the onus is on the defendants to shew that the absence of making such tests amounts to carelessness or negligence on behalf of the plaintiff after perusing the evidence many times, I am forced to the conclusion that the defendants have not satisfied that onus. What occurred to me in the course of the argument was that tests were made by the defendants only at two different spots to ascertain the bearing capacity of the soil one about 10 yards away from the plant by means of placing weights on a column sunk into the ground and the other inside the boiler room by sinking a disc into the soil and placing weights thereon, and, it appearing from the evidence that there was a subsidence in 3 different places in the plant, although there was no subsidence discovered where the soil was equally loaded in other places. In other words, what number of tests of the bearing capacity of the soil would it be necessary for the plaintiff to have made to refute the allegation of negligence that he overtaxed the bearing power of the soil? This would suggest to me that there is a variance in the bearing capacity of the ground upon which this building is erected, or that the introduction of water materially affects its bearing capacity. There is no doubt that the introduction of water materially affects the bearing capacity of this particular soil. The defendants do not seek to hold responsible the plaintiff for the introduction of the foreign water into the plant. There is no responsibility on his part to be gathered from the evidence for the break in the water main and the consequent introduction of the water and I am forced to the conclusion, having, as I have said, perused the evidence a number of times, that the subsidence which occurred was not occasioned by the defects in the design but to the introduction of the water into the plant from the blow-out in the pipe line, over which the plaintiff had no control, and he was in no way responsible for the inevitable accident. I am forced to the conclusion that the subsidence was due to the introduction of water

into the plant. From a scrutiny of the evidence it will be observed that Grimmer states that prior to the accident the east sedimentation basin was partially filled with water and there was some water in the west sedimentation basin, and that there was no discovery of any leakage in either of the basins until after the blow-out on August 9th. There is no evidence of any subsidence in the electric light plant which immediately adjoins the plant in question, nor is there any evidence of whether water reached the electric light plant; nor is there any evidence as to the weight placed upon that soil. There is no evidence of the subsidence continuing, the farthest that the evidence of the defendants goes is that in addition to the necessary repairs it will require very careful watching. This seems to create the presumption that as soon as the soil dried out the subsidence discontinued and it therefore was occasioned by the introduction of the water. With regard to the subsidence in the boiler room where the defendants contend that the water was not so clearly traceable it can be hardly supposed that the amount of water discharged by the two steam gauges would be sufficient to so saturate the ground as to create a subsidence. The inference would seem to be that the amount of water introduced was of such volume to have reached the engine room. The volume of water carried to the building can be estimated to have been of considerable amount from the evidence of Mr. Grimmer, the city engineer. Speaking of the pressure he says, in referring to ex. 51: "There is a peculiar thing in these logs, that during the time after this accident was supposed to happen there was an increase in pressure practically every night and both for 6 days before—I did not go back any further. The same thing occurs for 4 days following." There is nothing to be found in the evidence which would indicate that there was any trouble at all until after the blow-out occurred on August 9, 1913. From the photograph of the sketch of the plant produced at the trial it will be observed that the footings in connection with the clear water basin and the sedimentation basin come down considerably below the floor of the basin. The evidence is that the footings have a weight of 4,000 pounds per sq. ft.; the floor of the basin has only a weight of 1,100 pounds per sq. ft. The evidence further shews that there was a subsidence in the floor of the basin but there was no subsidence in the footings. This would indicate that the foreign water got underneath the floor of the basin but did not seep to the bottom

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of the footings. Consequently there was subsidence by reason of the introduction of the foreign water in the floor but none with respect to the footings, which further confirms the result that I have arrived at, that the subsidence was due to the introduction of foreign water and not due to overloading of the power bearing quality of the soil. How the water got underneath the floor of the basin does not seem to be quite clear, but the fact remains that there was a subsidence in the floor and none in the footings. This seems to be confirmed by the evidence of Grimmer, when he says: "We opened up the western side of the building and we ran into moist ground and we went down through that as far as we could find any sign of moisture and finally came to dry material. Apparently that appeared to us at that time as being the extent to which it had gone." If I must determine whether the subsidence was occasioned by the overloading of the soil or the introduction of foreign water I must, on the evidence, find that it was due to the latter. There will, therefore, be judgment for the plaintiff for the sum of $16,076.75 less the amount included in that for interest. It is not a case, I think, where interest should be charged. The damage was occasioned by an inevitable accident and the city, I think, had some justification for defending the action. Counsel for the city in his argument stated that the plaintiff in his claim included the sum of $1,650 for interest. I am unable to follow these figures but if that is the correct amount the judgment will be reduced to that extent. If the parties cannot agree upon the amount then it can be spoken to again before the final minutes of judgment are settled. The costs will follow the event. There will be a 30 days' stay. *Judgment for plaintiff.*

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PARRON v. KELLY.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. June 29, 1917.

VENDOR AND PURCHASER (§ I E—27)—RESCISSION—FRAUD—AFFIRMANCE OF CONTRACT.

An agreement for the sale of land will not be rescinded for fraud where the plaintiff has elected to affirm the bargain, or where his acts and conduct are inconsistent with an intention to claim rescission.

Statement.

APPEAL by plaintiff from the judgment of Clement, J., dismissing the action which was one for the rescission of agreements of sale of land in the townsite of New Hazelton or in the alternative an action for deceit and damages therefor for fraudulent misrepresentation. Affirmed.

Ritchie, K.C., for appellant; *Taylor*, K.C., for respondent.

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Macdonald, C.J.A.

MACDONALD, C.J.:—It is a ground of appeal that the trial was prematurely stopped by the judge. That might have been good ground for ordering a new trial had not counsel for appellant failed at the time to object. He not only did not object or urge that he wished to offer evidence in rebuttal, but on the contrary, as it appears to me, he acquiesced in what was done and entered upon the argument on the footing that the evidence was all in. Therefore, I think he cannot now have a new trial on this ground.

On the merits, as the case now stands, we are asked to reverse the trial judge's finding that the representations complained of were not relied on by the plaintiff. If I were deciding the matter in the first instance, I might not come to the conclusion to which the trial judge came, but the demeanour of the plaintiff and his witnesses may have greatly influenced him, and as I am not convinced that he came to a wrong conclusion I would affirm his finding.

The plaintiff claims for rescission and, in the alternative, damages for deceit. It is clear to me that no case for rescission has been made out for two reasons—first, the plaintiff elected to affirm the bargain; and secondly, his acts and conduct were inconsistent with an intention to claim rescission.

I am also of opinion that fraud has not been proven. I think the case for the respondents is a stronger one than was that made against the directors in *Derry* v. *Peek* (1889), 14 App. Cas. 337, at 374.

The appeal should be dismissed.

GALLIHER, J.A.:—I would dismiss the appeal. Galliher, J.A.

McPHILLIPS, J.A.:—(dissenting) (after setting out the allegation of the fraudulent misrepresentation as contained in the statement of claim.) McPhillips, J.A.

The evidence both documentary and oral testimony is most voluminous, and upon this evidence the trial judge held that there was no intentional misrepresentation. He does not hold that there was only innocent misrepresentation, which if supported by the facts, might have admitted of his dismissing the action for rescission; but even if that holding could be supported upon the facts, it would have been a bar to the counterclaim for specific performance which has been allowed. In my opinion, the fraudulent

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misrepresentations were amply proved and were the inducing causes for the plaintiff to enter into the agreements of sale; and it cannot be at all reasonably supposed that the plaintiff would have entered into the agreements of sale except upon the faith that the representations were true and with great respect to the trial judge I am entirely unable to accept the view taken by him of the evidence.

In the present case it cannot be said that there was no misrepresentation. All that the judge does hold is that there was no intentional misrepresentation. I am not aware that in the science of the law there is any known doctrine of intentional or non-intentional misrepresentation. One party making to the other a false representation as to a material fact relating to the contract thereby induces that other party to contract and upon slight evidence it may be inferred, if need be, that he would not have contracted but for the belief that the representation was true, the plaintiff being an active business man resident in Dawson City—a place very remote from New Hazelton and the City of Vancouver, where the defendants are resident—unquestionably relied upon the representations made to him, and his earnest endeavour was to purchase land only in the townsite which would attract to it the citizens of Hazelton as well as the other incoming settlers, consequent upon the construction of the Grand Trunk Pacific Railway.

In my opinion it is unnecessary to refer in detail to the evidence. That which is clearly borne out by the evidence is this, that the representations induced the plaintiff to contract, *i. e.*, the effective cause—it is not a case of the plaintiff acting upon his own judgment. That the false statements were made knowingly, without belief in their truth, or recklessly, without caring whether true or false, is apparent throughout the evidence, and it is idle to contend otherwise. And when we have this proved and established in the clearest way it is quite unnecessary to prove that the false representations were made with the actual intention of defrauding. Being made knowingly or recklessly, a fraudulent intention will be inferred. (*Polhill* v. *Walter*, 3 B. & Ad., 114, 123 (110 E.R. 43); *Wilde* v. *Gibson*, 1 H.L.C. 605-633; *Peek* v. *Gurney* (1873), L.R. 6 H.L. 377, 409; *Smith* v. *Chadwick*, 9 App. Cas. 187, 201; *Derry* v. *Peek*, 14 App. Cas. 337, 365, 371,

374; *LeLievre* v. *Gould*, [1893] 1 Q.B. 491, 498, 500; *Stone* v. *Compton* (1838), 5 Bing. (N.C.) 142, 155, 156 (132 E.R. 1059); *Crawshay* v. *Thompson* (1842), 4 Man. & G. 357, 382 (134 E.R. 146).

Upon the facts of the present case only one conclusion can be come to; and that is, that there was the intention to deceive. In any case actual proof of this intention is not obligatory. The Earl of Selborne, in *Coaks* v. *Boswell*, 11 App. Cas. 232, at 235, said:—

> The time which had elapsed between the purchase sought to be set aside and the commencement of this suit might have been a serious obstacle to the relief sought, if rested on any other ground than that of fraud; but if fraud were proved, that difficulty would be overcome.

And at p. 236:—

> A man is presumed to intend the necessary or natural consequences of his own words and acts; and the *evidentia rei* would therefore be sufficient without other proof of intention.

In *Arnison* v. *Smith* (1889), 41 Ch.D. 348, Lord Halsbury, L.C., at p. 368, said:—

> If men tell for business purposes what in plain English is called a lie, they are guilty of fraud, and to talk about their having had no intention to deceive is no more a defence than it would be a defence to a prosecution for forging a bill of exchange to say that the forger meant to pay it when it became due.

And see *Behn* v. *Burness* (1863), 3 B. & S., 751, 753 (122 E.R. 281), Ex. Ch.; *Arkwright* v. *Newbold* (1881), 17 Ch.D. 301, 320; *Edgington* v. *Fitzmaurice* (1885), 29 Ch.D. 459, 465, 466, 480-482; *Angus* v. *Clifford*, [1891] 2 Ch. 449, 471. It has been urged that the plaintiff was not misled and that he could have made enquiries which would have prevented him from assuming to be true that which he was told. In *Bloomenthal* v. *Ford*, [1897] A.C. 156, Lord Halsbury, L.C., at p. 162, said:—

> As to the question of law, I confess for myself I entertain a doubt whether it is ever true, in a case where one person has been induced to act by the misrepresentation of another, that you can go beyond the fact whether it is so or not. In arriving at a conclusion upon this question of fact, like every other question of fact, all the circumstances must be considered. A statement may be made so preposterous in its nature that nobody could believe that anyone was misled, and in considering these questions, as in *Freeman* v. *Cooke*, 2 Ex. 654; and other cases which might be cited on the subject, the learned judges discussing questions of fact together with questions of law, not unnaturally sometimes point to this or that circumstance as being a circumstance from which people would naturally infer that a man did not believe what he professed to believe; but once the conclusion is arrived at that the belief was induced, and intentionally induced, by a misstatement of fact intended to operate upon the mind of another, upon which the man has acted, then I do not think any case can be found in the books in which it has been suggested that

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the legal consequence does not follow, namely, that there is estoppel, and that it is open to the person who has made the representation to say, "I told you so-and-so, but you ought not to have believed me; you were too *great* a fool. I had a right to mislead you because you were too great a fool." I do not believe that any such case can be brought forward, or that there is any authority for such a proposition.

It has been argued that the course of conduct of counsel for the plaintiff at the trial precludes the consideration of the granting of a new trial, in that he would appear to have assented to the trial judge stopping the case—that is, did not press the point that there was evidence in rebuttal to be called and did not press for the reception of further evidence upon the part of the plaintiff. After careful consideration of this point I am not of the opinion that counsel failed in any respect from discharging his full duty. When the judge had emphatically stated his conclusion—*a fixed opinion*—it would not seem to me to be fitting and would possibly lead to unseemly happenings at the trial that counsel should have to be unduly insistent in his point. If the trial judge has misdirected himself or there has been error in law at the trial it must be corrected unless there was consent or that which could be held to amount to consent and upon that the trial proceeded and judgment given. (See *Weiser* v. *Segar*: Vaughan Williams, Stirling and Cozens-Hardy, L.JJ. (1904), Law Times Jour., p. 8; *Nevill* v. *Fine Art & General Insce. Co.* [1897], A.C. 68; *Seaton* v. *Burnand*, [1900] A.C. 135, at pp. 143, 145.

However, in my opinion, the case is not one which necessarily calls for a new trial. The action was not one that went to a jury, and it was not contended upon the appeal upon the part of the defendants that any further evidence could be usefully adduced—that is, the court has before it the evidence upon which judgment may be given, and should give the judgment which the court below ought to have given.

It was held in *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, 67 L.J. Ch. 402, that:—

> The hearing of an appeal from decision of a judge sitting without a jury is a re-hearing of the case and it is the duty of the Court of Appeal to reconsider the evidence and if the circumstances warrant to differ from the judge even on a question of fact turning on the credibility of the witnesses.

I am clearly of the opinion that the judgment is wrong, and should be set aside, and there should be judgment for the plaintiff (appellant) for damages for deceit and an enquiry should be had to assess the damages. The appeal therefore in my opinion should be allowed. *Appeal dismissed.*

McCORD v. ALBERTA AND GREAT WATERWAYS R. Co.

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S. C.

Alberta Supreme Court, Simmons, J. August 28, 1917.

WATERS (§ II G—125)—SURFACE WATER—INTERFERENCE WITH FLOW—DRAINAGE.

An increase of surface water upon low lying land, consequent upon the construction of a drain upon adjacent land, entitles the owner of the former to damages from the person who authorized the construction of the drain.

[*Makowecki* v. *Yachimyc*, 34 D.L.R. 130, followed.]

Statement.

ACTION for damages for flooding plaintiff's land.

G. B. Henwood, for plaintiff; *N. D. Maclean*, for defendant.

Simmons, J.

SIMMONS, J.:—The plaintiff is the owner of the south west quarter of section 17 and the south east quarter of section 18 in township 57, range 22, west of the fourth meridian in the Province of Alberta.

The defendants have constructed a line of railway through section 24, in township 57, range 23 west of the fourth meridian in the Province of Alberta, said line of railway running diagonally from south west to north east across said section 24.

There is a well marked depression in the configuration of the lands above mentioned and adjacent lands which runs from north west to south east crossing section 24 in township 57, range 23, and crossing sections 18 and 17 in township 57, range 22.

In rainy seasons the surface water collects in this depression and flows with a perceptible current from north west to south east. On sections 18 and 17 the beaver built beaver dams 12 to 18 inches high across the lowest part of this depression. It is admitted that the beaver does not construct dams in still water but only where there is a current of water moving in a definite direction.

In dry seasons there is very little water in this depression and no perceptible current. The movement of the water from north west to south east has not worn any well defined channel, nor are there any banks defining the course of the water.

In April, 1914, the right of way agent of the defendant railway company obtained from William F. Brown an agreement for the sale from Brown to the railway company of a right of way across the south west quarter of said section 24 for the price of $25 an acre, and the construction of a continuous ditch on both sides of the railway that will deliver the water from the right of way on this quarter. Brown says the sale was completed on the basis of this

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offer to sell, and Mr. Smith, chief engineer of the company, declares the company did not complete the sale on this basis and did not agree to build the ditch. Subsequent negotiations would indicate that Brown's contention is correct. After the construction of the railway, Brown requested the company to construct the ditch. A meeting of the engineer and Brown took place in the office of Norman L. Harvie, secretary of the Provincial Railway Department, and Harvie says Smith agreed to construct a ditch or pay for the construction of it. This agreement was carried out by Brown constructing the ditch at a price agreed upon, and the railway company paid to Brown the contract price agreed upon between them. The ditch runs parallel with the railway line for some distance through section 24 and crosses the right of way and leaves the railway at right angles traversing the south west quarter of section 19 in township 57, range 22, and stops just south of the boundary line between sections 19 and 18. The ditch is 7 ft. wide at the top and 4 ft. wide at the bottom and at the railway line it is 4 ft. deep. It drains the lands through which it passes, but since the ditch was not continued south east in the line of depression the waters collected by the ditch are distributed over the surface of sections 17 and 18 and causing a larger area in these sections to be submerged in rainy seasons than would occur if the water had been allowed to pass along the depression in its natural flow.

Before the construction of the ditch, a large portion of section 24 would be submerged in very wet seasons. It is obvious that a body of water forming a slough will have its volume decreased in a marked degree by evaporation and percolation, and that the quantity of water moving slowly over an uneven surface where there is no defined channel will not be nearly so great as will happen when a ditch is constructed which gathers the water in its course and accelerates the movement in the direction of the natural fall of the land.

The plaintiff says the ditch did increase the volume of water upon his land and his statement is corroborated by his neighbors, Faling, Ely and Olsen, and I have no difficulty in accepting this view as it is the natural and probable result.

The plaintiff claims that, as a result, his hay meadows were flooded in the seasons of 1915 and 1916, whereby he suffered

damage in the loss of his hay. I am satisfied upon the evidence that some of his lands were submerged as a consequence of this increased flow of water upon his land.

The first reported case involving the question of liability in this province is *Makowecki* v. *Yachimyc*, 34 D.L.R. 130. The judgment of the court (Stuart, J., dissenting), was given by Beck, J. The converse proposition, namely, the obstruction of the natural flow or fall of water in a physiographic depression or natural drainage basin, was under consideration. The court adopted the so-called rule of civil law as defined by Farnham on Waters, namely, that there is a servitude upon the lower lands to receive the natural flow, *provided the industry of men has not created or increased the servitude.*

Applying this rule to the case under consideration the defendant company is liable to the extent in which it has increased the natural flow of the water. The effect of the artificial drain in augmenting the increase is difficult to estimate. If the ditch had been continued through plaintiff's land and for about a mile farther south easterly, it would have discharged the flow of water into a drain constructed along the right of way of the C.N. Railway, which latter drain would have carried the water to the river.

A rational solution would seem to involve drainage legislation which would apportion the cost upon the lands benefited. Brown admits the drain has increased the value of his lands and has converted slough land into good agricultural land.

However, I must apply the law as I find it. The plaintiff claims that 120 acres of hay lands in the south west quarter of section 17 were flooded in the summer of 1915 and 1916, and he lost 120 tons of hay each year valued at $6.25 to $6.50 per ton. In the seasons of 1915 and 1916 the rainfall was very great, with the result that lands occupying depressions had a tendency to become sloughs, and this was especially the case in 1916.

I think that even in the absence of the ditch at least two-thirds of the plaintiff's hay lands would have flooded in 1915 and 1916, preventing him from cutting hay.

I would estimate his damages on the basis of loss of 40 acres of hay in 1915 and 40 acres in 1916, estimated at a value of $6 per ton.

Judgment for $480 and costs. *Judgment for plaintiff.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. May 16, 1916.

1. MASTER AND SERVANT (§ I E—20)—TERM OF EMPLOYMENT—CONCURRENT AGREEMENTS.

Where a contract of employment provides for an annual salary for 3 years, with a clause that the term of employment is to run "concurrently with the term of a certain agreement," which was for 21 years, terminable at the end of 7 years, the term of hiring must be deemed to be governed by the latter clause.

2. DAMAGES (§ III A—85)—FOR WRONGFUL DISCHARGE.

In estimating the damages for wrongful discharge from employment regard must be had to the life of the servant and the reasonable probabilities of securing other employment for the unexpired term.

[*Goldie* v. *Cross Fertilizer Co.*, 28 D.L.R. 477, 49 N.S.R. 540, reversed.]

Statement.

APPEAL from the judgment of the Supreme Court of Nova Scotia, 28 D.L.R. 477, 49 N.S.R. 540, reversing the judgment of Russell, J., and dismissing an action for wrongful discharge from employment. Reversed.

A. K. McLean, K.C., for appellant; *Mellish*, K.C., and *Ross*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree in the conclusion reached by Idington, J.

Davies, J.

DAVIES, J. (dissenting):—The trial judge adopted the plaintiff's contention as to the construction of this hiring agreement and held that the plaintiff had been wrongfully and without proper justification discharged and admitting that the assessment of the damages which should be awarded depended "upon the wildest sort of a guess" fixed them after making what he judged to be fair allowance for the possible termination of the slag agreement, the risk of life and the possibility of obtaining other work, at $20,000 and directed judgment accordingly.

The Court of Appeal for Nova Scotia unanimously set aside the judgment and dismissed the action on the ground that the slag agreement had never come into operation up to the time of the trial at any rate but, on the contrary, its coming into force had been expressly postponed by the parties to it owing to the inability of the steel company to furnish slag of the standard quality provided for—and that while the hiring agreement provided for a fixed period of hiring for 3 years definitely that period was subject to the limitation that it might be terminated at any time within that period if the slag agreement was for any reason not in operation.

After much reflection and consideration, I have reached the opinion that the hiring agreement was for a term of three years definitely and that this fixed term was not dependent upon the coming into force or continuing in force of the slag agreement. On this one point, I am unable therefore to agree with the judgment appealed from. Plaintiff's dismissal, therefore, on September 4, 1914, cannot be justified on the ground that the slag agreement was not then in force, and unless justified on the grounds stated of his incompetency and inefficiency and neglect of positive orders with respect to the analysis of the slag which at that time the steel company had delivered to the defendants and which was placed or heaped in certain piles or mounds which were specially designated as required to be mixed so as to make a marketable fertilizer, cannot be justified at all.

I have been much troubled over this question of wrongful dismissal during the fixed term of 3 years on the ground of alleged incompetency and positive neglect of important orders, but in the result I reach the conclusion that the dismissal was not justified on those grounds and that plaintiff is entitled to recover his wages for 11 months from the time of his dismissal. He was paid his wages to July 1, 1914, and would therefore be entitled to recover 11 months' wages at $155 a month. As he had the use of the defendant's house and had free coal and light for at least a year, these items claimed by him should not be allowed and he should have judgment for the 11 months' wages at $155 per month, or $1,705. I am not fully satisfied that he was able to conduct the slag analysis. It is true that he was paid that bonus for the previous year and that perhaps should be taken as evidence that his analysis was satisfactory to the company. With a good deal of doubt as to that bonus item I will allow it added to the $1,705 above for wages—that would make $1,955 for which plaintiff would be entitled to judgment.

Then comes the broad question whether the term of the hiring agreement has been extended after that period of 21 years or less under the third clause of the hiring agreement.

I have reached the same conclusion on this most important point as the Appeal Court of Nova Scotia and upon the same grounds as were very lucidly stated by Drysdale and Harris, JJ., in their reasons for judgment.

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The obvious purpose and object of the third clause of the hiring agreement providing that it should run concurrently with the slag agreement was not to fix a definite term for the hiring which could easily have been done by naming an arbitrary period, but to provide that after the 3 years of a fixed term the hiring should be continued so long as the slag agreement was in operation. The term of the hiring agreement was made dependent upon the term the slag agreement operated. If the latter agreement ceased because of the inability of the steel company to supply slag of the quality specified, the hiring agreement would automatically cease with it. If, for the same reason, the parties were obliged to postpone the coming into operation of the slag agreement, the third clause of the hiring agreement could not be made operative or effective.

As a fact, the slag agreement never had, up to the time of the trial, and as far as the record before us goes, never has yet come into operation. On the contrary, by express agreement between the parties to it, its coming into force was expressly postponed, and in the meantime the steel company was to be paid for the slag they delivered which was below the standard grade of 17% and ranged from 12.69 to 14.6% at the minimum price mentioned in the slag agreement. But the mention of a minimum price to be paid for slag accepted by the Cross company, though below the standard of the contract, did not bring the contract into force.

It was optional with the defendant company whether or not they would, under the peculiar circumstances, accept this slag, the quality of all of which was below the standard price or not, and by a separate agreement contained in the correspondence they did agree to accept non-standard slag at a lower price than the contract provided for standard slag. This delivery and acceptance at such price was, however, entirely apart from the slag contract itself, the coming into force of which was expressly agreed should be postponed.

The facts are that on January 19, 1912, the defendant company wrote the steel company giving them "formal information" of the fact that they had previously verbally given Mr. Butler, the manager of the steel company, that "although they had been grinding experimentally for their work they had not been able to get any 'standard grade' for slag, the average phosphoric

acid coming out a shade under 14%." They, thereupon, proposed an arrangement as follows:—

(1) That the start of contract should be delayed until say July 1, unless, before that time, you are in a position to deliver slag of standard grade as set forth in contract, and give us notice accordingly. (2) That meantime we should work up as much as possible of the slag already delivered, or which may be delivered, and pay for same one dollar per ton as set out in clause 16 of contract. (3) That in consideration of the very poor quality you should cancel the debit notes sent us for labourage incurred in unloading slag at our mills and that the arrangement come to on this point as per our letter of August 16 last, and your acknowledgment of equal date should stand suspended until the contract formally commences. (4) That until then, also, we should make no charge for the collection of the material returned to you as provided for in clause 18 of contract.

On the following day Mr. Butler wrote in reply:—

Cross Fertiliser Co., Ltd., Sydney, N.S. 20th January, 1912.

I am in receipt of your letter of the 19th instant. I have discussed the matter with our president, and his judgment corresponds with my own, namely, that you should go ahead and grind up the material that you have on hand and pay therefor at the lowest price provided for in the contract. Under the circumstances, it does not seem to us that anything further is necessary, and you can take action accordingly. (Sgd.) M. J. BUTLER,
2nd Vice-President and General Manager.

On February 7, 1912, Cross Co. again wrote Butler as follows:—

Referring to our letter of the 19th ult., and your acknowledgment of the following day and our subsequent conversation, we confirm having arranged to postpone the start of our contract until say July 1 next, and meantime to go on using up as much as possible of the slag already delivered to us and to pay for same at the rate of $1.00 (one dollar) per ton, all as set forth in ours of 19th ult.

On June 14, 1912, when the time to which the coming into force of the slag contract had been postponed was approaching, further negotiations between the steel company and the Cross company took place between the two companies resulting in an agreement extending the then "present agreement" regarding the supplying, the price, and delivery of basic slag until December 31, of the year 1912, and postponing till that date or until the steel company was able to supply slag of standard grade the coming into force of the slag contract.

It seems quite clear that this action of the two companies in postponing the coming into force of the slag contract arose entirely from the inability of the steel company to supply the slag of the standard grade and had nothing to do with the agreement between the plaintiff and the Cross company.

The two companies were dealing in a business way with a

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tentative agreement entered into between them for the delivery of slag of a certain standard. It was an experiment. The experiment was not successful in the sense that slag of standard quality could not be delivered and an arrangement outside of the slag contract for the acceptance by the Cross company of the slag below the standard quality and at a price agreed upon was entered into. As a fact, the steel company, up to the time of the trial of this action, had never been able to deliver slag of the standard grade, and the coming in force of the contract of December 10, 1910, between them had been postponed by mutual agreement from time to time and it had never gone into operation.

That being so, when the plaintiff's 3-year contract expired, on my construction of the hiring agreement, on June 30, 1915, there was no term of the slag agreement existing or with which the term of the hiring agreement could continue to run concurrently.

The parties to that slag agreement for good business reasons mutually agreed to postpone the coming into force of that agreement and up to the time of the trial certainly that slag agreement was not in force.

If that is so, how can the time of the plaintiff's employment which was to run concurrently with the term of the slag agreement be said to have continued after the fixed period of 3 years expired?

There was no such term. It had not begun to run. The conditions under which it was to begin to run and to continue to run could not be brought about. Standard slag could not be delivered to the steel company to manufacture fertilizer, and when that was, after fair trial, found to be so, like good business men, the managers of both companies agreed to postpone the coming into operation of their slag agreement until such time as standard slag could be delivered.

Under these circumstances, I have no doubt that the judgment of the Appeal Court, so far as it negatives the continuance of the hiring contract beyond the 3 fixed years, was right and that no damages could be recovered beyond the fixed period because there was no agreement of hiring beyond them or rather because the conditions on which a hiring beyond the 3 years depended, never arose.

With the exception of the above suggested modification of the judgment appealed from I concur in dismissing the appeal and to the extent of that modification would allow it.

Under the circumstances, there should be no costs in this court.

IDINGTON, J.:—The appellant sued for wrongful dismissal by respondent from his position as works manager of its works at Sydney in Nova Scotia.

The trial judge found that he had been wrongfully dismissed as alleged and entered judgment for $20,000 damages. Upon appeal therefrom the Court of Appeal put another interpretation than the trial judge upon the contract and reversed the judgment.

Only one of the four judges in appeal deals with the facts alleged to justify the dismissal and he only briefly.

I have perused the entire evidence in the case and a careful consideration thereof leads me to accept absolutely the findings of the trial judge as to the wrongful dismissal of the appellant and his characterization of the nature of the defence set up in justification thereof. There seems to me no difficulty in the case except in reaching the correct interpretation and construction of the contract, and, if broken, as alleged, in fixing the proper measure of damages.

For both these purposes it is necessary to realize who the parties were, their relations to each other and what they were about.

The respondent is a company incorporated under and by N.S. law and engaged in the manufacture at Sydney of fertilizer from slag which is a waste by-product of the Dominion Iron & Steel Co., also carrying on business at Sydney.

The respondent seems to have been promoted and organized by the Alexander Cross & Sons, Ltd., of Glasgow in Scotland, incorporated under the Companies Act, 1862, and carrying on there a similar business in the manufacture of fertilizers.

The shares in the respondent company were mainly held by this Glasgow company. The appellant had occupied for 3 years, in a branch of that company's business carried on in England, the position of works manager. He was, during that time, under the eye of Walker, who, later, carried out the purposes of the principal company in making the contract with the Dominion Iron & Steel

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Co., to which I am about to refer, and in organization of the respondent, erecting its buildings, and establishing its plant to fulfil the purpose of that contract.

He was induced by Walker to leave his position in England and come to Nova Scotia in April, 1911, and assist in such work of erecting and establishing the plant of respondent on the faith of obtaining a permanent position with respondent.

During that preparatory work he received a salary of $125 a month for nine months after that sort of work had been accomplished and the manufacturing had begun. Meanwhile, he qualified himself for the work of analyst to enable him to discharge a service which it was intended should be additional to that he had been doing as works manager in England.

On October 1, 1912, after the work of manufacturing had been in operation for some months, the following contract was entered into:—

Memorandum of agreement made October 1, 1912, between the Cross Fertilizer Co. Limited, a body corporate, incorporated under the laws of Canada and having its head office at Sydney in the Province of Nova Scotia, of the first part hereinafter called the Fertilizer Company and Matthew Russell Goldie of the second part hereinafter called the works manager whereby it is agreed as follows:—

(1) The Fertilizer Company shall employ the works manager and the works manager shall serve the Fertilizer Company in the conduct of the entire business of the said Fertilizer Company carried on at Sydney. (2) The works manager's remuneration shall be:—

(*a*) A salary fixed as follows: For the year ending June 30, 1913, $1,620; For year ending June 30, 1914, $1,740; For year ending June 30, 1915, $1,860 per annum, payable monthly.

(*b*) An annual bonus of $250 subject to the works manager proving himself competent to make out an annual balance sheet of the company to the satisfaction of the auditor the Fertilizer Company shall appoint, and of conducting the slag analysis necessary in connection with the business.

(*c*) A free house, coal and light; such house not to be used for any other purpose than to lodge the works manager and his family.

(*d*) The dividends accruing on the shares in Alexander Cross & Sons, Limited, Glasgow, allotted to the works manager in accordance with separate agreement between him and Alexander Cross & Sons, Limited, and Sir Alexander Cross, Bart., and Alexander Cross, Esq., of Knockdon.

3. The works manager's employment hereunder shall run concurrently with the term of that certain agreement between Alexander Cross & Sons, Ltd., and the Dominion Iron & Steel Co., Ltd., of date December 10, 1910.

4. The works manager shall devote himself exclusively to the business of the Fertilizer Company and subject to such orders and directions as may, from time to time, be given him by the directors (all of which orders and direction the works manager shall promptly and faithfully obey, observe and

comply with). The works manager shall assist in the general conduct of the business of the Fertilizer Company and shall use all proper means in his power to maintain, improve and extend the business, and to protect and further the reputation and interest of the Fertilizer Company.

The usual attesting clause and signatures follow.

It is this contract which requires interpretation and construction.

I am of opinion, having regard to those surrounding circumstances which must be had in view insofar as the contract is ambiguous, that the term of the employment was to be that specified in above clause 3. This contract must be read as if annexed to the other contract mentioned in the clause or as if same had been, in relation to its nature and time to run, incorporated therein. Such seems the manifest purpose of the whole arrangement for it was in truth the due fulfilment of the purpose of that other contract which had been assigned to the respondent and under which the works had been carried on for nine months previous to this one though not perhaps to the full extent contemplated therein that the parties had in view.

There is no other term specified. If it had been intended to restrict its operation to the limited period of 3 years it was easy to have said so, yet that is not expressed. The contract was prepared by respondent's solicitor and presented to the appellant for consideration and he was given a perusal of the other contract before he accepted the terms named in this.

It was necessary he should see it and have some comprehension of its terms before he could have given a faint conception of what he was asked to accept. And when Walker pretends his allowing appellant to see it as if only exhibiting a secret that had no relation to the business in hand, he, to my mind, tends to discredit himself, and to lead us to accept if need be the statement of others, relative to the length of the engagement which he has chosen to contradict.

I do not think it is necessary to rely herein upon (or form any opinion as to the admissibility as part of what may be looked at to aid in construction) such statements and I exclude for the present both these and the rather distorted view presented of the effect of ex. F.A. so far as bearing upon the question of construction.

I think clause 3 means just what it says so far as intelligible to him reading the agreement it refers to.

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And as to that term of employment of which it assured the appellant, it clearly was not that which from external causes, beyond the contemplation of the parties to this agreement, might either prevent its becoming operative at all or ultimately put an end to it, but only those which were within the express language used therein that could concern appellant.

I respectfully submit that the views presented by the judgment of the Court of Appeal are entirely beside the question which has to be considered, or that could have been within the contemplation of the appellant and respondent in framing such a clause.

Each was entitled to look only to the language used in the agreement and nothing else unless that something else was brought to the notice of him to be effected thereby.

In the agreement between the companies there was the following clause:—

3. This agreement shall extend to and cover the period of twenty-one years from the date the slag company has its mills erected and ready to start grinding, and that railway sidings with all necessary connections to the Sydney and Louisburg Railway have been laid down, such date to be fixed by a memorandum exchanged between the parties which shall be attached to this agreement, and form a part thereof. Provided, however, anything herein contained to the contrary notwithstanding, that the Slag Company shall have the right, upon giving 6 months' notice in writing of its intention so to do, of determining this agreement at the end of 7 years from the date so fixed and also the same right at the end of 14 years from the said date.

It is admitted all these conditions precedent to the coming into operation of the contract had been substantially complied with.

As prudent business men looking ahead, to the far-off time when they might have passed away, they deemed it right to have a record kept of the actual coming into effect by the completion of construction of the several works and annexed to the contract, and thus avoid disputes as to the date of that event.

What had they to do with the meaning of appellant's contract?

It was that which reasonably must have been presented to his consideration at the time of commencement, which we are concerned with.

The omission to make any such memorandum could not affect him, or be permitted to affect him, in relying upon the obvious fact that the time for making such a memorandum had long since passed, when this contract was executed.

If the memorandum had never been made and the work of operating and manufacture had begun, no matter how imperfectly, or to what limited extent, could, for example, either of the parties thereto, 21 years later, say it had never begun to run and insist upon its then beginning? Would any court listen to such a contention?

Or suppose appellant had, 3 months after executing and acting on this contract before us, found a more profitable job and quit, could the pretence that is maintained against him in the court below be of any avail if the now respondent in such event sued him for damages for such a breach of contract?

I think a court so appealed to would be apt to be impatient of such a defence.

It is quite true that because the full benefit expected was not at once realized, the companies adopted the expedient of postponing the coming into effect of the contract as between them though operating the works.

That can neither affect nor can it be said to have been intended to affect the contract now in question that could not extend the term of appellant's engagement for he was no party thereto, knew nothing of it, and both must be held to have intended by clause 3 just what it says and what any court should say that the term with which the employment was to be concerned was that which the companies' agreement read in light of the surrounding facts and circumstances would lead any reasonable man applying his common sense there to be induced to say it means.

It certainly could not be said to apply to the beginning of that term for, obviously, that had so far as one's senses could perceive passed some months before. And its language can only be given effect to by making it terminate at the end of 21 years from the completion of the works mentioned in the clause quoted above or within such earlier termination of such companies' agreement by operation of causes or condition named therein and presented or presumably presented to the mind of the appellant when perusing it as above set forth.

Moreover, the contract was, as pointed out by appellant's counsel, even according to this method of fixing its commencement, brought into effect on April, 1914, by the express language of the previous writing of December 5, 1913, which let that date

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of April 1 lapse without more being said. All that sort of treatment seems idle, so far as this contract is concerned. If any one will test it by applying the possible results from using what is implied therein as between parties hereto, the absurdity of it will soon appear.

This is a contract for a term of employment dependent upon the concurrence of another according to the terms thereof so long and so far as it can be reasonably applied as having been held in contemplation of the parties hereto. It is what these parties intended to agree upon that we must extract from the words, and not the possibilities of twisting the language they used to mean something they never intended or could have intended.

If we keep that purpose in view there is not much trouble in this case till we come to the assessment of damages.

We must, if we can, give effect to every word used, and no more than a fair effect to the language used, and that being done in light of the past and present story of these parties, there is not much doubt but that it was felt after 4 years' and more relation with each other in several and trying conditions and confidence in each other as the result, that they could work together to the end of the companies' contract whatever that might be.

The contract between the parent company and the appellant is dated the same day as that now in question and in a sense incorporated therewith and need to be referred to in order to give vitality to subsection (*d*) of clause 2 of same. The need thereof abundantly shews the force of what I have just said, and demonstrates, if need be and can anything more clearly express than the words of clause 3, that these parties thoroughly understood appellant was to stay with respondent for twenty-one years if need be, but at all events during the currency of that company's contract.

In short, measured in any way one can, we are driven not only by the language but by everything therein to give the term of the intended existence of the companies' contract as that of the intended duration of the contract now in question.

For a breach of such a contract what evidence have we and what damages are assessable?

The dismissal has been, I respectfully submit, looked at by the court below from a point of view and with a range of vision entirely too narrow.

The dismissal is in the following language:—

Mr. M. R. Goldie, Sydney, N.S. 4th Sept., 1914.

Dear Sir,—You will please take notice that the Cross Fertilizer Co. Limited, hereby rescinds and cancels the agreement of October 1, 1912, under which you became its works manager, and this is to be taken as a notice that from and after this date you are not in the employ of this company, either as works manager or in any other capacity.

You will also forthwith, upon the receipt of this notice, quit and deliver up the house of the company now occupied by yourself and family.

(Sgd.) CROSS FERTILIZER CO. LIMITED, G. R. Walker, *Director*.

No haggling there about time or terms or whether the other contract between the companies was in operation and had begun to run or not. The contract, whatever it is or may mean, is repudiated in its entirety, and it is the case of *Hochster* v. *De la Tour*, 2 El. & Bl. 678 (118 E.R. 922), that is presented thereby and the measure of damages within that and the case of *Hadley* v. *Baxendale*, 9 Ex. 341, which we should address ourselves to. Properly applied the law stated therein should solve the difficulties of this case without dwelling upon the trivialities so much pressed upon us.

Can there be a doubt of the unjustifiable repudiation by respondent of its contract whatever it may be and the possibility of its coming into operation no matter when, and that the repudiation covers the whole field? Is there the slightest shadow of doubt that the companies intended to execute their contract?

Is there any doubt that appellant, but for some rather indirect motive of Walker, would have been yet in respondent's employment? Is there any reasonable doubt but therefor that he would have been continued for a long time? There was a possibility of the contract ending through the advancement of science and experience therein applied to the art which one of the contracting parties was following. This is not, in my present view of the features of the contract, of much consequence.

There was an absolute right on the part of respondent to terminate the company's contract at the end of 7 years. Whether that was extended as between the parties thereto is no concern of appellant. His rights must be measured by what was presented by respondent to and made thereby apparent to him as the basis of and the meaning of his contract with respondent.

What is such a contract worth in way of measuring damages?

The cases I have referred to must be taken as our guides. The former disposes, I think, of all involved in the judgments

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below, but does not carry us far in a case of this kind, in the way of measuring damages beyond the general principle that the appellant is not supposed thereunder to remain idle.

The other case furnishes us with the proposition that we must have regard to the reasonable probabilities of what was within the contemplation of the parties.

Assuming the contract likely to run for the full term of 21 years we must bear in mind 9 months of that had run before this contract entered into, and that nearly 2 more years of it had run during appellant's service before dismissal.

But when regard is had to the absolute right, as the companies' agreement read originally, of respondent to terminate, upon notice, the companies' agreement at the end of 7 years, and nearly 3 years of that time had run before dismissal, what is or rather was there but a bare possibility of its running beyond that? It is said it had proven profitable. How can we tell if that is sure to continue? Then the appellant's life had to be reckoned with. And the possibility of science so advancing as to render the companies' contract, by its very terms, ended has to be borne in mind.

It is not what the contract, if made in light of the alteration of the express terms thereof by the conduct of the parties or otherwise, should be held to mean, but made and read in light of an intention drawn from its original reading. True, that actual reading has not been altered, but the conduct of the parties has changed its effect.

We have not been given much assistance by the evidence bearing upon the solution of what is to be attributed to these contingencies. Nor have we been given much assistance on this branch of the case by the able counsel who dealt so fully and well with the meaning and application of the agreement.

Respondent seems to have considered throughout the case, that it could only have one side of it and abstained from giving evidence to help mitigate the damages. Yet did not the onus of proof rest upon it, the wrongdoer, according to the finding which I uphold? I think so. The appellant relies upon *Yelland's* case (1867), L.R. 4 Eq. 350. But that does not carry him the length of maintaining the amount of damages claimed. What should be allowed in reduction on account of the liberty, as the

judgment expresses it, of acting for others? Although the onus of proof in mitigation of damages for an ordinary breach of contract above the consequences of the breach are, as it were, self evident or within the range of common knowledge, yet in a case of this kind where such consequences may extend beyond that sphere, I think he claiming damages must prove them.

The appellant may find it difficult to get exactly the same sort of employment including duties as an analyst in this rare sort of business. That part of his engagement was, probably, only worth the bonus of $250 a year. His position, apart from that, only required the qualities that he seems to have possessed in an eminent degree which would fit him for any other place open, I think to men, even so late in life as 48 years of age.

We must, of course, recognize, if we know anything of the world, the increasing difficulties of men of that age getting some permanent employment as foreman of men or managing works of any kind. Yet, as I am putting the case for the present, the certainties of his terms of office only reached a little over 4 years. The possibilities or probabilities beyond the first 7 years are not nearly as much and at all events have not been proven beyond what would give rise to a mere surmise. That surmise may be possible of some such estimation, but we have not the proof to go far.

Again we have appellant's own way of looking at his position and possible compensation therefor. If that had been followed up in connection with ex. F.A. and an estimate given based on it, in this connection, instead of the untenable use of the evidence as bearing upon the construction of the contract, it might have been much more valuable than it is.

I cannot agree with the trial judge's assessment. Indeed I cannot agree with anything that occurs to myself without seeing objections thereto. If appellant is the man he is represented to be, I imagine he should be able to get employment for 4 or 5 years at half the salary he was getting and his loss ought to be made good for him by respondent.

I would fix that and the slight value I attach to the possibilities beyond the term of 7 years at together $7,000 and include therein the part of salary unpaid.

I do not think the objection that the Statute of Frauds re-

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quires the wages to be stated in a contract running beyond the term for which an oral contract binds, is tenable.

I think the appeal should be allowed with costs throughout and judgment be entered for the sum of $7,000 and costs.

ANGLIN, J. (dissenting):—After giving to this case a great deal of consideration, I have reached the conclusion that the construction put upon the contract between the plaintiff and the defendants by the N.S. Appellate Court is correct. The controlling feature of the agreement, in my opinion, is that it provides for a salary for 3 years only. I cannot read the words "per annum" which follow that provision, as implying an indefinite extension involving payment of salary at the rate fixed for the third of the 3-year term, or at some higher rate. The third clause of the hiring agreement does not state that the employment of the plaintiff shall run or last for the term of the "slag contract," as it probably would have done if the intention had been thereby to fix the duration of the engagement. It provides that the employment shall run concurrently with the term of the slag contract. That does not necessarily mean that the employment shall begin and end with the commencement and termination of the slag contract, which were uncertain. Only the compelling force of language which did not admit of any other would justify an interpretation so distinctly inconsistent with the restriction of the salary provision to a 3-year term. Without unduly straining the meaning of the terms in which it is couched the clause under consideration is susceptible of being regarded as a provision that, beginning from the fixed date named in the hiring agreement, June 30, 1912, it should last for 3 years from that date, running for that period concurrently with the term of the slag contract, if the latter should be in force, but subject to earlier termination if that contract either should not come into force or should cease to be operative under clause 17 thereof. In this view of his engagement, the plaintiff has no claim.

The slag contract never came into operation. Having regard to the plaintiff's position and his opportunities of knowing what was going on in connection with the operation of the Fertilizer Company's works, I cannot in the absence of evidence to that effect, assume that he was ignorant of the fact that the parties to the slag contract had already twice agreed to postpone its

coming into effect and that there was at least no ground for the belief that there would not be further postponement. There is no suggestion that these postponements were not *bonâ fide* or that they were in any way influenced by any effect they might have upon the plaintiff's rights or position. The defendants were, in my opinion, therefore, within their rights in terminating the plaintiff's employment.

But if the purpose and effect of clause 3 of the hiring agreement be not what I have indicated, it is too vague and uncertain to effect an extension of the employment beyond the 3-year term which clause 2 (*a*) seems definitely to contemplate and provide for. On this basis the plaintiff would be entitled to a balance of several months' salary. If that view of the case should prevail I accept the assessment of damages proposed by Davies, J.

I agree with the observations of Drysdale, and Harris, JJ., as to the improbability, having regard to the surrounding circumstances taken as a whole, of the defendants having committed themselves to an engagement of the plaintiff which would bind them to retain his services for more than 3 years.

BRODEUR, J.:—I concur with Idington, J. *Appeal allowed.*

Brodeur, J.

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. June 25, 1917.

COMPANIES (§ V F—241)—SHAREHOLDER'S LIABILITY—ALLOTMENT—NOTICE—DE FACTO OFFICERS—ESTOPPEL.

The receipt of notice of a shareholders' meeting by a subscriber for shares is notice of acceptance of his application for shares; the allotment of the shares is valid though made by *de facto* directors, particularly where there is a provision in the charter validating their acts; and where after receiving the notice he attends the meetings, or gives proxy to another to represent him thereat, without taking any steps to repudiate the subscription, he will be precluded from disclaiming his liabilty as a shareholder.

Colonial Assurance Co. v. *Smith*, 4 D.L.R. 814, referred to.

APPEAL by defendant from a judgment of Mathers, C.J.K.B., in favor of plaintiff, in an action by a liquidator to enforce the liability of a shareholder. Affirmed.

Statement.

A. E. Hoskin, K.C., and *E. D. Honeyman*, for appellant.

S. E. Richards, and *W. P. Fillmore*, for respondent.

PERDUE, J. A.:—This action is brought by the Traders Trust Co. as liquidator of the Colonial Insurance Co. which is being wound up under the provisions of The Winding-Up Act, R.S.C. 1906, ch. 144, and amending Acts. The action is brought pursuant to an order made by Prendergast, J., to recover from the

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defendant, as a shareholder in the Colonial Insurance Co., the sum of $4,500, being the amount claimed to be remaining unpaid on 50 shares of the capital stock of the last mentioned company. The defendant denies that he was or is a shareholder. He claims that he did not apply for shares; that shares were never allotted to him, and that no notice of allotment was given to him. In the alternative, he claims that if shares were allotted to him at a directors' meeting of the company, the meeting was irregular and the persons who pretended to make the allotment were not directors of the company. In reply to the defence, the plaintiff sets up that defendant acted as a shareholder in the company by attending meetings and voting thereat both in person and by proxy, and held himself out as a shareholder of the company.

On February 12, 1912, the defendant applied to the Colonial Insurance Co. which I shall hereinafter call the company, to be allotted 50 shares of its capital stock. At the same time, he gave his promissory note for $500 as his first payment on the shares. On the 28th of the same month a meeting of persons claiming to be the duly elected directors of the company was held and at that meeting a resolution was passed allotting 50 shares to the defendant and stating that he had already paid $500, his first call in respect thereof. A certificate of the issue of these shares was made out and signed by the secretary and handed by him to the president and manager, one William Smith, for the defendant. At this time a contest was going on between two factions of the shareholders, one of them consisting of Smith and his supporters, and the other being the shareholders who desired a change in the management and directorate. The defendant was a friend of Smith's. The annual meeting of the company was held on February 14, 1912, and at this meeting a Board of Directors, consisting of Smith and 4 others favourable to him, were declared elected without a ballot being taken. An action was brought in the name of the company and certain shareholders against these 5 persons, to set aside their election as directors. The suit was tried before Mathers, C. J., who set aside the election and declared it void, and appointed a day for holding a meeting of the shareholders to elect a new Board of Directors, of which meeting notice was to be given as directed. See the report of the case, *sub nom Colonial Assurance Co.* v. *Smith*, 4 D.L.R. 814, 22 Man. L.R. 441.

Pursuant to the above decision, notices in the form of registered letters were sent to the shareholders that a meeting would be held on August 5 for the election of directors. The letter sent to the defendant was signed for and received by his wife. The meeting was postponed several times. At one of these postponed meetings the defendant was, according to the minutes, represented by proxy. At the meeting of August 5, he was nominated as a director. In May, 1913, notices were sent by registered letters to the shareholders that a meeting would be held on May 15, 1913, for the election of directors. The registered letter addressed to the defendant giving him notice of the meeting was received by him. The minutes of the meeting of shareholders on the last mentioned date state that the defendant was present. Although he denies this, the secretary, Dick, states positively that he saw him at the meeting.

A new Board of Directors was elected on May 15, 1913, all of them being selected from opponents of the Smith interests. At a meeting of the new directors held immediately after the shareholders' meeting, the defendant presented a letter withdrawing his application for shares in the company. This letter was ordered to be "laid upon the table" and no further action was taken upon it.

The stock certificate issued in favour of the defendant was not produced and defendant states that he never received it. His promissory note given to pay the first call is not amongst the company's papers, and cannot be found. Other important documents are also missing.

The evidence shows that the defendant applied for the shares and gave his promissory note in part payment for them. The directors accepted his application and allotted to him the shares in so far as the board, constituted as it was, had power to do so. No formal notice to him of the allotment has been proved, but I agree with the trial Judge that the defendant received the notice, calling a meeting of shareholders for August 5, 1912, and that this operated as a notice to him that his application for shares had been accepted. His wife signed the receipt for the registered letter enclosing the notice. He does not deny receiving it, and admits that he may have received it. He was a friend of Smith and was willing to help him in his schemes relating to the company.

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He applied for the shares at Smith's request, and I would infer that one of his purposes in doing so was to assist Smith by increasing the voting power at Smith's disposal. He placed himself in Smith's hands, and, I have no doubt, enabled him to add these shares to the number represented by him and his supporters. When Smith and his friends were finally defeated, and the shares could be of no further use to them, the defendant immediately tried to withdraw his application. I am convinced that the defendant was all along fully aware that the shares had been allotted to him by the *de facto* board of directors in February, 1912.

The main question involved in this appeal is whether the Board of Directors elected on February 14, 1912, had power to accept the defendant's application and allot shares to him. The company was incorporated by an Act of the Legislature of Manitoba under the name of the "Manitoba Assurance Company," being 52 Vict. ch. 53. The name was afterwards changed to the present one. By an amendment to the Act of Incorporation, the Board of Directors was to consist of not less than 5 and not more than 15. Sec. 25 of the Act of Incorporation is as follows:—

> All acts done at any meeting of the directors, or by any person acting as director, shall, notwithstanding it may afterwards be discovered that there was some defect or error in the appointment of any person attending such meeting as a director, or acting as aforesaid, or that such person was disqualified, be as valid as if any such person had been duly appointed and was duly qualified to be a director.

There is no substantial difference between this section and sec. 99 of the English Act of 1845, and clause 94 of table A of schedule 1 to the Companies (Consolidation) Act, 1908 (Imp.).

In the present case there was an appointment of directors, made at a meeting of shareholders in February, 1912, but this appointment was not in accordance with the provisions of the Act of Incorportion. The defendant was not at the time a shareholder in the company, and there is nothing to show that he was aware of any invalidity in the election of the directors at the time the shares were allotted to him on February 28, 1912. He must be treated as an outsider who made a *bonâ fide* application for shares, which was accepted by the *de facto* directors who allotted the shares to him. I think he was aware that the shares had been allotted to him, and that he used them or permitted them to be used for voting purposes.

At the time of the allotment there was a Board of Directors

apparently elected under the Act, and in actual control of the company's affairs. Where third persons *bonâ fide* deal with such *de facto* directors who, as far as such third persons know, appeared to be the properly appointed directors, the transaction is protected by sec. 25. In *Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869, the company's articles of association contained a clause substantially the same as sec. 25 of the defendant's Act of Incorporation. In that case certain persons acted as directors but had not been legally appointed as such. It was held that a bank which paid out in good faith the money of the company on cheques issued by the directors was protected by the above clause. Even in the absence of such a clause, persons dealing with a company incorporated under a general or special Act are not required to inquire into the internal proceedings of the company: *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327, (119 E.R. 886); *Re County Life Assur. Co.*, L.R. 5 Ch. 288; *Biggerstaff* v. *Rowatt's Wharf*, [1896] 2 Ch. 93.

The above are cases where the dealings in question took place between the company and persons outside the company. But the provisions of the above sec. 25, or the corresponding clause in the English Act, have been extended so as to validate acts of *de facto* directors relating to its management and internal affairs. In *Dawson* v. *African etc. Co.*, [1898] 1 Ch. 6, the articles required that there should not be less than three directors. One of the directors became disqualified by parting with his shares, but after six days he acquired other shares sufficient for his qualification, and continued to act as a director. His co-directors who had power to fill the casual vacancy did not reappoint him. The directors made a call which was resisted by shareholders on the ground that the board was not duly constituted. It was held by the Court of Appeal that a clause in the articles similar to the above sec. 25 operated not only as between the company and outsiders, but also as between the company and its members, and was sufficient to cover such irregularities.

This case was followed by Farwell, J., in *British Asbestos Co.* v. *Boyd*, [1903] 2 Ch. 439. It was held that a clause in the articles similar to that in the *Dawson* case cured irregularities in the filling of vacancies in the board of directors. This decision was approved by the Court of Appeal in *Channel Collieries Trust* v. *Dover etc.*

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Rly., [1914] 2 Ch. 506. In the latter case it was held that sec. 99 of the Act of 1845 (similar to sec. 25 of the Colonial Assurance Co's Act) which applied to the defendants, validated an allotment of shares by a Board of Directors not legally constituted. The interpretation placed by Farwell, J. in the *British Asbestos Co.* case on the words "notwithstanding it may be discovered afterwards that there was some defect" was approved. These words are also found in the above sec. 25, and the Court, following Farwell, J., held that they "do not mean merely notwithstanding that the facts which show the defect were afterwards made known, but that they mean notwithstanding that the defect itself, the defect arising from the facts, was afterwards discovered."

I think that the directors appointed in February, 1912, believed that they had been duly elected, notwithstanding the arbitrary and improper conduct of Smith at the shareholders' meeting. The persons so appointed acted as *de facto* directors and carried on the business of the company for more than a year. It cannot be said that the defect in the appointment of the directors was discovered, that is, ascertained as a result from known facts, until the judgment of Mathers, C.J., was delivered. This case would, therefore, be governed by the decisions in the above cases.

There are, no doubt, certain earlier cases to be found in which a view has been taken apparently contrary to the decisions above relied upon, but these are either distinguishable from, or actually overruled by, the later authorities.

I think the appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—This action is brought by the plaintiff, as liquidator of the Colonial Assurance Co., incorporated by special Act of the Legislature of Manitoba, and declared to be a company within the provisions of the Winding-Up Act, ch. 144, R.S.C., to recover the amount claimed to be due by the plaintiff as a contributory of the said company for 50 shares of stock thereof upon which there is alleged to be due and unpaid the sum of $4,500. The action is brought by the plaintiff pursuant to an order made by Prendergast, J. The action was tried by the Chief Justice of the King's Bench, who entered a judgment for the plaintiff for the amount claimed.

As pointed out by the Chief Justice of the King's Bench, there is no question that the defendant made an application for the

shares. He also found that the directors, or those assuming to act as such, had made an allotment of the shares applied for. This finding was disputed on the argument before us.

The Manitoba Assurance Association was originally incorporated by 52 Vict. ch. 53. The name was subsequently changed to that of the Colonial Assurance Co. By sec. 10 of the Act the Board of Directors was fixed to be not less than 7 in number. This sec. 10 was amended, ch. 51, 3 Edw. VII., by substituting the word "five" for the word "seven."

At a meeting of the shareholders, held February 16, 1905, the government of the company was vested in a Board of Directors consisting of 5 shareholders, each to hold not less than 15 shares, the majority to constitute a quorum. At a meeting of the Board of Directors held June 16, 1909, the above qualification was altered to 50 shares, on which not less than 10% had been paid. The number of the members of the Board was left unchanged. At the annual meeting of shareholders held February 16, 1910, 5 directors were elected. Notwithstanding the above by-law, at the next annual meeting, February 22, 1911, 11 directors were elected, and at the directors' meeting held immediately thereafter Wm. Smith was elected president and manager.

At the annual meeting held February 14, 1912, Wm. Manahan, James Hooper, William Smith, Fred Crossley and John M. Dick were elected directors; of these Hooper, Smith and Crossley were members of the Board elected in 1911.

The circumstances attendant on this meeting and election are set out in the judgment of Mathers, C. J., in *Colonial Assurance Co.* v. *Smith*, 4 D.L.R. 814, 22 Man. L.R. 441, delivered July 9, 1912, whereby the election was set aside and a new election ordered to be held on July 29, 1912, and it was further declared that the Board of Directors existing previously to said election still subsisted until their successors were appointed. The judgment of the Chief Justice was, by consent, made part of this case.

At a meeting of the directors held February 17, 1912, Smith was appointed president and manager. At a subsequent directors' meeting on February 28, 1912, Smith, Hooper, Crossley and Dick were present and notice was taken and entry made in the minute book of the action above referred to to set aside the election of the directors. There is also this entry: "Moved by

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Mr. Hooper, sec. by Mr. Crossley, That application of Thomas Goodman, for fifty (50) shares of the capital stock of this company be received and allotted at par, he having already paid five hundred ($500) dollars the first call in respect thereof. Carried."

The special shareholders' meeting directed to be called by the Chief Justice took place August 5, 1912. At this meeting the chairman called for nominations for the Board of Directors and amongst those nominated was T. Goodman, by J. M. Dick. This nomination was, amongst others, objected to on the ground of want of qualification. No election took place at this meeting which was adjourned until August 15, and the same was then adjourned from time to time until October 3, when, according to the minute thereof, amongst the shareholders present was "T. H. Goodman, per George Leslie." This meeting was again adjourned and finally held May 15, 1913, when, amongst the shareholders noted as present in the minute book appears the name of T. H. Goodman, representing 50 shares. At this meeting none of the directors elected at the meeting in February, 1912, were re-elected, and an entirely new board of six was appointed. At a meeting of these new directors held immediately after a shareholders' meeting the chairman read a letter from T. H. Goodman, withdrawing application for 50 shares of stock in the company. It was moved and carried that this letter be laid on the table. Minute Book, p. 192.

It appears from the minutes that the 5 directors elected February 14, 1912, met at intervals and transacted the necessary business of the company thereafter throughout the year. Their last meeting in that year being held December 16.

With reference to the powers and authority of a *de facto* Board of Directors, sec. 25 of the company's Act of incorporation provides as follows:

> All acts done at any meeting of the directors, or by any person acting as director, shall, notwithstanding it may afterwards be discovered that there was some defect or error in the appointment of any person attending such meeting as a director, or acting as aforesaid, or that such person was disqualified, be as valid as if any such person had been duly appointed and was duly qualified to be a director.

The corresponding section of the English Companies Act of 1845, sec. 99, is as follows:

> All acts done by any meetings of the directors or a committee of directors or by any person acting as a director, shall, notwithstanding it may after-

wards be discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

There is no doubt that in the earlier cases the English Courts looked with disfavor on the acts of merely *de facto* directors.

In *Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151, article 45 of the memorandum of association provided that the first subscribers should be the directors until these were appointed and art. 44, that the directors should be five to be determined by the subscribers. There were 7 subscribers and 3 of them undertook to elect 5 directors, 3 of whom made a call on shares. It was held, notwithstanding that art. 60 of the memorandum was sec. 99 of the Act, that the directors were not duly appointed and therefore unable to make a call: as the persons who made the call were not a quorum of the subscribers.

In *Re London & Southern Counties Co.*, 31 Ch.D. 223, where directors were appointed at a meeting attended by two only of the subscribers it was held by Chitty, J., that their appointment was invalid, following *Howbeach Coal Co.* v. *Teague*, *supra*.

In *Harben* v. *Phillips*, 23 Ch.D. 14, Chitty, J., held that the object of an article such as above section 99 was to protect outside persons who dealt with the corporation, and that it merely provides for the validity of acts done notwithstanding it should afterwards be discovered there was a defect in the appointment. But as the defect had been discovered before that portion of the Board which purported to act in the name of the Board had sent out the notices this fact to the mind of the Justice completely answered the argument.

The above case was referred to and distinguished in *Browne* v. *La Trinidad*, 37 Ch.D. 1.

In *Re British Empire Match Co.*, 59 L.T.N.S. 291, Kay, J., held an allotment made by two directors, when three should have been appointed and one of them refused to act, was invalid as there was no board of which two could form a quorum. There was in this case an article similar to sec. 99 above, but it was not referred to in the judgment.

In *Tyne Mutual Steamship Ins. Co.* v. *Brown*, 74 L.T.N.S. 283, a call was made by directors who had ceased to hold office, their term under the articles having expired. Lord Russell held that it was a case where there was neither defect of appointment

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nor defect in qualification, and therefore the curing article, similar to sec. 99, did not apply. He distinguished the cases of *Briton Medical Assurance Co.* v. *Jones*, 61 L.T. 384, and the well-known case of *Mahony* v. *East Holyford*, L.R. 7 H.L. 869.

Subsequently the English Courts took a broader view of the powers of *de facto* directors, which has since been maintained.

In *Dawson* v. *African Consolidated Co.*, [1898], 1 Ch. 6, the articles provided that the directors should be not less than three nor more than seven. Three *de facto* directors assumed to make a call. One of these had previously parted with all his shares. Six days after doing so he acquired other shares sufficient to qualify and continued to act as director. It was held by the Court of Appeal that the 114th article of association (same as sec. 99 above) operated not only between the company and outsiders but also between the company and its members and was sufficient to cover such irregularities. Lindley, M.R., distinguishes and criticizes the judgments in the *Howbeach* case and confesses he is unable to understand why the curing article in the memorandum in that case did not validate the acts done by the directors. "It may have been that the clause did not apply to that extent," he says, at p. 13, "because there was no subsequent discovery, the whole thing having been above board and the defect known to everybody." Chitty, L. J., does not deal with this last point. Vaughan Williams, L. J., says it was not necessary to deal with the meaning of the words "afterwards discovered" because there was no evidence the directors knew of the defect when passing the resolution.

Lindley on Companies, at p. 415, says: "Apparently such a clause (as sec. 99) will not apply between the company and its shareholders when the defect was known at the time the act in question was done." Citing the above cases of *Bridport Old Brewery Co.*, (1867) L.R. 2 Ch. 191, which deals with the acts of a liquidator invalidly appointed.

Subsequently to the edition of Lindley on Companies (1902), quoted from above, *British Asbestos Co.* v. *Boyd*, [1903] 2 Ch. 439, was decided. There three directors, B., R. and M., were appointed by the articles, two of them forming a quorum. B. was appointed secretary whereby he became disqualified. At a meeting, attended only by B. and R., a letter was read from M. re-

signing his directorship, and B. and R. passed a resolution appointing B. general manager. At a subsequent meeting, attended only by B. and R., D. was elected a director. B., R. and D. subsequently called a general meeting. B., R. and D. acted in good faith, and the fact that B. had vacated his directorship and the subsequent irregularities were not brought to their attention. It was held that the effect of art. 108 of the memorandum (similar to above sec. 99) validated appointments of B. and D. and the subsequent acts of B., R. and D., and that they were a duly constituted Board. Farwell, J., in his judgment defines the phrase "notwithstanding that it shall afterwards be discovered that there is some defect" as not meaning that the facts are afterwards discovered, but that the defect is afterwards discovered. "It is not, therefore, that the facts are not known, but that the knowledge of the defect is not present to the mind of any person to whom it is material at the time to know it." He held, following *Dawson's* case, that the article and section (of the Companies Act, 1862) are of general application, applying both between the company and outsiders and the company and its members, or members *inter se*. "The result is that on January 5, which was the critical date, there was a *de facto* Board of Directors as to whom there had been no discovery that there was any defect in their appointment." It is to be observed that Farwell, J., applied the rule in this action in which the directors were themselves defendants, and who were relying upon, acting upon and claiming the benefit of the curing section.

In *Channel Collieries Ltd.* v. *Dover, etc. Rly. Co.*, [1914] 2 Ch. 506, a single director purported to appoint two others who were not qualified as to shares, and the three allotted qualifying shares to these two. It was held by the Court of Appeal that the two were not duly appointed, but that the irregular allotment of shares was made by *de facto* directors which was validated by sec. 99 of the Act of 1845, which is to be construed broadly as between companies and their members as well as between companies and outsiders, following *Dawson's* case and *the British Asbestos* case. Lord Cozens-Hardy adopts the view of Farwell, J., as to the meaning of the curing section as above, and says that the test, in applying section 99, is whether the parties are acting in good faith. If they are, then the section ought to be available for all

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parties, including directors. But "if there is a lack of good faith the Court will not allow those who are lacking in good faith to take the benefit of it." "The mere fact that the persons claiming the benefit of the section had notice of the existence of the facts which led to the disability is not sufficient to disentitle him to rely upon it if he can honestly say, 'I was not aware of the defect and the consequences of the facts I knew, I was not aware of the disqualification which now exists.'"

The plaintiff company was a shareholder of the defendant company and the action was brought against the defendant company and the three directors.

Now in this case before us, the objection to the appointment of the directors is not taken by them but by the defendant Goodman, a shareholder. He certainly is not shown on the evidence to have had any knowledge of the proceedings at the meetings which were called in question in the action previously decided by the Chief Justice. Nor is there anything in the judgment of the Chief Justice as reported to show that the *de facto* directors, in allotting the shares, were acting otherwise than in good faith. The chairman at the meeting in question was, so far as appears, acting merely on a mistaken view as to the validity of the shareholders' by-laws, which were held to be void, as an attempt to exercise a power regulating voting by proxy which belonged to the directors and in overlooking the provision of the Act requiring the election to be by ballot. It seems to me that more than this must be shown to establish a case of lack of good faith. For all that appears the legal conclusions of the facts known to the directors were not present to their minds when they made the allotment to the defendant and could not have been known to them until the judgment was delivered in the case by the Chief Justice on July 9, 1912.

The effect of such an article as sec. 99 above is discussed in Stiebel on Company Law, p. 364. "The effect of this section would seem to be that where a company has allowed persons to act as directors, even though they have not any right to do so, persons dealing with such directors will not be bound to inquire into their authority to act, and the company will be as much bound as though they were validly appointed directors. Moreover, the effect of the section seems to be even wider than this,

for persons who have shares in the company will, at all events where there is the common form of article validating the acts of such *de facto* directors, and probably where there is no such article, not be entitled to object to any act of such directors, done before the defect is discovered, on the ground of the defect; and it would appear that the company would be entitled to enforce acts done by such directors, even when the other party wishes to evade his obligations on the ground that the directors with whom he dealt were not validly appointed." In a footnote it is stated that in view of *Dawson's* case and the *British Asbestos* case, *Howbeach* v. *Teague*, *supra*, cannot be any longer regarded as an authority to the contrary.

Upon consideration, therefore, I agree with the finding of the Chief Justice of the King's Bench that the allotment of stock to the defendant by a *de facto* Board was, in this case, validated by sec. 25 of the Act of incorporation.

It was argued that even if the directors had the power to allot, there was no notification of acceptance communicated to the defendant. The necessity of such notification was conceded. The Chief Justice held that the defendant had received the notice of the shareholders' meeting dated July 18, 1912, which was sent by registered letter, receipted for by his wife; also the notice of the meeting held in May, 1913. The receipt of these notices being established it seems difficult to contend that they did not affect the defendant with knowledge that his application has been accepted by the company. He could draw no other conclusion than that it had been.

Objection was taken to the notice sent out under the judgment of the Chief Justice as not being authorised by the directors. But that notice was sent pursuant to a judgment in an action to which the company was a party. In any event "Notice of allotment, if brought home to the allottee not from the company but *aliunde*, will be sufficient." Palmer, Company Law, 110, citing *Wallis'* case, L.R. 4 Ch. 325*n*.

What is sufficient notice is defined by Montague Smith, J., In *Re Richards and Home Assur. Association*, L.R. 6 C.P. 591, at 595, as "Anything emanating from the company which indicates to the party that the shares have been allotted to him, and which binds them, will be sufficient."

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As to Goodman's having given a proxy to Leslie to represent him, which was produced at the meeting held Oct 13, 1912, as shown by the minute book, it appears that Leslie was an employee of the Colonial Investment Co., which had offices in the same suite as the Colonial Assurance Company. Dick, the secretary, says, p. 15: "There was certainly a proxy" (meaning the one in question) and further he states, "This proxy was got by Mr. Smith to be used on his side of the question in voting for himself, and the proxy was certainly there or it would not have been recorded in the book," p. 81. Dick had searched for the proxy but was unable to find it. Leslie says that Smith "might possibly have got Goodman to sign one in my favor and keep it for an emergency," p. 91. Goodman says, "I don't remember whether I signed it or not." It does seem to me that we are justified in accepting Dick's testimony.

There is no doubt that Goodman attended the meeting of May 15, 1913, of which he had received notice. Dick testifies that he has an independent recollection of seeing him present. Goodman says that he attended that meeting merely to present his letter of withdrawal of his application for shares. But that letter was not presented until the meeting of directors held subsequently to the shareholders' meeting when the Smith party was defeated. After the result of the shareholders' meeting, Goodman's status as shareholder was of no value to Smith. It would appear that Goodman's letter of withdrawal dated May 15 was enclosed with other similar applications in a letter to the company from Wm. Smith, dated the same day, and signed by him as manager. I think on the evidence that Goodman was present as a shareholder at the special meeting of shareholders held May 15, 1913.

The giving of the proxy and the attendance at the meeting are ample evidence that Goodman had received notice of acceptance of his application for shares.

It is evident that the company treated Goodman as a shareholder, as we find that the certificate for 50 shares issued in his favor was drawn up and signed by the secretary and handed to Smith; that Goodman was entered as a shareholder on the books of the company; that his request to withdraw was not acceded to by the directors; that his note for $500 was kept as an asset of the company and was never cancelled.

In connection with all the transactions between Goodman and the company up to May 15, 1913, we must bear in mind the close relations existing between Goodman and Smith, the president of the company, whose position as such was becoming imperilled at the time of these transactions. It is quite evident that Smith desired to have Goodman as a shareholder and supporter in the faction fight then pending. According to Goodman's evidence, Smith suggested to him that he should apply for shares in the company. The relations between the two were intimate. They had considerable dealings together, and Goodman was a frequent visitor at Smith's office. Smith suggested that he should make the application for shares. Goodman says.—"I told him (Smith) at the time I didn't want any stock in the company, I couldn't afford to buy any stock. I told him that, I said, 'You know I have been borrowing money from you time and again, and I can't take any stock in it.' He said 'No, you don't have to, you make application for fifty shares and it will be all right, you won't have to bother with it any more. I will see that you don't have to worry your head about it.' "

Later he says he remembers signing the application for 50 shares and the note to apply on the purchase, that Smith told him he would never be bothered with it, and that he did this as an accommodation for Smith. Smith told him, "You won't hear any more about it, I will see that that will be torn up." and I said "That is all right then, I will sign it." About this time Goodman heard of Smith's trouble with the Board of Directors.

It is impossible to read Goodman's examination on discovery and his cross-examination without coming to the conclusion that he, at Smith's request, had constituted Smith his agent to do all that was necessary to make him a shareholder of fifty shares. *Re Elec. Tel. Co. of Ireland*; *Cookney's* case, 3 DeG. & J. 170 (44 E.R. 1233), referred to in *Universal Banking Co., Gunn's* case, L.R. 3 Ch. 40, 44, was a case where Cookney authorised a a director of the company to have him made a shareholder. Such was also the fact here, and it results that the allotment of the shares at a meeting presided over by Smith and the delivery of the certificate to Smith were of the same effect as if Goodman were present at the meeting, and the certificate subsequently delivered to himself. In view of this relationship between Smith

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and Goodman there was no necessity for giving notice of the allotment to Goodman. And, therefore, the objection that notice was not given within a reasonable time falls to the ground.

On the evidence, therefore, I think the proper conclusion to be drawn is that Goodman was sufficiently notified of the allotment of shares to him.

There is the further consideration presented on the argument that Goodman by his acts and conduct has precluded himself from disputing his position as a shareholder.

The payment of money on account of shares, the active participation in the affairs of the company, knowingly allowing one's name to appear as a shareholder or director, and the like, have always been considered as important but not conclusive elements in determining whether a person is to be estopped from denying that he is a shareholder. Each case of this kind must depend upon and be governed by its own circumstances: Mitchell, Canadian Commercial Corporations (1916), at pp. 500-1.

In *Levita's* case; *International Contract Co.*, L.R. 3 Ch. 36; the circumstances were held sufficient to justify holding the party applying for shares to his liability. In *Gunn's* case, L.R. 3 Ch. 40, it was held that they were not. In *Re Peruvian Railways Co.; Crawley's* case, L.R. 4 Ch. 322, the execution of a transfer of shares was held sufficient to preclude the subscriber from saying he did not know of the allotment.

In *Morrisburgh & Ottawa R. Co.* v. *O'Connor*, 23 D.L.R. 748, 34 O.L.R. 161, the defence to an action for calls was based on the provision of an Ontario statute that no subscription for stock induced by verbal representations should be binding, unless prior to the application the subscriber should have received a copy of the prospectus. It was held, nevertheless, that as the defendant had allowed his name to be on the list of shareholders for two years and more, without objection, he could not be relieved in the circumstances. This decision was followed in *Re Gramm Motor Truck Co.*, 26 D.L.R. 557, 35 O.L.R. 224. An application to remove a shareholder from the list of shareholders was refused, and *Morrisburgh & Ottawa R. Co.* v. *O'Connor*, followed.

Where a person knows, or is presumed to know, that his name is on the register, and he is wrongfully there by virtue of his contract being wholly void, in order to avoid liability as a contributory he must promptly repudiate the contract: Mitchell, Canadian Commercial Corporations, 499, and the cases there referred to.

What are the circumstances in this case. We have the defendant giving his note for $500 to the company and allowing it

to be retained, receiving the notices of meetings referred to, attending a meeting as shareholder, giving a proxy to another to represent him at a meeting and standing by without taking steps to recall or repudiate his application from the time of his application in February, 1912, until the directors' meeting May 15, 1913. And in giving proper weight to these considerations, we must keep in mind the relationship of principal and agent between Goodman and Smith already referred to. There was here no such restriction on the agency as was found in *Robinson's* case, 4 Ch. 330. Smith became Goodman's agent for all purposes necessary to constitute the latter a shareholder. All the knowledge that Smith had of the various proceedings connected with the application, the allotment and the issue of the certificate and the other matters involved, was Goodman's knowledge also. With these facts in view, it is difficult to see how Goodman can now be allowed to alter his position and disclaim his liability. On the contrary, I think the true inference is that Goodman intended to be a shareholder until the shareholders' meeting of May 15, 1913, resulted in a change of the directorate and that his withdrawal, on that date, was altogether too late to affect his status as shareholder.

In my opinion the appeal must be dismissed with costs.

Howell, C.J.M. Haggart, J.A.

HOWELL, C.J., and HAGGART, J.A., concurred in dismissing appeal. *Appeal dismissed.*

ORSER v. COLONIAL INVESTMENT & LOAN Co.

Saskatchewan Supreme Court, Lamont, J. September 17, 1917.

MORTGAGE (§ VI A — 70)—FORECLOSURE—PERSONAL JUDGMENT—CONCURRENT REMEDIES.

A final order of foreclosure of a mortgage under the Land Titles Act, vesting the mortgaged property in the mortgagee, does not prevent the latter from proceeding to realize the mortgage debt under his personal judgment, given by the order *nisi*, so long as he remains in a position to re-convey the mortgaged property; if he proceeds on his judgment, the foreclosure will be reopened to enable the mortgagor to redeem.

[See also *Scottish Temp. Assn.* v. *Registrar of Titles* (B.C.), 36 D.L.R. 152.]

Statement.

ACTION to remove execution as a cloud on title. Dismissed.

A. E. Vrooman, for plaintiff; *W. R. Kinsman*, for defendants.

Lamont, J.

LAMONT, J.:—In 1912, the plaintiff, being then registered owner of lots 1 and 2, block 9, in Manor, Saskatchewan, mortgaged them to the defendant company to secure the repayment of $1,200. The mortgage becoming in arrear, the company in June,

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1914, brought a foreclosure action in the Supreme Court, and in their statement of claim they asked for judgment against the plaintiff for the amount of the mortgage debt and interest and for foreclosure of the plaintiff's interest in the said property. On August 19, 1914, the company obtained an order giving them judgment against the plaintiff for $1,232.40 and costs to be taxed, and further ordering him to pay the above sum into court on or before March 11, 1915, and decreeing that in default of such payment there would be foreclosure absolute and the title to the mortgaged premises would vest in the company freed from all right, title and interest of Orser and all persons claiming through or under him. The money not being paid, the company, on March 30, 1915, obtained a final order of foreclosure. This was registered in the proper Land Titles Office, and a certificate of title to the mortgaged property was issued in the name of the company.

In September, 1915, the defendants issued an execution against the lands of the plaintiff by virtue of the personal judgment they had obtained.

This execution affects the title of a quarter-section of land of which the plaintiff is the registered owner and with which he now desires to deal, and he has brought this action to have it declared that the execution is a cloud on his title to the quarter-section and for an order directing its removal.

The defendant company in its statement of defence to this action alleges that it still has the mortgaged property and is ready to re-convey it to the plaintiff on payment of the mortgage debt, interest and costs.

The argument on behalf of the plaintiff is, that a mortgage under our Land Titles Act differs from a common law mortgage in that it passes no estate or interest in the mortgaged property to the mortgagee, that it, therefore, has not attached to it the rights and incidents which, under a common law mortgage, belong to the mortgagee, by reason of his being the holder of the legal estate; that under a statutory mortgage, such as the one in question here, a mortgagee has only such rights as are expressly or by necessary implication given to him by the statute, and he is liable to all statutory obligations imposed upon mortgagees (for this, *Smith* v. *National Trust Co.*, 45 Can. S.C.R. 618, 640, 1 D.L.R. 698, is cited); that a foreclosure under the Land Titles Act is not merely

a debarring of the mortgagor's right of redemption, as under a common law mortgage, but is a transferring of the mortgaged property to the mortgagee, and that, upon registration of the final order of foreclosure and the issuing of a certificate of title to the mortgagee, he stands in the position of a transferee under the Act, as was held in *Colonial Inv.* v. *King*, 5 Terr. L.R. 371, 379, that, being a transferee, the mortgagee is bound under sec. 63 of the Act to indemnify and keep harmless the transferor from and against the moneys secured by the mortgage, unless the implied covenant to do so is expressly negatived in the instrument, and that in this case, as the final order of foreclosure contained nothing from which it could be inferred that the implied covenant under sec. 63 was not to be operative, the defendants were bound to indemnify the plaintiff and keep him harmless in respect of the mortgage debt. In other words, it must be presumed that they took the mortgaged property in satisfaction of their claim.

Another argument advanced was, that, on obtaining a certificate of title of the mortgaged property, the mortgage charge merged in the estate, unless an intention not to merge was shewn.

For the defendants it was contended, that as in equity a mortgage had always been treated merely as a security for the mortgage debt, the fact that under the Land Titles Act a mortgage did not vest any estate or interest in the land in the mortgagee could not make any difference to the rights of a mortgagee who should be given by the court the same rights as if he had a mortgage at common law.

Apart from the provisions of the Land Titles Act, the rights and obligations of a mortgagee are well settled. He is entitled to pursue all his remedies concurrently. He may, in the same action, have personal judgment for the debt and judgment for foreclosure; he may, after he has obtained foreclosure, enforce his personal judgment by execution, so long as he is in a position to return the mortgaged property intact upon payment by the mortgagor. If he is not in a position to re-convey the mortgaged estate, he will be restrained from enforcing his personal judgment. Where, however, after foreclosure he realizes on his personal judgment, the foreclosure is re-opened and the mortgagor has a new right to redeem: *Lockhart* v. *Hardy*, 9 Beav. 349 (50 E.R. 378), *Kinnard* v. *Trollope*, 39 Ch.D. 636, Bell & Dunn on Mortgages, p. 269.

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In the view I take of this case it is unnecessary to determine whether or not a mortgagee, who obtained foreclosure and has the title to the mortgaged property vested in himself, is saddled with all the obligations of a transferee of mortgaged property under the Land Titles Act, for, assuming that he is, it is still open to him as it is to a transferee to negative the implied covenent (sec. 167) and in my opinion the proceedings in this case afford clear evidence that the implied covenant was not to be operative.

If the order *nisi*, instead of giving personal judgment with the foreclosure, had given the foreclosure alone but had expressly reserved to the mortgagee leave to ask for judgment on the covenant later, it could not be contended, after foreclosure absolute, that the mortgagee took the mortgaged property in satisfaction of the debt, and was bound to indemnify the mortgagor against his covenant to pay. If this is so, how can a mortgagee be said to take the mortgaged property in satisfaction of the debt, when the court, in the order *nisi*, instead of giving him leave to obtain a personal judgment on the covenant later, gives him the judgment in the order? The fact that the leave reserved was not repeated in the final order would, in my opinion, make no difference. The court having granted it in the order *nisi*, I can see no necessity for having it repeated.

In *Empire Loan* v. *Bernard* (unreported), my brother Newlands held that a mortgagee was entitled to his final order without vacating the personal judgment previously obtained.

I am, therefore, of opinion that in a foreclosure action where the order *nisi* gives the mortgagee personal judgment against the mortgagor as well as foreclosure, the taking of the final order and vesting of the mortgaged property in the mortgagee does not prevent the mortgagee from proceeding to realize the debt under his personal judgment, so long as he is in a position to re-convey the mortgaged property. If, however, he proceeds on his judgment, the foreclosure will be re-opened.

Action dismissed with costs.

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MAH KONG DOON v. MAH CAP DOON.

Alberta Supreme Court, Harvey, C.J. September 14, 1917.

PARTNERSHIP (§ VI—25)—DISSOLUTION—SUBSEQUENT ACTS—LEASE.

After the dissolution of a partnership, or after a partner has for all practical purposes ceased to be such, he has the right to obtain in his own name a lease on the premises occupied by the partnership, and to hold it for his own personal benefit.

APPLICATION by plaintiff for a declaration as to a certain lease and a direction of sale. Dismissed.

A. F. Ewing, K.C., for plaintiff; *S. B. Woods*, K.C., and *G. E. Winkler*, for defendant; *G. B. O'Connor*, K.C., for purchaser.

HARVEY, C.J.:—The statement of claim which was issued on July 7, 1917, alleges that the parties had been carrying on business as partners at will since 1913, and that for the past year and 8 months the defendant Mah Cap Doon had had entire management of the business and that he was misconducting himself in various ways, and ask for an injunction to restrain him from dealing with the assets of the partnership, a receiver, and a declaration of dissolution, etc.

On July 10, the plaintiff obtained *ex parte* an order restraining "the said defendant from collecting or getting in or receiving any part of the assets . . . and from selling, mortgaging or otherwise disposing of any of the chattels or personal property of the said partnership," and appointing a receiver to get in the assets and pay the debts and pay the balance as directed. On the same day the order and the statement of claim were served on the said defendant. On August 16, the receiver sold the stock-in-trade, book debts and furniture in bulk.

The firm was the lessee of certain premises under a lease expiring on March 31, 1918. The purchaser of the stock-in-trade, etc., claims that when he purchased he thought he was purchasing the interest in this lease. I am not asked, nor would it be appropriate in this application to determine the rights of the parties in respect to this contention. A few days after the service of the papers on the defendant Mah Cap Doon he consulted a solicitor as to his right to enter into business on his own account and to obtain for himself a further lease of the same premises. On being advised that he had that right he applied to the agent of the owner for a lease to himself of the premises for 2 years commencing at the expiration of the existing lease. He explained that it was for himself as the plaintiff had begun an action dissolving the partnership and put him out and a receiver in. The lease was granted to him on these conditions and the plaintiff now asks for a declaration that the lease enures to the benefit of the partnership.

It is quite clear from the facts stated that the defendant did

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not intend to act for the partnership in obtaining the lease and it seems equally clear that, in view of the action and the order obtained, he had no right to bind the partnership by the lease and it seems scarcely fitting for the partner who had, by his action, deprived the defendant of all right to act for the partnership to contend that what he did was for the partnership benefit.

It is stated, however, in Lindley on Partnership (8th ed.), at p. 370, that—

> it has been decided more than once, that if one partner obtains in his own name either during the partnership or before its assets have been sold, a renewal of a lease of the partnership property, he will not be allowed to treat this renewed lease as his own and as one in which his co-partners have no interest.

There is no authority, however, referred to by the author which expressly holds that a lease entered into after dissolution, but before sale of the firm's assets, must be deemed to be for the benefit of the partnership.

The text has stood in the above words for at least 20 years, and it would appear from the case of *Re Biss*, *Biss* v. *Biss*, [1903] 2 Ch. D. 40, 61, which is cited in the later edition in a footnote, that while the main proposition may be correct as a general rule, even it is subject to considerable qualification. The basis for the statement that the rule applies even after dissolution before sale of the assets seems to lie in such decisions as *Clegg* v. *Fishwick* (1849), 1 Mac. & G. 294, 41 E.R. 1278, the headnote of which is:—

> Parties interested jointly with others in a lease cannot take to themselves the benefit of a renewal to the exclusion of the others so jointly interested with them.

In that case and in all of the cases reported that I have found, the partner or partners obtaining the renewal obtained it or laid the foundation for obtaining it before dissolution and in most of the cases they then brought about the dissolution by their own acts.

One can easily see that such action would be little different in most cases from actual fraud but the duty which one partner owes another before dissolution is by no means the same as it is after dissolution and even before dissolution it seems clear from *Re Biss* that there may be cases in which one partner could take a renewal for his own benefit.

The first part of the headnote of *Re Biss* is in direct conflict with the headnote of *Clegg* v. *Fishwick*, as an absolute rule.

In that case (*Re Biss*), Buckley, J., considering himself bound

by authority held that the lease was for the benefit of the others interested because one was an infant. In the Court of Appeal the decision was reversed that being held not to be an essential feature. Collins, M.R., points out that there are two classes of cases, in the first of which, *e.g.*, the cases of trustees obtaining renewals, there is an irrebuttable presumption of law of personal incapacity to take the renewal for the personal benefit while in the second, in which that of partners falls, there is at most a rebuttable presumption of fact.

As to the first, Buckley, J., says (p. 43):—

> The principle is that the trustee owes it to his *cestui que trust* to obtain a renewal, if he can do so on beneficial terms, and that the Court will not allow him to obtain a renewal upon beneficial terms for himself when his duty is to get it for the *cestui que trust*.

Collins, M.R., referring to the same matter, says (p. 57):—

> The reason of the rule in the case of trustees and others whose liability is absolute and irrebuttable is said to be public policy; and is based it would seem largely on the fact that possession gives to such person an opportunity of renewal acting upon the goodwill that accompanies it. It may well be, therefore, that different considerations apply in the case of persons not in possession.

As to partners his view seems to be that the partner may go into the facts to shew "that he has not abused his position or intercepted an advantage coming by way of accretion to the estate." Romer, L.J., deals at some length with the general principles.

It seems clear, therefore, that it is quite competent for the defendant to shew that he is entitled to the benefit of this lease for his individual interest and that he is so entitled unless he has failed in some respect in the duty he owed his partners. He contends that the partnership was dissolved on July 10, when he was served with the statement of claim and on the authorities I would think this the correct view were it not for the fact that, on August 2, he consented to an order, one of the terms of which is that the partnership is declared to be dissolved as of the date of the order.

In my opinion, however, the date of the legal dissolution is of no importance. For all practical purposes he ceased to be a partner when the Court, at the instance of the plaintiff, forbade him having anything more to do with the partnership business and put its own officer in charge of it for the purpose of winding

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it up, and his relations with and duties to his co-partners became the same as when a dissolution had been legally effected. As the then existing lease had several months to run no renewal was necessary for the purposes for which the partnership then continued to exist and apparently no one would have had any right to obtain a new lease in the interest of the partnership. I feel quite at a loss then to understand on what ground the plaintiff, who had by his own act deprived the defendant of the right to make a lease in the interest of the partnership, can maintain that the lease which was obtained is for its interest. If the defendant had obtained the lease in the supposition that he was acting for the partnership it would, of course, raise other considerations as is pointed out in the cases, but he was perfectly frank with the lessor who knew that he was dealing with him for his own benefit. He was not then in possession, a fact which Collins, M.R., suggests may be material and it appears to me that the concluding words of Romer, L.J., in the *Biss* case are entirely appropriate here:—

> He was in no wise in any fiduciary position in respect of the matter; he owed no duty to anyone in respect of it; he has been guilty of no fraud or concealment; and he has not used any right that a Court of equity can recognize as belonging to other persons to enable him to obtain the lease.

I am of opinion that the defendant is entitled to hold the lease for his own personal benefit and the application will, therefore, be dismissed with costs. *Application dismissed.*

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K.B.

STURGEON v. HENDERSON.

Manitoba King's Bench, Mathers, C.L.K.B. June 15, 1917.

1. LEVY AND SEIZURE (§ III A—40)—AUTHORITY OF SHERIFF—CROPS—HARVESTING—NEGLIGENCE.
   A sheriff seizing standing crops under a *fi. fa.* has no right to incur expense in harvesting and threshing them without the authority of the execution creditor; the authority may be implied. It is not negligence of the sheriff in having the threshing done in the winter instead of the spring, at a greater cost, in anticipation of probable damage to the crops from the spring thaw.
2. SHERIFF (§ I—3)—POUNDAGE—"SUM MADE"—EXPENSE.
   Money expended upon property after seizure, in order to render it salable, forms no part of the "sum made" by the sheriff, within the meaning of the tariff of sheriff's fees, and the sheriff is not entitled to poundage upon the sums which he retains to cover his own expense.
3. LEVY AND SEIZURE (§ III C—50)—PRIORITIES—EXECUTION—RENT—ATTORNMENT CLAUSE.
   A claim for rent by way of interest under an attornment clause in a mortgage has priority over the claim of an execution creditor.

Statement.

ACTION against the sheriff of the Western Judicial District for negligence in the execution of a *fieri facias de bonis.*

J. C. Collinson and *L. D. Smith*, for plaintiff.

G. R. Coldwell, K.C., and *J. Kerr*, for defendant.

MATHERS, C.J.K.B.:—The plaintiff recovered a judgment in this Court against Charles H. Adderson, James R. Adderson and George B. Adderson, farmers, residing within the defendant's bailiwick, for the sum of $6,881.10. A writ of *fieri facias de bonis* directed to the defendant was issued and placed in his hands on August 12, 1915.

The judgment debtors, or some of them, carried on a large farm near Beresford, on which they had some 200 acres under wheat, together with some coarse grains.

On September 18, the wheat being then cut and in stook, the defendant seized. After the seizure he took steps to have the crop threshed, and eventually succeeded in arranging with a farmer and thresher named Simpson, to thresh this crop immediately after he had finished his own.

The crops in that district were very heavy in 1915, and the season was a very unfavourable one for threshing. The weather reports indicate that rain fell during 17 days in September. On October 7, there was a snowfall of several inches. On October 25, snow again fell, and on this occasion remained. The weather conditions were such that many thousands of acres of wheat remained in stook all winter. Simpson was not able to commence threshing for the sheriff until December 14. At this time the snow was quite deep, but he moved his machine on to the farm and commenced to thresh. Previous to this the defendant had employed one of the judgment debtors to stack the grain, and he had continued stacking until stopped by the snow. Simpson commenced to thresh the stacks, but he found that owing to the depth of the snow, it was impossible to move his threshing outfit from stack to stack and it became necessary to haul the unthreshed grain from the stacks to the machine upon sleighs. He continued to thresh throughout December and part of January, when he discontinued, and commenced again in March after the weather had somewhat moderated. The wheat in stook was dug out of the snow 2 or 3 feet deep and hauled on sleighs to the machine, and the threshing was finally concluded about the end of March.

The total amount of wheat was 3,658½ bushels, which realised when sold, $2,987.05. Out of this the sheriff paid prior claims

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amounting to $652.15, and the balance $2,334.90 went to pay the costs of threshing and his own fees, leaving nothing at all for the execution creditor. Subsequently the sheriff seized some horses and other goods, out of which he realised $404. After the expense of this latter seizure, and prior claims were paid, there was $198.39 left. This money he distributed by giving the plaintiff $73.91, and to a subsequent execution creditor, whose execution amounted to $17,656.59, he paid $124.48.

There was a quantity of coarse grain on the farm which the defendant did not seize. No complaint, however, is made upon that score, nor is any complaint made with respect to the goods and chattels seized and sold.

The plaintiff and his solicitor both reside in Winnipeg, and the defendant did not inform either of them that he proposed to thresh the crop, nor did he ask the plaintiff to sanction his doing so; but he proceeded to thresh entirely on his own account. The sale of a crop in stook is unheard of in that locality, and I am satisfied that it would have been very difficult, if not impossible, to have effected a sale of the crop in that condition. Every farmer in the locality was busy saving his own grain, and many failed in doing so. In any event, the sheriff made no attempt to sell the stooks, but proceeded at once to arrange to have the grain threshed. In justification of the course pursued it was pointed out that the sheriff's practice during the 15 years he has occupied the office, has always been to proceed of his own motion, to thresh any grain seized by him in stack or stook, and on this occasion he pursued the practice which he had always followed. He appears to have assumed that it was his duty to perform the work with respect to seized crops, which the debtor would have performed before selling had there been no seizure. The law, however, does not impose any such duty upon a sheriff. It does not oblige him to incur the expense of either harvesting or threshing crops, which he may have seized, and if he does so without the sanction of the execution creditor, he is not entitled to reimburse himself out of the moneys realised for the expense so incurred; *Re Woodham*, 20 Q.B.D. 40. The sheriff in that case having seized a standing crop caused it to be cut and threshed without having first procured the authority of the execution creditor. His right to be paid the expense so incurred was contested, and in giving judgment Mr. Justice Cave said:—

No statutory provision can be found giving liberty to incur them, or providing for their repayment if incurred. The sheriff is bound to levy and sell, and if he thinks that any expenses ought to be incurred while the goods are in his possession, he can get authority from the execution creditor to incur the expenses, and if he does so, he can recover the amount from the execution creditor, or if authority is refused, he need not incur the expenses. So also he may get authority from the execution debtor, and may recover the amount of the expenses from him; but there is nothing in any statute shewing any duty on the part of the sheriff to incur such expenses of his own motion.

There is no doubt the sheriff had not the express sanction of the execution creditor to incur the expense of threshing this crop. But I do not think express authority is necessary. It is sufficient if implied authority has been shewn. It is admitted that the plaintiff's solicitor, by whom the execution was placed in the sheriff's hands, and who acted for the execution creditor throughout with respect to it, did not expect the sheriff to offer the crop for sale in the stook, but believed that it first would be threshed and he was satisfied that that should be done. He had from time to time written the sheriff letters between October 27, 1915, and March 3, 1916, asking the sheriff to report progress, but had received no replies. He had, during the winter, procured his agent to call upon the sheriff and obtain information. Finally, on March 3, 1916, the sheriff wrote as follows:—

The threshing is not nearly all done on this farm and I do not know when it will be finished. All the grain that has been threshed had to be dug out of the snow which made it a very slow job and awful expensive. I did not seize the stock for this reason, if I had we would not get the threshing done at all. The defendants are working just as hard as they possibly can do to get this work done. It would be an impossibility to get threshing done if their horses and implements were taken away from them at present. There are thousands of acres of grain standing in stook in this part of the country unthreshed. If this grain is not threshed before spring I very much fear it will be almost useless as a lot of grain will be covered with water. The Northern Life Assurance Co. hold a mortgage on the Adderson farm. There is $728.55 interest past due since January 1, 1915. This will be a prior claim. After the wages are paid and the expenses, the past due interest will have to be paid.

The plaintiff's solicitor replied on March 24:—

I am pleased to see that the defendants are working just as hard as they possibly can to get the threshing done and I have no doubt that you will do everything possible to make the money under the *fi. fa.*

The plaintiff argues that the fair interpretation of the sheriff's letter of March 3, and his own of March 24, was that, although he knew the threshing was being done, he believed that it was being done by the judgment debtors and at their own expense. I do

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not agree with the plaintiff's interpretation of the correspondence, because in the last line of the sheriff's letter he notifies the plaintiff that "after the *wages* are paid and the *expenses*, the past due interest will have to be paid." That was a distinct intimation that the wages and expenses were to be paid out of the proceeds of the crop.

I find, therefore, that, although the defendant did not expressly inform the plaintiff or his solicitor that he intended to thresh the crop, the plaintiff knew that the sheriff was proceeding to thresh and he was quite willing that he should do so, knowing and intending that the expenses of the threshing should be deducted from the proceeds. Hence the sheriff in my opinion had the plaintiff's implied sanction for what he did and is entitled to be reimbursed the reasonable cost of the threshing.

The plaintiff's counsel did not seriously argue that the plaintiff was not aware of the fact that the sheriff was threshing the crop and that the expenses of so doing would have to be paid out of the proceeds, but he strenuously contended that the sheriff had not acted reasonably in proceeding to thresh the crop in the winter when the ground was covered with snow to a depth of 3 or 4 feet, and that he should have waited until the snow had disappeared in the spring. Many farmers did wait, and after the snow had disappeared threshed their crop at little if any more than the ordinary expense of so doing. It is admitted that the spring of 1916 was remarkable in that the snow disappeared without leaving any large quantity of water, and this unexpected condition aided the farmers in saving their crop. It is admitted that if the sheriff had waited until the spring before threshing, the work could then have been done at much less expense. It is further admitted that the expenses paid by him for threshing at the time and under the conditions prevailing when this crop was threshed were not excessive.

There is no reason to doubt but that the sheriff *bonâ fide* believed that if the threshing was not completed before spring, the crop would be, to a large extent, if not entirely, destroyed by water. Mr. Thompson, a large farmer who resides in the district and who was familiar with the conditions prevailing there during the winter of 1915-1916, concurred with the sheriff in thinking that it would have been dangerous to have left the crop until the spring before threshing. The sheriff was faced by the alternative

of conducting the threshing operations during the winter at an enormously increased cost, or leaving the crop until the spring at the risk of it being totally destroyed by water. The judgment debtors whose crop it was, apparently agreed that the threshing should proceed, and actively co-operated in having it done. Under these circumstances I cannot find that the sheriff, in proceeding to thresh as he did, acted unreasonably. Could he have foreseen that the snow would have disappeared in the manner in which it did, he, of course, would not have threshed, but in view of the very large quantity of snow, he anticipated an unusual quantity of water on the land in the spring, in which event the grain standing in stook would almost certainly have been totally destroyed.

At the commencement of the trial, counsel for the defendant admitted that certain prior claims paid by him and included in his statement of disbursement, could not be justified. Three prior claims for wages were sent in, verified in the usual way, amounting to $508. These he allowed at the full amount, but an examination of the proofs shew that part of the time charged for is for work done for the judgment debtors subsequent to the seizure, and that the real amount which should have been allowed as prior claims was $247.50. He also paid a lien note amounting to $134.90 upon one of the horses seized, which was not valid, and in the settlement with Simpson, the thresher, he, by mistake in addition, overpaid him to the amount of $100. These overpayments amount to the sum of $495.40. It is admitted therefore that the sheriff has this sum still in his hands as proceeds of the execution.

Amongst the expenses charged is $180 paid to the judgment debtor for stacking. The evidence shews that the reasonable cost of stacking wheat was 5c. per bushel. It appears that the proceeds of the stacking was at least 1,840 bushels, which at 5c. per bushel, would amount to $92. No reason can be assigned why the sheriff should pay $180 to the judgment debtor for work that was only worth $92. He appears to have left the matter entirely in Simpson's hands, and Simpson left it entirely in the hands of the judgment debtors, whose bill for 30 days at $6 per day for a man and team, they both accepted without question. I think the sheriff must be charged with the difference $88.

A question was raised as to the validity of the subsequent execution for $17,656.59, and the right of the sheriff to appropriate

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any portion of the proceeds to it. It appears that the execution creditors in this subsequent judgment, Peacock & Davidson, had entered into an agreement to sell the lands upon which the crop in question was grown to the Addersons, and that the judgment upon which this execution was issued was upon the covenant to pay contained in that agreement. The judgment was recovered on November 18, 1915, but in May or June, 1916, Peacock & Davidson made an arrangement with the Addersons by which the agreement was cancelled, the land was taken back and resold to the wife of James Adderson. Peacock & Davidson having taken back the land and resold it could no longer enforce their judgment for the purchase price. Had it been shewn that these facts were known to the sheriff, he should, I think, have held his hand, at least until the plaintiff had had an opportunity of investigating and disputing the right of Peacock & Davidson to any share of the proceeds of the execution. Although the sheriff knew that the land had been taken back by Peacock & Davidson and resold, there is nothing to shew that he knew the judgment had been recovered upon the covenant to pay in the agreement to sell it or that the judgment had been otherwise satisfied. He had an execution in his hands which was upon its face valid, and he was justified, and indeed he was bound, I think, to recognise it as a valid and subsisting execution. Now, however, that the facts have been brought to his knowledge, he should not appropriate any portion of the money in his hands to the Peacock & Davidson execution until he has notified the plaintiff and allowed him a reasonable opportunity to take the necessary proceedings to have that execution either withdrawn or set aside.

The plaintiff takes exception to the amount charged by the sheriff for poundage. There is nothing to shew the exact amount retained by the defendant for poundage, but it was admitted that the amount was calculated upon the gross amount realised for the property seized. By the tariff of the sheriff's fees he is allowed poundage "when the sum made" shall not exceed $1,000, 5%; for the sum over $1,000 and up to $4,000, 2½% and for the sum over $4,000, 1¼%. These percentages are "exclusive of mileage going to seize and sell and all reasonable and necessary disbursements and allowances incurred in the care and removal of the property."

In *Michie* v. *Reynolds*, 24 U.C.Q.B. 303, followed in *Hamilton and Port Dover Ry.* v. *Gore Bank*, 20 Gr. 190, at 202, it was held that a sheriff is not entitled to charge poundage upon the gross amount realised, but only upon the sum he makes and has to pay over. It seems to me clear, that money expended upon the property after seizure, in order to render it salable forms no part of the "sum made" by the sheriff, within the meaning of the tariff. The sheriff cannot be said to have "made" the money paid to defray the cost of stacking or threshing. He is not therefore entitled to poundage upon these or other sums which he retains to cover his own expenses. In this case the gross amount received was $3,391.05. The cost of threshing as charged was $2,090 and the amount I have allowed for stacking is $92, making a total of $2,182. The sheriff is entitled to poundage on the difference of $1,209.05; poundage, according to the tariff, upon this sum is $55.22. In the statement furnished by the sheriff the poundage and other fees are blended, so that I cannot tell the exact amount retained for poundage. He appears to have calculated it separately upon the amount received from the sale of the wheat, and the amount realised from the sale of the stock. Calculated upon this basis it would amount to $119.97, or an overcharge of $64.75. If there is any error in this calculation, it may be corrected when settling the minutes of judgment.

Another very important question arises as to the claim of the mortgage company to the overdue interest under the attornment clause in the mortgage.

The mortgage is dated January 27, 1910, and was made pursuant to the Short Forms Act, by Peacock & Davidson as mortgagors to The North American Life Ass. Co. as mortgagees, to secure $8,000 with interest at 7% per annum. It is under the old system of registration, and contains the following clause:—

> And for the better securing the punctual payment of the interest on the said principal sum the mortgagor doth hereby attorn tenant to the mortgagee for the said lands at a yearly rental equivalent to the annual interest secured hereby to be paid . . . yearly on each . . . day of . . . and . . . the legal relation of landlord and tenant being hereby constituted between the mortgagee and the mortgagor.

In addition it contained the usual covenant found in the Short Forms Act, empowering the mortgagee to distrain for arrears of interest.

It is admitted that there was $728.55 interest due and in arrear

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upon the mortgage at the time of the seizure, and that such interest had been overdue since January 1, 1915.

On September 27, 1915, the solicitors for the mortgagee wrote the sheriff a letter claiming "arrears of interest under the attornment clause in their mortgage amounting to $728.55, which matured on the 1st January, 1915."

On March 3, 1916, the sheriff wrote to the plaintiff's solicitor saying in part:—

The Northern Life Assurance Co. hold a mortgage on the Adderson farm. There is $728.55 interest past due since January 1, 1915; this will be a prior claim After the wages and the expenses the past due interest will have to be paid.

The mortgagees are The North American Life Assurance Co., not The Northern Life Assurance Co., but nothing turns upon this slip. To this letter the plaintiff's solicitor replied on March 24, 1916, saying in part:—

It is possibly well settled law that if a mortgage contains the usual attornment clause, rent which was due at the time a seizure was made might reasonably come ahead of the *fi. fa.* but this is only where the rent was due when the seizure was made. It would, therefore, be well for you to make sure first that the mortgage contains the proper attornment clause, and second, that the rent was due when you seized. I know of no principle under which interest since the date of the seizure would be allowed as a preference.

The sheriff afterwards paid out of the proceeds of the crop to the mortgagees $144.15. The plaintiff disputes this payment upon two grounds. First, he says the claim was made by the mortgagee for "interest" not for "rent," and that by sec. 2 of the Distress Act, the right of a mortgagee to distrain for "interest" is limited to the goods of the mortgagor, and the goods taken in execution were not the goods of the mortgagors. If the claim of the mortgagees was based upon their right to distrain for interest, the objection of the plaintiff would be well founded; *Miller* v. *Imperial Loan and Inv. Co.*, 11 Man. L.R. 247. But in my opinion the correspondence quoted shews that the claim of the mortgagee was based not upon the covenant giving the right to distrain for arrears of interest, but upon the attornment clause, by which the mortgagors attorn tenant to the mortgagees. The letter of the mortgagees' solicitor distinctly states that the claim is made "under the attornment clause" and by his letter to the sheriff the plaintiff's solicitor shews that he so understood the claim. So long as it was made clear by what right and under what provision in the mortgage the claim was made, it appears to me a matter of indifference by

what name it was called, whether rent or interest. It has been more than once held in this Court that an attornment clause such as that contained in this mortgage, does effectually create the relation of landlord and tenant between the mortgagee and mortgagor, provided that the rent reserved bear a reasonable proportion to the fair annual value of the land; *Linstead* v. *Hamilton Prov. & Loan Soc'y.*, 11 Man. L.R. 199; *McDermott* v. *Fraser*, 25 Man. L.R. 298, 23 D.L.R. 430. In this case the mortgage covered a whole section of land, and the annual interest was $560, which could not be considered an excessive rent.

The second objection urged by the plaintiff's counsel is that the attornment clause fixes no date for the payment of the rent reserved, and is therefore inoperative.

In the printed form the blanks left for the date of payment are not filled out, but if the clause be read disregarding the blanks, it provides for a yearly rental equivalent to the annual interest, which is $560, "to be paid yearly." The mortgage is dated January 27, 1910, and therefore the first year's rent would be overdue on January 28, 1911. On January 28, 1915, there was $728.55 overdue for interest. By sec. 3 of the Distress Act, a landlord's right to distrain as against a writ of execution is limited to 1 year's rent, where the rent is payable yearly. All that the mortgagee can claim in this case as against the plaintiff is $560. Of this amount he has already been paid $144.15, leaving a balance of $415.85 unpaid.

I find that the mortgagees had a claim for interest or rent under the attornment clause in their mortgage for $560, which ranked ahead of the plaintiff's claim under his *fi. fa.* and that the sheriff was justified in paying the mortgagees the sum he did pay them.

I find that subject to any corrections that may be made upon settling the minutes of judgment, that, of the moneys realised under the plaintff's execution, the defendant has still in his hands $648.15 to be paid and applied according to law.

I find that the North American Life Assurance Co., the mortgagees, have a claim prior to the plaintiff for the sum of $415.85 overdue rent.

If upon these findings, the parties cannot agree upon the minutes of judgment, they may come before me again.

The plaintiff is entitled to the costs of the action.

Judgment accordingly.

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COLUMBIA BITULITHIC Limited v. B.C. ELECTRIC R. Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. March 26, 1917.

STREET RAILWAYS (§ III C—42)—NEGLIGENCE—CONTRIBUTORY—ULTIMATE —DEFECTIVE BRAKES—SPEED.

Defective brakes on a street car incapable of arresting its speed when approaching a highway crossing is negligence which will render the railway company liable for a collision, notwithstanding the plaintiff's contributory negligence.

[*B.C. Electric* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, followed; 31 D.L.R. 241, 23 B.C.R. 160, reversed.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia, 31 D.L.R. 241, 23 B.C.R. 160, reversing the judgment of Murphy, J., at the trial, by which the plaintiff's action was maintained with costs. Reversed.

The appellant's servant (one Hall) was driving a team of horses and a wagon, the property of the appellant, along a road, known as Townsend Road, which was crossed by the company respondent. On the way, one Sands got up from the road and sat beside the driver. On nearing the track, which was approached by an up grade, the two men were engaged in conversation and took no precautions. When the horses were partially across the track, they were struck by a tramcar of the company respondent. Sands and the two horses were killed, Hall was thrown from the wagon and the wagon was damaged. The tramcar at the time was coming down grade at about 40 miles an hour. There was evidence that the brakes on the tramcar were defective.

Armour, K.C., for appellant.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree with Anglin, J., with this addition. The general proposition that "statutory powers may not be exercised with reckless disregard for the common law rights of others" cannot be open to objection. A statement of the contrary would seem sufficient to refute it. Adopting the language of Lord Sumner in *Great Central R. Co.* v. *Hewlett*, [1916] 2 A.C. 511, at 523-524, I would say that however general the terms used by the legislature in authorizing for the company's benefit what would otherwise be a nuisance the authority conferred must be exercised with reasonable care and not without it.

The application of the rule to the particular case, however, presents some difficulty. It is not suggested that railway trains can never pass over a public crossing except at such speed that in case of necessity they can be stopped before reaching it.

If it were, that would seem to be a proposition that one might have much hesitation in accepting although at first sight it seems reasonable.

In *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, the Privy Council held that it was the negligence of the respondent in coming out with defective brakes, which though antecedent to the appellant's negligence did not come into effect until afterwards and therefore was the cause of the accident. It may perhaps be suggested that the point of the decision was a fine one and that if the respondent had previously tied its hands so that it could not help coming too fast the appellant had also previously tied his hands so that he arrived at the crossing too slow to be able to clear.

However, the judgment of the Privy Council must be accepted as the law not only as to the abstract principle which is clear but as applicable to this particular case; and as Martin, J., said in the Court of Appeal, "on the inferences to be drawn from facts about which there is no real dispute . . . the accident could . . . have been avoided if the brake had been in good order." This conclusion clearly brings the case within the decision of the Privy Council in *Loach* v. *B.C. Electric R. Co.*, *supra*, and the appeal must be allowed with costs here and in the Court of Appeal and the judgment of the trial Judge must be restored.

Davies, J.

DAVIES, J.:—The case between the *B.C. Electric R. Co.* v. *Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4, was one arising out of the same accident and on the same facts and circumstances as this action was brought on. The only difference is in the person who brought the action; but it is contended there exists a difference between the findings of the jury in the former case and the findings of facts or inferences from the evidence made by the trial Judge in the present action. The record of the *Loach* case is not before us and it may be that some of the evidence in that case as to the power of the motorman to have stopped the car before reaching the team crossing the track at the rate of speed the car was running with a defective brake, such as there was on the car, was not precisely the same as in this case. However, in the *Loach* case their Lordships cite the finding of the jury that while both parties were guilty of negligence, nevertheless, "the motorman could have stopped the car if the brake had been in an effective condition"; and Lord Sumner, who delivered the judgment, says:—"If the

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brake had been in good order, it should have stopped the car in 300 feet."

In so far as the general principle is concerned I take it we are bound by the law laid down in the *Loach* case by the Judicial Committee.

In the headnote to that case it is stated that their Lordships held:—

> The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages if the defendant, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence.

Several questions were raised and argued at bar as to whether the rate of speed at which the car was running when the motorman first saw the plaintiff's servant man driving his team and cart to cross the car track, was not in itself negligence, and whether the provisions of the Railway Act on the subject of the rate at which cars might run, extend to electric cars. In the view I take of the facts I think the appeal must be decided by determining whether there was evidence from which the proper inference should be drawn that if the car had been equipped with an adequate and efficient brake instead of an admittedly defective and inefficient one, it could, if promptly applied at the proper moment by the motorman, have stopped the car and avoided the accident. If such an inference is the proper one to draw, the defendants (respondents) under the authority of the *Loach* case must be held liable. The trial Judge thought himself bound by the decision of the Judicial Committee in the *Loach* case, and his finding on the fact whether efficient brakes would, if applied, have stopped the car in time, is as follows:—

> The plaintiffs desire me to find, that, had the brakes been efficient and applied as soon as the motorman saw the team, the car would have been slowed down sufficiently to allow time enough for the team to have cleared the tracks. It is possible the horses might have got over, but I do not think I can hold it proven that the wagon would also be across, and if not the horses would probably have been killed and certainly the wagon would have been damaged.

After careful consideration of the evidence, I am of opinion that the proper inference to be drawn from it is that had the car been equipped with proper and efficient brakes the motorman would have stopped it when he applied the brakes in time to have avoided the accident.

The evidence of Andrews is not as clear and satisfactory on the point as one could desire; but in answer to the Judge who said to him: "Well, if you are going 40 miles, you couldn't get down to 10 miles in 100 ft?" he answered: "Oh! no Sir, about 200 ft. in 40 miles an hour."

That 200 ft. was 100 ft. less than in the *Loach* case Lord Sumner thought it could be stopped altogether and would bring the car running at the reduced rate of 10 miles an hour within 200 ft. of the horses and truck crossing the track and still allow 200 within which the car might have been stopped altogether before it reached the team.

I would, therefore, allow the appeal and restore the judgment of the trial Judge with costs here and in the Court of Appeal.

Davies, J.

IDINGTON, J.:—I do not see enough in the facts presented herein whereby it is fairly possible to distinguish this case from that of the *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, arising out of same accident as in question herein, and am therefore of the opinion that the appeal should be allowed with costs throughout and the judgment of the trial Judge be restored.

Idington, J.

DUFF, J.:—The accident out of which the litigation arose occurred in Townsend Avenue in the municipality of Point Grey, a suburb of Vancouver, where that street is crossed by the Vancouver and Lulu Island Railway, the appellant company's horses and wagon being run down by a car of the respondent company.

Duff, J.

Pursuant to a contract with the Vancouver and Lulu Island Railway Co. and the Canadian Pacific R. Co., the lessee of the railway, the respondent company, some years ago, equipped the railway as an electric railway and were working it under the terms of the contract by authority of an Act of the Parliament of Canada (ch. 66, 6 & 7 Edw. VII.). The agreement requires the respondent company to provide an "electric car service" between Granville St. in the City of Vancouver, and Steveston on the Fraser Delta (a distance of about 15 miles) in part over the Vancouver and Lulu Island Railway and in part over a track owned by the C.P.R. Co. which, it may be assumed, was constructed under statutory authority as part of that company's system. The Vancouver and Lulu Island Railway though originally constructed under the authority of provincial legislation was afterwards declared to be a work "for the general advantage of Canada" and thereupon became

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and is a Dominion railway. The respondent company was incorporated under the English Companies' Act, acquired the property and rights of the Consolidated Railway Company, a British Columbia corporation, and own and operate lines of electric railway and other works in Vancouver and the suburbs of Vancouver and in other places in British Columbia under the authority of the Consolidated Company's special Act (B.C. statutes, 1896, ch. 55), all these works being local works under the exclusive jurisdiction of the provincial legislature. It may be a question whether the intention of the legislation authorizing the agreement above mentioned (ch. 66, 6 & 7 Edw. VII.) was to give the respondent company the status of a Dominion railway company *vis à vis* the enactments of the Dominion Railway Act, or whether the company is merely authorized to exercise, as contractor with the C.P.R. Co. and the Vancouver and Lulu Island R. Co., powers which are directly conferred upon and are the powers of the last mentioned companies which they are permitted to execute by the respondent company as their instrumentality. The point is not material to any question arising now, and I mention it to make it clear that nothing said in relation to this appeal should be treated as affecting any question which may hereafter arise concerning the status of the respondent company or the responsibility of either of the railway companies mentioned.

The line operated by the respondent company for the C.P.R. Co. and the Vancouver and Lulu Island R. Co. crosses numerous streets within the territorial boundaries of Vancouver which occur at the usual intervals and after passing the southern limit of the municipality (about a mile from the Granville St. terminus) in the municipality of Point Grey until the north arm of the Fraser is reached.

The respondent company contends that it is not judicially amenable in respect of harm caused to persons and things lawfully passing on a public highway across the line it operates by reason merely of the fact that such harm is ascribable to the unusual and dangerous speed of the car causing it; in short, operating the railway, as it contends under the provisions of the Dominion Railway Act the matter of the speed of its cars (it is argued) rests in its own uncontrolled discretion, save in cases in which that discretion is affected by the express provisions of the Railway

Act or by some regulation on the subject by the Board of Railway Commissioners.

It has often been laid down as a general proposition that the grantee of statutory powers is not in general responsible for harm resulting from that which the legislature has authorized provided it is done in the manner authorized and without negligence; but that an obligation rests upon persons exercising such powers not only to exercise them with reasonable care but in such a manner as to avoid unnecessary harm to the persons or property of others: *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430, at 438; *C.P.R. Co.* v. *Roy*, [1902] A.C. 220, at 231; *East Fremantle* v. *Annois*, [1902] A.C. 213, at 218; *Hewlett* v. *Grand Central*, [1916] 2 A.C. 511. The principle has often been applied and has been always considered to impose upon street railway companies an obligation to regulate the speed of their cars in and upon the public streets in such a way as not unduly to endanger the safety of the public.

All such general rules and principles are, however, in the last analysis rules of construction, and must give way to an express or implied contrary intention. "Obviously," said Bowen, L.J., in *Truman* v. *London Brighton and South Coast R. Co.*, 29 Ch.D. 89, at 108, "the question in each case turns on the construction of the Act of Parliament."

In *East Fremantle* v. *Annois*, *supra*, at p. 217, referring to a remark of Abbott, C.J., in *Boulton* v. *Crowther*, 2 B. & C. 703, at 707, that if the donee of a statutory power act "arbitrarily, carelessly or oppressively" the law has provided a remedy. Lord Macnaghten observed that such expressions, although as applied to the circumstances of a particular case they probably create no difficulty, are nevertheless when used generally and at large neither precise nor exact as to scope or meaning. In a word, his Lordship said "the only question is, has the power been exceeded? Abuse is only another form of excess." "There is," said Lord Selburne in *Truman* v. *London, Brighton and S. Coast R. Co.*, *supra*, at p. 53, "no cause of action on the ground of negligence in the manner of doing what is authorized if that . . . is in fact authorized"; that is to say has been declared to be lawful. If the particular thing "complained of is done in the place and by the means contemplated by the legislation" it is not an actionable wrong: *C.P.R. Co.* v. *Roy*, *supra*, (at p. 227); *Hamilton St. R.* v. *Weir*, 51 Can.

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S.C.R. 506, 25 D.L.R. 346; *Hewlett* v. *Grand Central, supra.* An electric railway company having authority by statute to place its transmission wires above the streets on poles or under ground was held not to be answerable in negligence for the consequences of not adopting the plan less dangerous to the public; the exercise of this discretion vested in the company was not reviewable by a jury: *Dumphy* v. *Montreal Light, Heat and Power Co.*, [1907] A.C. 454.

The question whether a railway company whose railway is being worked under the authority of the Dominion Railway Act in answerable in negligence for running its trains over a highway crossing at a speed which makes it impossible for the locomotive engineer with the appliances at his command, or with due regard to the safety of his passengers to exercise any effective control over the train with a view to the safety of persons crossing the track on the highway is therefore reducible to the question: Is such management of the trains legalized? And the answer to the question must, to repeat the remark of Bowen, L.J., turn upon the construction of the enactments from which the authority to work the railway is derived.

The difficulty of holding railway companies to be under the duty generally to regulate the speed of their trains at highway crossings in accordance with some standard of reasonableness to be determined and applied by a jury is obvious. Decisions upon questions of speed, it may be assumed, affect more radically the management of a railway line than decisions upon questions of what may be called collateral precautions, in providing for example, signalling devices or gates and watchmen at highway crossings. Reasonableness means, of course, reasonableness in all the circumstances. Is it for a jury to say whether a fast service between Montreal and Toronto or Montreal and Ottawa, for example, necessitating the passing of numbers of highway crossings at a rate of speed precluding the possibility of exercising in most cases control over the trains sufficient in itself to afford any safeguard for persons using the highway—is the reasonableness of such a service entailing such consequences to be left to a jury to determine? Is the fetter upon the railway company's discretion involved in such a rule within the contemplation of the Railway Act? I think the decision of this Court in *Grand Trunk R. Co.* v. *McKay*, 34 Can. S.C.R. 81, may be taken broadly to establish the

proposition that the discretion of the railway company exercised *bonâ fide* with regard to the speed of trains on a Dominion railway worked in the usual way by steam is not as a general rule amenable to judicial review with reference to some standard of reasonableness to be determined by a judicial tribunal.

It does not follow that in no circumstances does a legal obligation rest upon a company operating a railway under the Dominion Railway Act in relation to the speed of its trains in approaching or crossing a highway. For example, the Act provides for certain precautions with the object of warning the public of the approach of trains and the enactments prescribing these precautions presuppose that railway trains are not run at a speed which makes these warnings useless; and I am not prepared to say that for harm caused by a train running across a highway at such a speed as to nullify the utility of the prescribed statutory signals, other efficacious signals not being provided, the railway company could not be made answerable as for negligence. And the circumstances of a particular emergency may obviously cast a duty upon the servants in charge of the train to moderate its speed or bring it to a stop; so also the permanent conditions of a particular crossing or the practice of the railway in relation to it (a point to which I must again advert) may give rise to a duty to take extraordinary measures there for the protection of the public by controlling train speed where other effective measures are impossible or neglected: *Rex* v. *Broad*, [1915] A.C. 1110 at 1113, 1114; 33 N.Z.L.R. 1275 at 1291, 1299.

In addition to the general considerations above alluded to, there is another consideration which applies with some force to railway works under the Dominion Railway Act. The jurisdiction of the Dominion with regard to railways is limited to what may be called through railways, that is to say, railways passing beyond the limits of a province or connecting two provinces, and local railways declared by the Dominion Parliament to be works for the general advantage of Canada. Down to the time when the Railway Act received its present general form in the year 1888, the practice of making such declarations on grounds and for reasons having no kind of relevancy to the substance of the declaration itself had not come into vogue. Generally speaking, such declarations were reserved for undertakings connected organically with

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through railways. The responsibilities of the Dominion railway companies with regard to through traffic should not be lost sight of in considering the effect of the Dominion Railway Act in this regard.

The considerations, however, ordinarily relevant where the question concerns the management of a Dominion railway worked by steam, are largely without application to the undertakings operated by the respondent company under the authority of 6 & 7 Edw. VII. ch. 66. To make this clear it is necessary to refer to the specific provisions of the agreement of 1905 between the C.P.R. Co. and the Vancouver and Lulu Island R. Co. and the B.C. Electric Co. ratified by that statute.

The agreement requires the respondent company to maintain a "good, proper and efficient electric car service equipped with modern cars and supplied with the latest appliances"; and it prescribes that the service "shall be equal in every respect to the service now in effect on the lines owned and operated by the party of the second part between Vancouver and New Westminster."

By sec. 16 of the agreement it is stipulated that the respondent company shall protect and indemnify the C.P.R. Co. against all loss, damage or claims which may arise in consequence of the working of the railway under the agreement and

> will bear and pay all expenses incurred in doing all acts, matters and things as they are now or may hereafter be required for the maintenance and operation of the said railway in conformity with the laws of the Dominion of Canada

—meaning of course the Dominion law as affecting the undertaking in question. By another clause, inspection by the superintendent of the Pacific Division of the C.P.R. Co. is provided for and the respondent company undertakes to remedy any defects in the service of equipment of the railway to the satisfaction of the superintendent or any official appointed by him to make such inspection. It is quite evident that all the parties to these agreements have assumed—and carried the assumption into effect in practice—that important provisions of the Dominion Railway Act enacted for the protection of the public at highway crossings had no application to the railway when worked under the provisions of this agreement. The cars in use are of a type familiar in this country as the interurban trolley car worked by electric

motor, equipped with compressed air whistle and foot gong, brakes and reversing apparatus, having neither steam whistle nor bell weighing "at least 30 pounds" as prescribed for "engines" or "locomotives" by the Dominion Railway Act. The photographs in evidence indicate, and we may assume correctly, that at Townsend Avenue the sign "Railway Crossing" prescribed by that statute does not appear.

In this, no doubt, the purpose of the agreement as touching the character of the cars was faithfully carried out. The cars contemplated by the agreement are certainly not "locomotives" or "engines" within the meaning of the Dominion Railway Act. The intention of the parties was to establish a service which should be remunerative, and within the city limits, at all events, the agreement must be taken to have contemplated stopping at street intersections as in the working of a street railway service, for taking up and setting down passengers, and this would necessarily involve the use of such cars and appliances as would enable the cars to be easily started and readily brought to a stop. With such cars the working of a "proper and efficient" service as regards measures required for the safety of the public on the highways (by regulation of speed and otherwise) as well as in the interest of the patrons of the railway—would in the case of a short railway of 12 or 15 miles in length, having no through connections, present no greater difficulty than the working of an ordinary street car system in a large city.

By the special Act, ch. 66, 6 & 7 Edw. VII., it is declared that "subject to the provisions of the Railway Act" the agreement referred to and another to which a brief reference will be necessary set forth in the schedule to the statute, shall be legal and binding upon the parties thereto and it is enacted that "such respective parties may do whatever is necessary in order to give effect to the substance and intention of the said agreements."

Light is thrown upon the effect of the words "substance and intention" in the ratifying statute by a reference to the agreement of 1904 between the C.P.R. Co. and the respondent company which the statute also authorizes the respondent company to carry out. This agreement requires the company to establish an "electric street car" service between the corner of Robson St. and Granville St. (one of the principal thoroughfares in Vancouver)

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and Kitsilano, a route lying entirely within the municipal boundaries (except where it passes over the C.P.R. Bridge at False Creek) crossing on the way numerous city streets. The operation of this service required the running of the cars on Granville St. between Robson St. and the northern terminus of the railway bridge over the respondent company's tracks and this part of the service being operated over the respondent company's own street railway in Vancouver, a provincial undertaking, neither in whole or in part declared to be "a work for the general advantage of Canada," it follows that the parties must have had in view the use of cars of a character conforming to the provisions of the provincial law and to the arrangements between the respondent company and the municipality with respect to its street car service in Vancouver; and by the very terms of the agreement itself, the service provided is to be an extension of that street car service and is to be a continuous service from the corner of Robson and Granville Sts. to Kitsilano and back.

As regards this agreement there could be no manner of doubt that what was contemplated was "a street car service" in the strict sense "proper and efficient" as the agreement requires.

It follows from what I have said that the "substance and intention" of the ratified agreements was that a "street car service" and an "electric car service" should be provided by means of cars not equipped with steam whistle and bell in compliance with the requirements in respect of locomotives, of the Railway Act, but of the kind used by the respondent company in its already established electric car services. The agreements contemplated, I repeat, as protection of the public at highway crossings, and on the highway generally against the dangers incidental to the working of the service not the specific precautions prescribed by the Railway Act when such precautions would be unusual and impracticable but such precautions as would properly be taken in the operation of "proper and efficient" services of the character authorized; the "law of the Dominion of Canada" as pointed out above, in sec. 16 of the agreement means the law as it affects the particular undertaking.

That such cars should be equipped with efficient brakes is obviously contemplated—brakes, that is to say, efficient for use in such a service; but unqualified license as to the speed of cars might reduce this requirement to an idle formality.

The public would be entitled to expect the observance in both these services of the safeguards and precautions commonly observed in the operation of services of the same character for the protection of persons using the streets. That is what the agreements contemplate and that therefore is what the statute contemplates and that is undoubtedly what the respondent company professed, and no doubt quite honestly attempted to carry out.

Such being the effect of the special Act it is proper to note that by sec. 3 of the Railway Act the provisions of the special Act in so far as it is necessary to give effect to them shall be taken to override the provisions of the general Act.

Conformably to the spirit of that provision it is, I think, to the character of the service established and authorized (which excludes the use of most important special precautions for the safety of the public at highway crossings prescribed by the General Railway Act) that we must look for the purpose of ascertaining whether or not the general rule against negligent execution of the statutory powers applies in the matter of the speed of cars at such crossings. It results, I think, from what I have said, that the proper answer to the question is, yes.

As regards the crossing and the car in question there are, however, two reasons which put the question of the duty of the appellant company in relation to speed beyond question. First, as to the crossing—there was a stopping-place there and in the ordinary course of operation the car would be brought under control to enable the motorman to stop for passengers; and there could consequently be no general overriding necessity or convenience to prevent the taking of proper measures for the safety of the public on the highway; as to the car, the fact alone that it was not equipped with proper brakes was sufficient to limit in the special circumstances any otherwise uncontrolled discretion as to speed, assuming such discretion as a general rule to exist.

Two further questions arise: First, was the trial Judge right in finding as a fact that, had the car been equipped with a proper brake, Hayes, the motorman, would nevertheless have been unable to stop it or to check its speed sufficiently to avoid a collision or to make it harmless if one had occurred? My view is that the finding cannot now be interfered with in this Court, first, because it was concurred in by the majority of the Court of Appeal and it is at

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least quite impossible to treat the conclusion that the plaintiff had not adequately established the affirmative of this issue as clearly erroneous. And secondly, I agree fully with the Chief Justice of the Court of Appeal in his opinion that on the evidence presented, Murphy, J., could not properly have reached any other conclusion and that the testimony on which the appellant relies for impeaching the finding of the trial Judge is quite worthless. The evidence relied upon is that of one Andrews who says that he was acquainted with the car that caused the injury and that going at a rate of 35 to 40 miles an hour at the place where the accident occurred he could with the brake in proper order have brought the car to rest, to use his own language, in "about 12 poles" that is to say within a space of 1,200 ft. He is then asked to say within what distance he could reduce the speed from 40 miles an hour to 10 miles an hour assuming the appliances to be in perfect order. His testimony given in answer to that question, put by Murphy, J., himself, was that he thought he could effect such a reduction while the car was traversing a space of about 200 ft. I agree with the Chief Justice of the Court of Appeal that the trial Judge was entitled to disregard this evidence.

It is too obvious for argument that both statements of the witness cannot stand; which is to be accepted? It is evident that Murphy, J., did not consider he had evidence before him justifying the conclusion that with perfect appliances the speed of the car could be reduced from 40 to 10 miles an hour in less than 400 ft. and this view cannot be satisfactorily explained away on the assumption that the trial Judge misunderstood the answer to a pointed question asked by himself.

The next question is: Does the principle in *Loach* v. *B.C. Electric R. Co.*, 23 D.L.R. 4, [1916] 1 A.C. 719, apply in view of this finding of the trial Judge? Counsel for respondent relies upon the following passage in the judgment of Lord Sumner, speaking for the Judicial Committee, at p. 725, (23 D.L.R. 8):—

> Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt, it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequence of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

Counsel for respondent argues that Hayes' negligence really came to an end when he put the emergency appliances into operation on seeing the horses approaching the railway tracks about 16 or 18 ft. west of the west rail, although the effect, he admits, of his negligent conduct did not; and this, he argues, distinguishes Hayes' personal negligence from the negligence of the company in not providing the car with a proper brake, while (he argued) Hall's negligence in going on to the track after Hayes had done everything he could to stop the car, intervened between the negligence of Hayes and the final catastrophe. The acceptance of this argument seems to lead to the rather embarrassing position that if the rate of speed had been such that the car (equipped with a proper brake) could have been stopped in time to avert the accident the company might have been responsible; while given the higher rate of speed at which a proper brake would be ineffective the company would escape responsibility.

But assuming that in such a case as this it is possible to separate the negligence of the official responsible for default in failing to provide a proper brake from the negligence of the motorman who runs at a speed which is excessive not only in view of the fact that the brake is defective, but would have been excessive, that is to say, unreasonably excessive, even if the car had been equipped with proper appliances—assuming that the negligence of Hayes and that of this official can be considered as distinct negligences and that the two together ought not to be regarded as constituting one negligence, (see the judgment of Lord Watson in *Smith* v. *Baker*, [1891] A.C. 325, at 352), I think the judgment in *Loach's* case, when due effect is given to the whole of it, requires us to hold that the trial Judge was entitled to find Hayes' negligence to have been the sole cause of the injury of which the appellant company complains.

I think this conclusion follows from the observations upon *Brenner* v. *Toronto Railway Co.*, 40 Can. S.C.R. 540. To make this clear it will be necessary very briefly to indicate what was involved in that case. The plaintiff, a girl of 18, being on the south side of Queen St. in Toronto and having to cross the street saw a car coming towards her from the east, and assuming that she had time to cross before the car would reach her line of advance, she proceeded, and arriving at the car track, stepped on to the track in front of this car without having taken any precaution to ascer-

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tain its position before doing so and without having given the motorman any warning of her intention. She was immediately struck down and terribly injured.

The plaintiff's case at the trial was that the car, when she saw it, was at a considerable distance from her and that she was reasonably entitled to assume, if it was proceeding at the usual speed, that she could cross the track before it came up to her; that it was due to the motorman's negligence in driving the car at an excessively high rate of speed that this reasonable expectation was unfulfilled; and that this negligence of the motorman was the sole cause of the accident. The defendant's case was that when the plaintiff left the sidewalk after seeing the car approaching it was only a short distance east of her with power thrown off and running at about 6 miles an hour; and that the motorman reasonably assumed that she had no intention of crossing in front of the car until as she approached the rail her seeming want of attention to the noise of the gong which he was sounding excited his apprehensions and he applied first the brake and afterwards the reversing apparatus; but that after he had done this she stepped in front of the car and was knocked down. The plaintiff alleged also that assuming the car was moving at a moderate rate of speed, as the defendants alleged, the motorman was negligent in not stopping sooner. The jury rejected the plaintiff's case in its entirety finding the plaintiff's negligence to be the sole cause of her injury. Their findings acquitted the motorman of negligence in the matter of speed involving, in view of the Judge's charge, a finding that the motorman if he had more swiftly divined the plaintiff's intention to cross the track, could have stopped the car in time to avoid a collision, but negativing the charge of negligence in failing to do so.

On appeal to the Divisional Court the charge of the trial Judge was attacked in this way. The scene of the accident was immediately opposite the terminus of University Ave., a street which runs north from the northerly boundary of Queen St. A few feet east of University Ave., another street, University St., runs in the same direction from the northerly limit of the street also without crossing it. One of the rules of the company required the motorman on approaching a "crossing" to throw off the power or reduce the speed of his car so as to get it under control with a

view to emergencies. The Divisional Court held that in approaching the easterly limit of University St. the car was approaching a "crossing" and that this rule applied. The motorman in fact did not throw off his power or reduce his speed until he reached the easterly limit of University Ave. The plaintiff impeached the direction of the Judge and asked for a new trial on the ground that under a proper direction they might have found that the motorman was negligent in not throwing off power or reducing speed on approaching University St. and that they might moreover have found that if he had done so the motorman might in consequence of the reduced momentum, thereby occasioned, more effectually have checked his car on the application of the emergency apparatus and thus left the plaintiff a fraction of time more to escape. The Divisional Court gave effect to this contention. On appeal to the Court of Appeal it was held that there was no misdirection, that the rule in question had been sufficiently brought to the attention of the jury. In this Court the defendant company contended that supposing the rule might more pointedly have been brought to the attention of the jury on the issue of the motorman's negligence, a new trial ought nevertheless to be refused because when the admitted facts were considered with the conclusions of fact necessarily involved in the findings of the jury, it was clear that the plaintiff must fail because, assuming the motorman had been negligent in failing to observe the rule and that this negligence was one cause of the accident, still the plaintiff's negligent conduct was such that consistently with the conclusions involved in the verdict which were not affected by the alleged misdirection and the admitted facts the jury could only have found that this conduct was a "direct and effective cause" of the mishap. In other words, assuming the mishap to have been due in part to the negligence of the motorman and in part to the negligence of the plaintiff, then under the undisputed principles of the law of negligence the plaintiff could not in such circumstances recover. This contention prevailed with Girouard, J., and myself.

The effect of their Lordships' observations at pp. 725 and 726 appears to be that their Lordships disapprove of this view of *Brenner's* case.

The broad principle is, of course, undisputed (it is distinctly recognized in the last paragraph of their Lordships' judgment in *Loach's* case) that a plaintiff whose negligence is a direct cause of

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the injury complained of cannot recover even though the accident would not have occurred but for the defendant's own negligence; in other words, where the injury complained of is "directly" caused by the negligence of the plaintiff and the defendant. (See Lord Esher in *The Bernina*, 12 P.D. 58, at 61, and Lindley, L.J., in the same case at 88 and 89, and Willes, J., in *Walton* v. *London Brighton and South Coast R. Co.*, 1 H. & R. 424, at 429 and 430.) That is to say if the injury is not only the actual consequence but the consequence which any reasonable person in the plaintiff's position, knowing what the plaintiff knew, must have seen to be the probable consequence of his negligence and the chain of causality is not interrupted by the negligence of the defendant, then it is settled law that the plaintiff cannot recover. The effect of their Lordships' disapproval of the judgment mentioned seems to be that on the facts, undisputed or involved in the findings in *Brenner's* case which were unaffected by the misdirection, if there was any, the jury would have been entitled to find that the plaintiff's negligence was not a "direct" cause of the accident in the sense above indicated if they had found that the motorman was negligent in not observing the rule and that this negligence was one of the causes of the accident. There was in fact, it may be noted, nothing in the judgment referred to at p. 725 expressed or intended as a "comment" on any of the judgments in the Divisional Courts and one must, I think, assume especially in view of the sentence at the top of p. 726 that the observation on p. 725 was not intended as *obiter* and was not directed to any single sentence detached from its context or considered apart from the concrete issues raised by the *Brenner* appeal.

The plaintiff in *Brenner's* case had deliberately, knowing the car to be near and approaching her, stepped on the track in front of it without looking to see exactly where it was until, as she said, the catastrophe was "upon her" and, as the jury found, without any reasonable excuse for doing so; and after the motorman divining her intention, had made every proper effort to avoid a collision by trying to stop the car with his emergency apparatus, which he could have done had she given any reasonable warning of her intention to cross the track.

The effect of the approval of the judgment in the Divisional Court in *Brenner's* case seems to be that the negligence of the

motorman, in the case before us, notwithstanding his efforts to stop the car, must be regarded as continuing in the sense of being operative down to the moment of impact, while their Lordships expressly declare in *Loach's* case that the negligence of the teamster is to be considered to have ceased to operate when looking up on Sands' exclamation he, for the first time, became aware that a car was approaching but too late to enable him to escape.

ANGLIN, J.:—In the same accident in which the horses were killed and the wagon wrecked for loss of which the present plaintiff sues, one Sands, who accompanied the driver, also lost his life. In an action brought by his administrator against the present defendants, although the jury had found contributory negligence by Sands, the Judicial Committee of the Privy Council held them answerable for his death, (*Loach* v. *B.C. Electric R. Co.*, 23 D.L.R. 4, [1916] A.C. 719), on the ground that they

> could and ought to have avoided the consequences of that negligence and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it.

In that decision their Lordships have authoritatively determined, as stated in the head-note to the report, that:—

> The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages, if the defendant, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence.

Lord Sumner answered the contention that the contributory negligence of Sands (which was the same as that found by the trial Judge against the present plaintiff) had continued up to the moment of the collision by stating that "it does not correspond with the fact"; and his Lordship adverted to the distinction between negligence and its consequences. These observations are directly applicable to the facts as disclosed by the evidence and found in the present case.

The difference between *Loach's* case and the case at bar on which respondents rely is that, whereas in the former the jury had found that "the motorman could have stopped the car if the brake had been in effective condition," in the case now before us the trial Judge, though he held the brake was defective, and

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thought that, had it been efficient, the horses might have got over the crossing, did "not think (he could) hold it proven that the wagon would also be across, and, if not, the horses would probably have been killed and certainly the wagon would have been damaged."

Nevertheless, "applying the law as laid down in *Loach* v. *B.C. Electric R. Co.*, in reference to this same accident to the facts as found at the conclusion of the trial," the Judge held the defendants liable on the ground that by running at a reckless rate of speed in approaching a dangerous crossing the motorman had disabled himself from preventing the collision, which he might otherwise have avoided. If the rate of speed under the circumstances amounted to negligence, and disability to avoid the collision resulted from it, it was just as truly "'ultimate' negligence which makes the defendant liable" as was the sending out of the car with a defective brake, which their Lordships so characterized in *Loach's* case because of the motorman's consequent incapacity to avoid killing the unfortunate Sands.

That it would be negligent, without the warrant of statutory authority, to drive a railway train or a tramcar when nearly approaching an unprotected highway level crossing at a speed approximating 40 miles an hour (as was done in this case) is indisputable. Under some circumstances it might be more than merely negligent; it might be criminal.

The defendants are a Dominion railway company. They seek to justify the otherwise indefensible conduct of their motorman by invoking the Dominion Railway Act; and they cite the decision of this Court in *Grand Trunk R. Co.* v. *McKay*, 34 Can. S.C.R. 81.

It was determined in that case that the speed of a train passing through a thickly peopled portion of a city, town or village, unless so restricted by a special order of the Railway Committee of the Privy Council (now the Railway Board), need not be limited to 6 (now 10) miles an hour, under sec. 8 of 55 & 56 Vict. ch. 27 (now sec. 275 (1) of the Railway Act), when the fences on both sides of the track are maintained and turned into cattle guards at highway crossings as prescribed by sec. 6 (now sec. 254 (2)) of that Act. (But see sub-sec. 3 of sec. 275, as enacted by 7 & 8 Edw. VII., ch. 32, sec. 13.) The decision in the *McKay* case is also authority for the proposition that, at all events in the case of a steam rail-

way, such as was there under consideration, if the requirements of the statute and of any orders or regulations duly made thereunder as to the protection of a highway level crossing are complied with, there is no legal limitation which would make approaching and running over it at any rate of speed practically necessitated by the exigencies of rapid transit *per se* illegal or negligent *quoad* the public using such highway. That was merely an application of the rule that an action will not lie for the doing of that which is authorized by statute. What is *necessary* for accomplishing the purpose of a legalized undertaking will be deemed within the purview of the powers conferred for carrying it out.

No doubt the presence in it of sub-sec. 1 of sec. 275, already adverted to, and of sub-sec. 4 of the same section (as enacted by 8 & 9 Edw. VII., ch. 32, sec. 13), which limits the speed at crossings where there has been an accident, and of sec. 30 (*g*) and secs. 237 and 238 (8 & 9 Edw. VII., ch. 32, secs. 4 & 5) affords strong ground for the contention that in the case of steam railways, with which it is chiefly concerned, the Railway Act impliedly sanctions trains approaching and passing over the ordinary rural highway level crossing at a rate of speed limited only by the duty of not unnecessarily imperilling the safety of the trains and of passengers and employees. The chief purpose of authorizing the establishment of steam railways—rapid transit between widely separated points—(*Wakelin* v. *London and South Western R. Co.*, 12 App. Cas. 41, 46)—would be frustrated in Canada if the trains run upon them were obliged to reduce speed on approaching every unprotected rural highway which they cross at grade level.

I do not understand, however, that *Grand Trunk R. Co.* v. *McKay*, *supra*, or any other decision is authority for the proposition that statutory powers may be exercised with reckless disregard for the common law rights of others. Even in cases where the Act, speaking generally, authorizes the running of trains at a high rate of speed and the Board of Railway Commissioners has not made an order for special protection under sec. 237 or sec. 238 (8 & 9 Edw. VII., ch. 32, secs. 4 and 5) or, in the case of urban crossings, an order regulating speed under sec. 275 (3), circumstances may exist at particular level crossings which involve peril from running at high speed obviously exceptionally great. Failure to have a train under such control that it can be stopped, or its speed sufficiently reduced to avoid injury *at such a crossing*, when there

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would be a reasonable opportunity to do so if the speed were moderate, would amount to reckless disregard of the rights of others. As put in the very recent case of *Hewlett* v. *Great Central R. Co.*, 32 Times L.R. 373, by the Lord Chief Justice of England, presiding in the Court of Appeal,

> The common law said that when statutory powers were conferred in the absence of special provision to the contrary, those powers must be exercised with reasonable care.

Although the House of Lords ([1916], 2 A.C. 511), applying the principle of the decision in *Moore* v. *Lambeth Waterworks Co.*, 17 Q.B.D. 462, reversed the judgment of the Court of Appeal because the danger had been created not by the doing of that which the statute specifically authorized, but by a subsequent diminution of light owing to the exigencies of the war, for which the company was not responsible and against the consequences of which it was under no obligation to provide, Lord Sumner took occasion to state the principle of law which governs the operation of railways in these terms:—

> In such cases the authority in question is given in general terms; it is, for example, authority to work railways and to run railway trains in the undertakers' discretion; hence it is reasonable to infer that the legislature, in using such general terms, and in authorizing for the undertakers' benefit what would otherwise be a nuisance, meant them to exercise their authority with reasonable care, and not without it.
>
> Where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers: *Southwark & Vauxhall Water Co.* v. *Wandsworth Board of Works*, [1898] 2 Ch. 603, 611.

The common law rights of persons using highways are abrogated or subordinated only to the extent necessary to enable railway companies given crossing rights to exercise their statutory powers in a reasonable manner having regard to the purpose for which such powers are conferred: *Roberts* v. *Charing Cross, Euston and Hampstead R. Co.*, 87 L.T. 732.

The photographs in evidence and the testimony as to the motorman being unable, owing to the station built in the angle between the railway track and the highway and close to both, intercepting his view, to see approaching vehicular traffic on the highway until it was almost on the railway (the driver of the wagon probably could not see the coming car until his horses were actually on the rails) afford ground for thinking that the danger

at the crossing now under consideration was exceptionally great. But this aspect of the case was not dwelt upon below, and I allude to it chiefly to preclude the misapprehension that this judgment proceeds on the assumption that the Railway Act authorizes the running of trains at very high speed over every unprotected rural highway crossing, however exceptional the danger due to the surroundings.

As Sedgewick, J., and Davies, J., both pointed out in the *McKay* case, at pp. 89 and 98, the provision made in Great Britain for the maintenance and operation of gates wherever a railway crosses a highway at the level is economically impracticable in Canada. In lieu of it parliament has enacted that certain signals and warnings—the blowing of a steam whistle and the ringing of a bell (Railway Act, sec. 274), and the erection of a painted signboard (sec. 243)—should be substituted. The statutory authorization of running trains at a high and undoubtedly dangerous rate of speed when approaching and passing over highway level crossings, which would at common law be illegal and would render the company answerable for resultant injuries, must, I think, be taken to be conditional upon the company providing and utilizing the means of danger-warning substituted by the Railway Act for the impracticable gates, and also upon their complying with the explicit provisions of sec. 264 as to equipment with efficient brakes, which, of course, implies maintaining them in good working order. (No doubt for the protection of passengers and employees it is also a pre-requisite that the roadbed should be properly constructed and maintained.) Unless these requirements of the statute intended to lessen the danger inseparable from the running over unguarded highway level crossings at a high rate of speed are complied with, the statutory sanction, in my opinion, cannot be invoked, the common law standard of reasonableness applies, and running at a speed which, under all the circumstances, is unreasonable is unwarranted and amounts to negligence towards the public lawfully using such highways.

For the safety of that public the statute prescribes that

> Every *locomotive* shall be equipped and maintained with a bell of at least thirty pounds in weight and with a steam whistle (sec. 267), (and that)
>
> When any train is approaching a highway crossing at rail level, the *engine* whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be *rung* continuously from the time of the sounding of the whistle until the *engine* has crossed such highway (274 (1)).

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At every highway level crossing the company is required to maintain a sign-board with the words "railway crossing" printed on each side thereof in letters at least six inches high (sec. 243). This latter precaution is no doubt quite practicable in the case of electric tramlines or railways operating on private rights of way through rural districts. That it was not taken in the present case, as the photographs of the locus in evidence shew, affords an indication that the defendants did not consider the section prescribing it applicable to an electric tramway such as that which they operated. That is a more reasonable presumption than that they deliberately violated the statute. I am not, however, to be taken as holding that sec. 243 was not applicable. On the contrary, I incline to think it was and that failure to comply with it would probably, without more, suffice to render the running of the tramcar at a dangerously high rate of speed when approaching and passing over the highway crossing, if otherwise justifiable, unlawful.

But an electric tramcar is neither a "locomotive" nor an "engine" within the meaning of secs. 267 and 274 of the Railway Act. It is not equipped with the appliances for giving warning prescribed by sec. 267. Evidence to that effect was not given, it is true, but it is a matter of such common knowledge that it is a proper subject of judicial notice that the electric tramcar carries neither a steam whistle nor a "bell of at least thirty pounds in weight," nor indeed any bell which can be "rung"; and it would indeed be startling to tramway companies were it held that the Railway Act imposes such an obligation. The compressed air whistle sometimes supplied and the ordinary foot-gong operated by the motorman, while reasonably sufficient as substitutes for giving warning at shorter distances of the approach of comparatively slow-moving tramcars, do not serve the same purpose as the steam whistle and the heavy locomotive bell; and it is scarcely practicable for a motorman, if properly attending to his other duties, to keep the foot-gong continuously sounding while traversing eighty rods before passing over every highway crossing. The sections of the Railway Act which prescribes these safeguards in lieu of the impracticable gates, equipment with and use of which are made conditions of the implied authorization to run at a high rate of speed over level highway crossings, were clearly not meant to apply to electric tramcars. The special provisions made for electric cars by secs. 277, 278 and 393 (2) of the Railway Act

tend to confirm this view. Moreover, the practical necessity, on which the implication of the right to run trains on steam railways over unprotected highway level crossings (where the statute or an order made under it has not prescribed a reduced speed) at the same high rate of speed as that maintained on the company's private right of way chiefly rests, does not exist in the operation of the ordinary electric tramcar, whose speed can be so readily reduced and so rapidly increased that it is quite practicable to exact that it shall approach and pass over these crossings at such moderate rate of speed as should commend itself to a Court or jury as reasonable under all the circumstances. It follows that the Railway Act does not authorize the running of tramcars when approaching and passing over unprotected highway level crossings at a dangerously high rate of speed. In the absence of any maximum speed otherwise fixed by law for the operation of a tramcar when approaching and passing over such crossings the standard of reasonableness must govern, and any speed so great that the car is not under reasonable control, having regard to the circumstances, must be deemed unlawful.

The trial Judge found—in my opinion properly—that the defendant's tramcar was running at an excessive rate of speed in approaching the crossing. He also found that there had been contributory negligence by the plaintiff's driver. He further found upon sufficient evidence that but for the disability created by the excessive and unreasonable rate of speed the motorman could have avoided the collision notwithstanding such contributory negligence. I am, with great respect, of the opinion that on these findings his conclusion that the defendant company was liable under the law as laid down in *Loach* v. *B.C. Electric R. Co.* was sound and should not have been disturbed.

But, I am also of the opinion that the Judge's finding that it was not proved that an effective brake would have enabled the motorman to avoid the collision cannot be sustained. This Court is, no doubt, extremely loath to disturb such a finding when it has been affirmed by a provincial Appellate Court. In the present case, however, it seems to be quite clear that in the Court of Appeal there was a misapprehension of the evidence by the two Judges who upheld this finding. Macdonald, C.J.A. (with whom McPhillips, J.A., concurred), assumed that the witness Andrews had said that with an efficient brake the motorman could have reduced

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the speed of the car to 10 miles an hour "at the time of impact." Now when the motorman saw the horses upon, or about to enter upon, the crossing, he was still 400 ft. away. He says he immediately applied his brakes. His car was then running from 35 to 40 miles an hour. Andrews' testimony was that if going 40 miles an hour he could, with brakes in good condition, reduce the speed to 10 miles an hour within 200 ft. If so, it would seem reasonable to infer that he could stop the car in the remaining 200 ft. The affirmance of the trial Judge's finding in the Court of Appeal is therefore not entitled to the weight which must otherwise have been given to it. Indeed, it would appear that the trial Judge himself was probably under a similar misapprehension as to the effect of Andrews' testimony. Presumably referring to it, he says:—

> I would not care to be in a wreck that was struck with a street car that size with the momentum it would have of a 40 mile speed, and then getting down to 10 miles. Surely it would kill your horses just the same.

There is no question of credibility involved. Under these circumstances I think we may treat the finding that an effective brake would not have enabled the motorman to avoid the collision, as open to review.

Having regard to the admittedly defective condition of the brake, to the fact that the point of impact of the car was between the horses and the wagon, to the evidence of the motorman that he "did not want to bring the car up with a jar," that he "could have stopped it in a shorter distance by throwing people off their seats," that "after (he) hit" he "released the brakes to a certain extent to prevent a jar . . . threw off the reverse and eased off the brakes," and to the fact that even under these conditions the car stopped about 500 ft. beyond the crossing, I think it is a reasonable and proper inference that, had the brakes been in good condition and effectively applied, the car would either have been stopped before reaching the crossing, or its speed would have been so reduced that the horses and wagon would have had time to clear it. An additional moment or two would have sufficed. It is not wholly without significance that in the *Loach* case—of course it may have been on evidence somewhat different—Lord Sumner said:—"if the brake had been in good order it should have stopped the car in 300 ft."

Martin, J., in the Court of Appeal has dealt satisfactorily with

this aspect of the case and I agree with him that:—"On the inference to be drawn from facts about which there is no real dispute . . . the accident could . . . have been avoided if the brake had been in good order."

If this conclusion be correct the present case falls directly within the decision in *Loach's* case.

For the foregoing reasons I am, with respect, of the opinion that this appeal should be allowed with costs in this Court and in the Court of Appeal and that the judgment of the trial Court should be restored.

Anglin, J.

BRODEUR, J.:—I am of opinion that this appeal should be allowed with costs of this Court and of the Court below, and that the judgment of the trial Judge should be restored. I concur with my brother Anglin. *Appeal allowed.*

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Manitoba King's Bench, Mathers, C.J.K.B. August 9, 1917.

1. WILLS (§ III G—125)—PRECATORY WORDS—TRUST—ABSOLUTE ESTATE. Precatory words, such as "I wish," not capable of an imperative construction, do not create a trust, where from a perusal of the whole will it is manifest that an absolute estate was intended.

2. COSTS (§ II—20)—AGAINST INSTIGATOR OF ACTION—CO-DEFENDANT—"CASE OF SPECIAL IMPORTANCE OR DIFFICULTY."
A court has inherent jurisdiction to compel the real instigator or promoter of unfounded litigation, to pay the costs thereof, whether he is a party to the proceedings or not, and to award such costs against a co-defendant; a case does not become one of "special importance or difficulty," as ground for awarding more than the usual costs, because negligence and fraud were charged.

Statement.

ACTION for breach of trust in the administration of a decedent's estate. Dismissed.

E. J. McMurray and *J. F. Davidson*, for plaintiffs; *H. F. Tench*, for executor; *W. L. McLaws*, for defendants.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—On December 3, 1907, W. H. Perry died, leaving surviving him a widow, ten sons and one daughter. Some time before his death he made the following will:—

Plympton, Aug. 20, 1906.

I, W. H. Perry, sound in mind but sick in the body, do hereby make my last and only will.

I wish that the 1,200 acres of wild land I possess to be sold at the best conditions possible and the amount of said sale to be divided in equal shares between my eight sons living at home, viz., Charles Arthur, Walter Alexander, Robert Gordon, Edward Fancourt, Alfred Ernest, Frederic Bailey, Harvey Warren Wilkinson, Russell Earl.

In no case can they touch or handle their capital before they go and settle,

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or at the age of twenty-one years old. The said shares to be placed at interest in a savings department of a chartered bank at their proper names.

I leave and bequeath on my wife, J. Whitney, this farm, our home; and I wish the farm should be work as long as possible and whenever this would become impossible from any good cause; this said farm shall be sold, and the money obtained from said sale to go to my wife.

I wish and do want, that my only daughter, Edith Florence, shall inherit from her mother a share equal to that of the boys named above, and the balance to be divided in equal shares between all our children then living.

And I do appoint my son, William, the executor of this my only and last will.

Signed in the presence of:
D. Ferguson,
Thomas Wilson,
F. Royal, M.D.
W. H. Perry.

The will was duly probated by W. T. Perry the executor named in it, the legal work in connection therewith being performed by Mr. Grundy, a member of the law firm of Campbell, Pitblado & Co.

The testator and his family, prior to 1900, resided at Orillia, Ontario, where he carried on the business of a blacksmith. While there he had acquired some town real estate which, upon the advice of some friends, he had conveyed to his wife as a provision for her in case anything happened to him. The wild lands referred to in the will had been acquired by Mrs. Perry in exchange for this Orillia property. This exchange took place before the testator came to Manitoba.

The testator and his family came to Manitoba in 1900, and shortly thereafter he entered into an agreement to purchase the land referred to as the "home farm." At the time of his death in 1907, the purchase money was not quite, but nearly, all paid.

The widow and his eldest son, W. T. Perry, were present when instructions were given to Grundy to obtain probate of the will. The wild lands were then claimed by the widow as her own property, with the acquiescence of W. T. Perry, the executor; and consequently they were not included amongst the assets of the estate in the application for probate.

A short time afterwards, the widow, acting through W. T. Perry as her agent, began to deal with the wild lands, and before 1912, they had all been disposed of, chiefly in exchange for other real estate in Winnipeg and Norwood. 720 acres were exchanged for property on Langside St., Winnipeg; 240 acres for a house in Norwood, and the balance for sundry lots in Winnipeg, some of which were later exchanged for 240 acres of farm lands near Port-

age la Prairie. The solicitor's work in connection with the exchange of wild lands for Langside St. and Norwood properties was performed by Grundy, and the other exchange by Drummond-Hay of the same firm.

Later, Mrs. Perry entered into an agreement to sell the Langside St. property, and in February, 1912, the agreement of sale was sold to a man named Blanchard, for whom J. T. Haig acted as solicitor. The proceeds of this latter sale, $8,000, were paid over to W. T. Perry on February 5, 1912, by the cheque of Campbell, Pitblado & Co.

On September 14, 1912, J. T. Haig entered into an agreement to sell to Mrs. Perry lot 246 on Sherbrooke St., Winnipeg, for $27,225, payable $6,806.25 cash upon the execution of the agreement, and a like sum on September 14, in each of the years 1913, 1914 and 1915, with interest at 6%. The sale was negotiated by a real estate agent with whom Haig had listed the property for sale, W. T. Perry therein representing his mother. On September 18, 1912, the latter paid to Haig $6,431.25 and on the following day a further sum of $87.50; these two sums, together with $200 previously paid, representing the cash payment after the adjustment of taxes, etc., had been made.

Mrs. Perry failed to make the payment of either principal or interest which fell due under the agreement on September 14, 1913, but in lieu thereof, she gave her promissory note for $8,056, payable on July 14, 1914, to J. T. Haig and Isaac Pitblado, who owned a half interest in the lot sold, and she, at the same time, transferred to them her interest in some real estate situate on Balmoral St. and Young St., and gave a mortgage upon the home farm for $8,056, as security for the payment of the said promissory note. The Balmoral St. and Young St. lands were part of those received in exchange for the wild lands. Later, Mrs. Perry, with the consent of Haig and Pitblado, traded her interest in these latter lands for 240 acres farm lands near Portage la Prairie, hereinbefore referred to, these latter lands being conveyed to Haig and Pitblado.

The note was not paid when it fell due, and Pitblado and Haig sued Mrs. Perry upon it. After action, a settlement was arrived at, H. V. Hudson, a well known solicitor, therein acting for Mrs. Perry. By the terms of settlement Mrs. Perry was to give a quit-

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claim deed of the property on Sherbrooke St., purchased from Haig, and to give a mortgage upon the home farm and the 240 acres near Portage la Prairie for $5,000, payable $300 in November, 1915, and 1916, $400 in November, 1917, $500 in November, 1918, and the balance in November, 1919. This quit-claim deed and mortgage were to extinguish all claims against Mrs. Perry, all other securities were to be returned to her, and the $8,056 mortgage was to be discharged.

This settlement was duly carried out. The $8,056 mortgage was discharged, the quit-claim deed executed and the new mortgage for $5,000 was given to Haig.

On November 17, 1915, Mrs. Perry paid to Haig $200 on account of interest upon the mortgage, but no further payment has been made.

This action was brought on September 11, 1916, by all of the children of the late W. H. Perry (except G. H. Perry and E. F. Perry, who have assigned their title to C. A. Perry, and the eldest W. T. Perry), against the widow Jemima W. Perry and W. T. Perry, the executor, and against all the members of the firm of Campbell, Pitblado & Co.

The statement of claim charges the widow and executor with breaches of trust in dealing with and trafficking in the 1,200 acres of wild lands in such a way that their value has been totally lost to the estate, and alleges that such illegal dealing was upon the advice and with the active assistance of Campbell, Pitblado & Co.

It is charged against the defendant Haig that he knew the moneys paid to him upon the agreement of Mrs. Perry to purchase the Sherbrooke St. property were trust moneys which the executor could not properly invest in the purchase of such property. It is also charged that Haig obtained the promissory note and other securities hereinbefore mentioned by means of fraud and duress.

The relief asked against all the defendants is the repayment with interest of the moneys paid to the defendant Haig in respect of the Sherbrooke St. sale, together with $140 paid by Mrs. Perry for taxes thereon, the discharge of the mortgage for $5,000 upon the home farm and the Portage la Prairie farm, and the discharge of W. T. Perry from his executorship, and the appointment of a trust company in his place.

At the trial I intimated that in my opinion there was no evidence of fraud or misconduct on the part of Campbell, Pitblado & Co. or on the part of Haig or any other member of that firm. Since then I have gone carefully over my notes of the evidence, and I have now no hesitation in saying that there is not a tittle of foundation for the charges of fraud, duress and other wrongdoing so profusely made in the statement of claim. No attempt was made at the trial to sustain by evidence a single one of the charges of the fraudulent misrepresentation or duress made against Haig. The very most that was attempted was to shew that he had constructive notice that the properties being dealt with by the widow and the executor belonged to the estate and that the money he received was the proceeds of such property. But the evidence does not sustain even this diluted charge.

There remains only to be considered the validity of the $5,000 mortgage upon the home farm and the request for the discharge of W. T. Perry from his executorship.

If the defendant Jemima W. Perry took a fee simple estate in the home farm under the will, the plaintiffs have nothing to complain of, because she chose to mortgage it to Pitblado and Haig. The property was, in that case, hers, and she could do what she liked with it. If, as the plaintiffs contend, she took only a life interest under the will, the mortgage would constitute a charge upon that interest only. Any title she had to this farm depended upon the will, and she could encumber only such estate or interest as she had. She could not create by mortgage a charge upon the interest, if any, which the plaintiffs acquired under the will. If the matter had stopped there the action might be disposed of on the ground that the plaintiffs are not affected by the mortgage and are not entitled to attack it. It appears, however, that the plaintiff Edith Florence Perry executed the mortgage for the purpose of binding her interest, if any, in the land, and that she was at the time an infant under the age of 21 years. Being an infant, her execution of the mortgage was not void but voidable only and would bind her unless repudiated either before she came of age or within a reasonable time thereafter. She was not of age at the time the action was brought, but attained adult age before the trial. She is within her right, I think, in now insisting that the mortgage, in so far as it purports to bind her interest, is void, and for a declaration to that effect.

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This brings up the construction of her father's will and whether it gives her any interest in the mortgaged lands or whether her mother took the whole estate and not merely a life interest. It is my opinion that in this respect no distinction can be drawn between Edith and the rest of the children except that possibly her interest, if any, would be somewhat greater than theirs. If the will creates a precatory trust in favour of Edith it does the same with respect to each of the other children. It is set out in full in par. 4 of the statement of claim and need not be repeated here. It evidently was not drawn by a professional lawyer and some of the words used are not particularly apt, but in construing it an attempt must be made to arrive at the intention of the testator in so far as possible. The English Court of Appeal said in *Re Blantern*, [1891] W.N. 54, that

> the proper rule for construing a will is to form an opinion apart from the cases and then to see whether the cases require a modification of that opinion, not to begin by considering how far the will resembled others on which decisions had been given.

This passage was quoted approvingly in *Osterhout* v. *Osterhout*, 7 O.L.R. 402, 8 O.L.R. 685. What is meant is that the will is to be perused in the light of the circumstances under which it was made with a view to ascertaining the intention of the testator as expressed in it; for after all is said and done the ascertainment of the testator's intention is the object to be arrived at. As said by Lord Fletcher Moulton in *Re Atkinson*, 80 L.J. Ch., at 374, "The principle is that you have to find from the words of the will the intention of the testator." Following this method, I will endeavour to decipher the testator's meaning from this will.

By the first clause of the will he expresses the wish that the 1,200 acres of wild land be sold and the proceeds divided equally between 8 of his sons whom he names. It is important to remember that this 1,200 acres of land stood in his wife's name and really belonged to her. She had obtained it in exchange for Orillia property received from him no doubt as a gift, but as against him her title was unimpeachable. He does not give this 1,200 acres to his sons, but expresses a wish that it be sold for their benefit. Having expressed a wish that his wife's land should be sold to provide for 8 of his sons, he proceeds to make provision for his wife, and he says in the next clause: "I leave and bequeath on my wife, J. Whitney, this farm, our home." He then expresses

his wish as to how the farm shall be dealt with after his decease, whether it shall be retained and worked or sold, and he therefore says, "I wish the farm should be work as long as possible and whenever this would become impossible for any good cause this said farm shall be sold and the money obtained from said sale to go to my wife."

In the first place he gives the farm to her; but he evidently had in his mind the possibility that she might not be able to continue to work it. It is not difficult to imagine circumstances which might render this difficult if not impossible for his widow. His sons might not want to remain on the farm and help their mother. Some of them had already gone. Satisfactory hired help might not be obtainable. He therefore expresses the wish that it should be worked as long as possible and when it became impossible to work it that it should be sold and the proceeds given to her. Undoubtedly then, the farm, and if sold the proceeds, were to go to his wife. Her title so far as this clause is concerned was to be absolute, and unless from the other parts of the will it can be seen that, notwithstanding the language used, the testator intended to give her something less than the entire estate, the clause must be construed according to the ordinary English meaning of the words used.

Now let us see whether or not the testator has used any words to indicate that he did not intend his wife to have the absolute estate which the wording of the preceding clause would give her, but meant that she should take something less. Following the clause above referred to is this paragraph: "I wish and do want, that my only daughter Edith Florence shall inherit from her mother a share equal that of the boys named above and the balance to be divided in equal shares between all our children then living." This is the clause upon which the plaintiffs rely. The plain English of this passage is that the testator wishes his widow at her death to give Edith a share equal to what each of the 8 boys had received under his will and that the balance of the property should be divided equally amongst all the children. That was undoubtedly his wish; but the point I have to decide is whether he intended to impose upon his wife a binding obligation to deal with the farm in the manner stated and to confer upon his children rights which they would be entitled to enforce against her, or to leave her free to carry out his wishes or not to carry them out as

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she saw fit. If the former, she is a trustee for the children, but if the latter, the farm belongs to her absolutely.

First he gives the farm to his wife without any restrictions. The language he uses is "I leave and bequeath on my wife this farm." His subsequent reference to selling the farm and his wife receiving the proceeds may be put aside as at least not indicating any intention to make his wife a trustee.

Now he quite manifestly entertained certain wishes with respect to the children. It was his wish that after his wife's death everything should go to the children. So far as the farm was concerned, he could pursue one of two plans. He might leave the farm to his wife for her life and after her death to the children. In that case the title of the children would depend upon the will itself and they would be given rights which the law would enforce. The other plan was to leave the farm to his wife in fee simple and tell her in his will what his wishes were with respect to her disposition of all her property at her death, thinking, no doubt, that the expression of his wishes would be sufficient to induce her to dispose of the property in accordance therewith. I think he chose the second plan and the difference in the language used in the two clauses convinces me that the choice was deliberate and intentional. It cannot be said that he was not familiar with the use of apt testamentary words, because he uses such words in disposing of this farm—the only property disposed of by the will which really belonged to him. He did not intend that the children should acquire a title under the authority of the will: he therefore lays aside the testamentary words, "I leave and bequeath" and substitutes the words "I wish and want." He expresses the wish that Edith shall get something, not under his will, but "shall inherit from her mother," a share, &c. If, as is contended, the wife held the property in trust for the children subject only to a life interest, Edith could not inherit anything from her. The property would go to the children under the testator's will and not by inheritance from their mother. Again, it is not said that Edith's share is to be paid out of the proceeds of the farm, or that the "balance" to be divided amongst the children is so made up. The fact is that when the will was made the wife had some independent means, and the probability is that the testator merely intended to express the wish that she would at her death dispose

of all her property, that received from him as well as that which she otherwise possessed, in the way indicated.

I adopt the language of Boyd, C., in *Johnson* v. *Farney*, 29 O.L.R. 223, 9 D.L.R. 782, 14 D.L.R. 134, that "a wish or desire so expressed is no more than a suggestion to be accepted or not by the donee but not amounting to a mandate or obligatory trust." In the same case Meredith, C.J., treated as decisive the circumstances that the wish referred not only to the property acquired under the will but to the devisee's own property as well.

Having arrived at the conclusion from a perusal of the whole will that the intention of the testator was that his wife should take an estate in fee simple and not a mere life estate and that he had no intention of creating a trust in favour of the children, I turn to the decided cases to see if there is anything in them which would compel me to attribute to the testator any different intention.

I have read all the numerous cases cited by counsel, but I shall content myself by referring to only a few of them.

In some of the earlier cases upon the construction of wills the rule was laid down that the use of precatory words such as "I wish" or "It is my desire" and the like, should be construed as creating a trust in favour of the object of the wish or desire. The rule was acted upon and a trust declared in cases where it was by no means clear that the testator had any thought of creating a trust and even in cases where it was quite clear that he had no such intention. In 1871 in *Lambe* v. *Eames*, L.R. 6 Ch. 597, the court first shewed a disposition to break away from the old rule and to establish the much more sensible one that the court's duty was to find out what upon the true construction was the intention of the testator rather than to lay hold of certain words which in other wills had been held to create a trust. Since the decision in *Lambe* v. *Eames* the new rule suggested as the proper one in that case has been consistently followed and applied in the following cases: *Re Adams* (1884), 27 Ch.D. 394; *Re Diggles* (1888), 39 Ch.D. 253; *Bank of Montreal* v. *Bower*, 17 O.R. 548; 18 O.R. 226; *Re Hamilton*, [1895] 2 Ch. 370; *Re Walker*, [1898] 1 Ir. 5; *Re Oldfield*, [1904] 1 Ch. 549; *Comiskey* v. *Bowring-Hanbury*, [1904] 1 Ch. 415, [1905] A.C. 84; *Re Conolly*, [1910] 1 Ch. 219; *Re Atkinson*, 80 L.J. Ch. 370; *Johnson* v. *Farney*, 29 O.L.R. 223, 14 D.L.R. 134; In *re Cathcart*, 8 O.W.N. 572.

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In *Re Conolly, supra*, Joyce, J., said: "I am bound by the authorities with reference to precatory trusts and by the recent cases beginning with *Re Hamilton* to hold that where in a will words of gift are used which by themselves are sufficient to give a legatee, devisee or donee perhaps I should say, the whole property in the subject matter of the gift then the interest of that devisee or legatee will not be cut down to a trust estate or to a life interest with a trust for disposal after the determination of the life by the mere expression of a desire such as 'I desire that the the property shall be left by the donee' to some charitable purpose or to somebody else."

Still more recently, in *Johnson* v. *Farney, supra*, the modern rule was stated in substantially the same form: "An absolute gift is not to be cut down to a life interest merely by an expression of the testator's wish that the donee shall by will or otherwise dispose of the property in favour of individuals or families indicated by the testator."

I cannot say that I favour attempts to formulate arbitrary rules of construction as applicable to all cases as such rules are seldom found to be in all respects full and accurate. The above quoted attempts to summarize the results of decisions is, if I may with respect say so, defective in that they both ignore the fact that expressions of wish or desire are sometimes capable of being construed as imperative, in which case they may be sufficient to create a trust.

As said by Lindley, L.J., in *Re Williams*, [1897] 2 Ch. 12, at 19, "Not only in wills but in daily life an expression may be imperative in its real meaning although couched in language which is not imperative in form. A request is often a polite form of command."

It would not be correct to say that a gift absolute in form can never be cut down to a lesser interest by the use of precatory words because such words will be held to create a trust if from the context it can be seen that they were intended to be imperative: *Hill* v. *Hill*, [1897] 1 Q.B. 483; *Re Williams, supra, Re Oldfield*, [1904] 1 Ch. 549.

The rule cannot be safely laid down in less general terms than in the headnote *Re Hamilton*, [1895] 2 Ch. 370, where it is stated that "In considering whether a precatory trust is attached to any

legacy the court will be guided by the intention of the testator apparent in the will and not by any particular words in which the wishes of the testator are expressed," or, as stated by Fry, L.J., in *Re Diggles*, 39 Ch.D. 253, quoted with approval by Lopes, L.J., in *Re Hamilton*, *supra:* "The later cases have established the reasonable rule that the court is to consider in each particular case what was the testator's intention."

The plaintiffs' counsel has cited and relied upon a number of cases in some of which at least, precatory words were construed as imperative. Three of the cases cited by the plaintiffs' counsel involved the construction not of precatory words but of inconsistent bequests and are consequently of little or no assistance in the construction of this will.

The first of them is *Re Bagshaw*, 46 L.J. 567 (1877). In that case the court had to construe two apparently inconsistent gifts and if possible to make the two stand together. In the first place, there was a gift of the personal estate to the wife absolutely and later on a gift of the residue of the testator's estate, which as the will read included that already given to the wife, to trustees for his children. Clearly the wife could not take absolutely what was left to trustees for the children. From a perusal of the whole will in the light of the circumstances, the court came to the conclusion that the testator meant his wife to have a life interest in the personal estate only.

The next case is *Estate of James Lupton*, [1905] P. 321. This was another case of inconsistent gifts and not of precatory words. The testator, a very ignorant and illiterate man, used a printed form of will with a holograph addition. In and by the printed portion his wife was given his real and personal property absolutely, but in the addition written by himself it was after her death to go absolutely to another. It was held that the testator probably did not appreciate the effect of the earlier words and really must have meant that his wife should take a life interest only.

Re Salter Estate, [1917] 2 W.W.R. 1013, was of the same character as the two already referred to. It did not involve the construction of precatory terms, but of apparently inconsistent gifts. By one clause in the will property was left to the testator's wife in terms which, standing alone, indicated an intention that the gift should be absolute. By a later clause it was declared that the

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same property should after his wife's death go to his son absolutely. The intention that the son should have the property after his wife's death was clearly and positively expressed, and hence he must have intended that his wife should enjoy the property for her life only.

The next case relied on is *Comiskey* v. *Bowring-Hanbury*, [1905] A.C. 84. There the testator by his will left to his wife "the whole of my real and personal estate absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof, by will or testament, I hereby direct that all my estate be equally divided amongst the surviving said nieces." The Court of Appeal held ([1904] 1 Ch. 415) that the widow took the property unhampered by a trust, but the House of Lords, looking at the words merely as they stood in the will, and giving them their ordinary meaning, held that the wife took subject to an executory gift in favour of the nieces. Their Lordships attached importance to the fact that the property was to be kept together during the wife's life and then "it" was to be devised to the nieces; and to the use of the words "I direct." The case lays down no new principle but further affirms the doctrine that the testator's intention is to be ascertained and given effect to.

The case of *Osterhout* v. *Osterhout*, 8 O.L.R. 685, appears to have been a very plain one. The testator gave to his father one-half his ready money and securities, and one-half his other personal estate "with reversion to my brothers on the decease of my father." It is difficult to see how any controversy could arise as to the testator's intention it was so clearly expressed, and the court of course held that the father took only a life interest.

In the *Simon* case, 19 Man. L.R. 450, the decision turned entirely upon the construction to be put on the French words "Je veux" used in the will. These words were construed as words of direction and not words of mere desire and as such to shew an intention to cut down the apparently absolute gift in favour of the widow. That was a decision by the Court of Appeal and certainly lays down no doctrine inconsistent with the long line of cases decided by the Court of Appeal and House of Lords in England.

The case that comes nearest to the present one is *Re Walton Estate*, 20 Man. L.R. 686, a decision by my brother Prendergast. There the testator had bequeathed to each of his 3 sons one-third of his shares in the Canadian Pacific Railway, the shares to be transferred on the books of the company to their respective names. The will then said: "My wish and desire, however, is that though each of my said 3 sons shall have had such shares so transferred to them as aforesaid they shall not dispose of them but only the income derived therefrom shall be expended by them respectively and that upon the death of each of them his share shall be disposed of and the proceeds thereof divided equally amongst all my grandchildren, and in the event of my son Percy dying and not leaving lawful issue his share shall be sold and apportioned amongst my grandchildren as aforesaid." My brother Prendergast has, if I may say so, laid down the law with perfect accuracy; but a comparison of the two wills will shew that in the Perry will the second requisite to the creation of a precatory trust, viz., certainly as to the subject of the recommendation or wish, is entirely wanting. There is nothing in it to shew what property the testator wishes to be divided amongst the children. As already pointed out at the time the will was made his wife had independent means and the probabilities are that he had in his mind all the property of which she should die possessed. In any event there is nothing in the will to indicate that his wish related to the farm or its proceeds only. This circumstance sufficiently distinguishes the Perry will from the one in question: *Re Walton Estate*.

I have now dealt with all the cases cited by plaintiffs' counsel. The most that can be said of them is that they afford illustration of circumstances under which precatory words will be construed as imperative. Further than this no case upon the construction of one will can assist in the construction of another will. Since *Lambe* v. *Eames*, *supra*, was decided, no case can be found in which precatory words not capable of an imperative construction have been held to create a trust; and they have been so construed when, and only when, it was manifest from the whole will that such was he testator's intention. No such intention can be gleaned from a perusal of this will, and I therefore hold that under it the defendant Jemima Perry, the mortgagor, took the whole estate in the farm, and that the plaintiffs have no right of action.

The charges made against the defendants W. T. Perry and

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Jemima Perry are that the former as executor of the will, with the acquiescence of the latter, wilfully and negligently dealt with and trafficked in the 1,200 acres of wild lands left by the will to the 8 younger sons that the same was lost to the estate. These two defendants made common cause with the plaintiffs against their co-defendants. They were the chief witnesses on the plaintiffs' behalf and were prepared to admit any wrongdoing the responsibility for which they could cast upon their co-defendants.

I pointed out at the trial that the logical result of Jemima Perry's evidence was that the 1,200 acres with which she and the executor were said to have illegally trafficked to the damage of the estate did not belong to the estate, but was her own separate property and that the estate could not possibly be injured by her dealing therewith. There was a good deal of evidence that this 1,200 acres not only was in fact her own separate property, but that when the will came to be probated she claimed it as such with the knowledge and acquiescence of W. T. Perry, the executor, and that she afterwards dealt with it as her own. But it is sufficient for the purposes of this case to hold, as I do, that the plaintiffs entirely failed to shew that this 1,200 acres formed part of the testator's estate.

These being the facts, the whole claim of the plaintiffs against the executor and the widow, and through them against the other defendants, falls to the ground.

I further pointed out to the plaintiffs' counsel that the only possible way in which the estate as represented by the executor could become interested in these 1,200 acres would be if the widow were compelled to elect and had elected to take what was given her by the will and relinquish her title to the 1,200 acres wild lands. As the case was framed, however, the question of election could not be tried and no application to amend or recast it was made, but since the trial plaintiffs' counsel has addressed to me a written argument upon the subject of election.

The action was based upon the theory that the testator owned both the wild lands and the home farm. That is the case the plaintiffs attempted to prove, and they must stand or fall by it. I believe in freely permitting amendments so that the real controversy between the parties may be tried, but the plaintiffs having utterly failed to support the case made in their statement of claim,

cannot after the action has been tried be permitted to abandon that claim and to substitute an entirely new and inconsistent one, requiring a realignment of parties.

The plaintiffs have failed against all the defendants and the action must be dismissed with costs.

The defendants' solicitors have asked me to award them costs, not only against the plaintiffs but as against their co-defendants W. T. Perry and Jemima Perry as well. There is no doubt that this litigation was instigated and promoted by W. T. Perry. Plaintiffs' solicitors received their instructions from him. None of the plaintiffs appeared at the trial, and there was presented the somewhat unique spectacle of counsel for these two defendants endeavouring to support by argument the plaintiffs' claim.

I was referred to rule 942 as conferring jurisdiction to make the order asked for. Before that rule was passed, when defendant was entitled to costs against a co-defendant, he could only be given them by the awkward expedient of directing the plaintiff to add them to his costs against the cost-paying defendant. This rule was passed to remedy that defect and to give the right of recovering costs by one defendant against another direct. It was not intended to confer any new jurisdiction but to give a right of recovering direct, what, theretofore, he could recover only through the plaintiff. Neither do I think that jurisdiction has been enlarged by rules 934 and 952. While the English O. 45, r. 1, was the same, it was held in *Re Mills*, 34 Ch.D. 24, that no new jurisdiction was conferred by it. In consequence of that holding the rule was amended in 1890 and the words added: "And the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." Ontario also amended its rule from which our 934 was taken by adding the same words. This addition was held in England to give the right to award costs where previously there was no power to do so: *Re Fisher*, [1894] 1 Ch. 450; *Dartford* v. *Moseley*, [1906] 1 K.B. 462. In Ontario the amended rule has been held to empower the court to compel payment of costs by a person not a party to the proceedings, but in England it has been held that costs cannot be ordered against a stranger to the proceedings: *Forbes Smith* v. *Forbes Smith*, [1901] P. 258, at 271; *Rex* v. *Ashton* (1915), 85 L.J.K.B. 27.

I am of opinion, however, that the court has inherited from the

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old Court of Chancery inherent jurisdiction to compel the real instigator and promoter of unfounded litigation to pay the costs of it, at least when he is a party to the proceedings: *Re Bombay Civil Fund Act*, 40 Ch.D. 288; *Andrews* v. *Barnes*, 39 Ch.D. 133, and it may be although not a party: *Re Sturmer and Beaverton*, 25 O.L.R. 190, 566, 2 D.L.R. 501.

The judgment will be that the action be dismissed as against all the defendants. And that the defendants other than W. T. Perry and Jemima Perry do recover their costs against the plaintiffs and the said W. T. Perry. Fiat for examinations for discovery.

I was asked to remove the restriction imposed by rule 951 to taxing more than $300. A judge has a discretion to do this only "in cases of special importance or difficulty or in any case in which he shall be of opinion that costs have been incurred by vexations or unreasonable conduct on the part of the plaintiff or defendant."

Under English O. 65, r. 9, providing for the allowance of costs upon a higher scale "on special grounds arising out of the nature and importance or difficulty or urgency" of the case, it has been held that neither the mere bulk of the case, whether in subject matter or in time occupied on the trial, nor the fact that charges of fraud or negligence are made constitute special ground for granting costs on the higher scale without which there is no jurisdiction to interfere: *Re Spettigue's Trusts*, 32 W.R. 385; *Paine* v. *Chisholm*, [1891] 1 Q.B. 531; *Assets Development Co.* v. *Close*, [1900] 2 Ch. 717. Great caution must be observed in applying the English cases not only because the difference of the wording of the two rules but also because the difference in circumstances between here and England. The fact that a case is of great importance and difficulty is not sufficient under the English rule because, under it, the discretion can only be exercised "on special grounds arising out of the nature and importance or difficulty, etc." of the case: *Williamson* v. *North Staffordshire*, 32 Ch.D. 399; *Rivington* v. *Gordon*, [1901] 1 Ch. 561; whereas under our rule all that is required is that the case be of "special importance or difficulty." Again the English rule does not impose an arbitrary limitation upon the quantum of costs recoverable, but only relates to the scale upon which costs may be taxed. Under such a rule all the costs necessarily incurred would be taxed on the same scale, including counsel fees, and the time necessarily consumed in

the trial would not seem to be a special ground for allowing costs on an increased scale, as was decided in *Williamson* v. *North Staffordshire and Paine* v. *Chisholm*. It may be that under a rule which establishes an arbitrary limit of $300 including counsel fees the length of time necessarily occupied in the trial ought to be considered as constituting a case, one of "importance or difficulty." Upon that point, however, I at present express no opinion. The ground urged in this case is that charges of negligence and fraud were recklessly made against professional men. A case does not become one of special importance or difficulty for that reason alone as said by Buckley, J., in *Assets Development Co.* v. *Close*, [1900] 2 Ch. 717, at 721: "I do not find myself in a position to lay hold of the mere fact that fraud is alleged as a special ground for ordering the plaintiff to pay more than the usual costs."

I must decline, therefore, to interfere with the costs as fixed by the rule. *Action dismissed.*

BEURY v. CANADA NATIONAL FIRE INSURANCE Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. April 13, 1917.

INSURANCE (§ III A—44)—INTERIM RECEIPT—DURATION.

An interim receipt for a period of 30 days, issued on an application for a yearly policy, covers a loss occurring after the expiration of the receipt but within the term for which the policy applied for was accepted.

[35 D.L.R. 790, 38 O.L.R. 596, affirmed.]

APPEAL by the defendants from the judgment of Britton, J., 35 D.L.R. 790, 38 O.L.R. 596. Affirmed. Statement.

A. C. Heighington, for the appellants.

Gideon Grant and *P. E. F. Smily*, for the plaintiffs, respondents.

MEREDITH, C.J.C.P.:—It seems to be a growing fashion for plaintiffs in actions against insurance companies to imagine that all that need be done by them to obtain a judgment in their favour is to refer the Court to some insurance enactment: and to feel aggrieved when required to bring their cases, by evidence, within the provision of the enactment the benefits of which they claim: and a fashion which, I have no doubt, receives quite too much encouragement from the jury-box, if not also from the Bench. Meredith, C.J.C.P.

This case is one of that character: we are expected by the plaintiffs to assume that the case is one within the provisions of condition 8, sec. 194 of the Ontario Insurance Act, and apply its

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provisions so as to exclude the defence that the insurance actually effected was for one month only, and that the loss occurred after the expiration of that month. But the ordinary and obvious rule, that you must catch your hare before you can cook it, must not be overlooked here, whether it has been or has not been elsewhere.

In another case, of a like character, before this Court a short time ago, and before the Supreme Court of Canada more recently —*Sharkey* v. *Yorkshire Insurance Co.*, 37 O.L.R. 344, 54 S.C.R. 92, 32 D.L.R. 711—we were urged, in like manner, to apply the provisions of sec. 156 of the Ontario Insurance Act, not to any term or condition of the contract, but to the consideration of the question what the contract itself really was; whether it was for the insurance of a horse in a dying state when the contract was actually made, or was of a sound horse at that time; and so urged although, upon that question, the plaintiff herself had adduced, as evidence in her behalf, the application for insurance which, under sec. 156, she sought to exclude in so far as it might sustain the defendants' contention as to the proper interpretation of the contract as evidenced by the policy alone; and although sec. 156 is expressly made subject to the provisions of sec. 194, one of the conditions of which makes the application a controlling factor: condition 8. I refer especially to this case, as one of the learned Judges of the Supreme Court of Canada seems to have given some encouragement to that urging which seems to have been renewed in that Court; an encouragement which may call for a statement of my reasons for having rejected it in this Court, reasons not printed because they seemed to me too obvious to justify the waste of a word over them: and indeed wasting a word over them now may be unnecessary, as another of the Judges of that Court made plain the absurdity of making evidence of the application in one breath and endeavouring in the next breath to exclude all parts of it not favourable to the party who had appealed to and made evidence of it; and as the learned Judge who appeared to give encouragement to the contention concluded his judgment by following precisely the same method and reaching exactly the same conclusion as that followed and reached in the judgment he at the outset found fault with. So that, perhaps, it should be enough, in the interests of justice, to let the overruling, by the latter part of that judgment, of the former part of it, suffice; but, having

regard to the methods so commonly adopted, as I have said, in cases such as that, and to the encouragement given to them, it may be better to state fully my reasons for dealing with the application for the insurance in *Sharkey's* case in the manner in which it was dealt with by me, whether those reasons be good, bad, or indifferent, and whether or not they should have been and should be obvious. The question in *Sharkey's* case was, as I have said: What was the contract? The words of the policy favoured the defendants' contention upon this question. The most that could be reasonably contended for by the plaintiff was that they were to some extent ambiguous. And in these circumstances she appealed to her application for the policy, with a view to support her contention as to the real meaning of the contract. Apart from any of the provisions of the Ontario Insurance Act, that she had a right to do, *because the application was expressly incorporated with and made part of the contract;* and nothing in the Act precluded her from appealing to that part of the contract in aid of her contention as to its true meaning. The restrictions of sec. 156 (3) are expressly limited to insurance companies: whilst, as I have said, these restrictions are made expressly subject to the provisions of sec. 194, one of which makes the application control the contract to the extent provided for in it: condition 8. Then, having so rightly made the application part of the contract for her purpose, I should have thought it altogether too childish to contend that it could be looked at in so far only as it might help the plaintiff. At the trial the plaintiff had succeeded mainly, it seemed to me, because the figure and abbreviated word "3 mos." were written in a marginal corner of the application, and upon that mainly she relied in this Court to support that judgment. Other parts of it supported the defendants' contention; and yet it was seriously urged that they could not be looked at even to counteract the effect of the marginal words "3 mos." The only pity is that it should be needful to say: that the whole of the writing may be looked at in such circumstances; that it must be looked at unless we are also to close our eyes to common sense and the law. Regard must be had to the whole enactment and to its purposes. A word here and a word there in any writing may be made contradictory of each other, and to lead to all sorts of absurdities if we confine our view to the words here and there and are blind to purposes and context. The main purpose of sec. 156 is to provide against

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terms and conditions modifying or impairing the contract of insurance. Contracts of insurance were frequently rendered invalid by "warranties" contained in the application; insurers perhaps generally not knowing the nature and effect of a warranty. No question of any such character arose in this case: and, having regard to sec. 194, condition 8, I find it difficult to understand why, in a case such as this, in which there is nothing like an attempt to modify or impair the policy, by terms, conditions, or warranty, the application may not be looked at if there be ambiguity in the expressed words of the contract. But it was not needful to express an opinion on that question; the plaintiff, having made evidence of the application, was bound by that course, even if otherwise it would not have been evidence. And, besides all this, an application might well be conclusive evidence if reformation of the contract were sought: the Act can hardly have been meant to bind the parties to a contract which neither ever made or intended to make.

Then, coming back to this case. The provisions of condition 8, sec. 194, cannot be applied to it until the plaintiffs have proved that the interim receipt, upon which this action is brought, is not in accordance with the terms of their application for such insurance, and that the company did not point out in writing the particulars wherein it so differed. And the only point of difference that is material to the rights of the parties is: whether the insurance was one for the long-date—one year—or was one for the short-date—30 days. If for the short-date only, then the defendants are not liable; that date expired before the fire: if for a year, then the defendants are liable, there is really no substantial defence to the action.

The parties are agreed upon two things: (1) that a contract of insurance was made; and (2) that it was made verbally, by telephone.

The substance of the evidence respecting the contract, shortly stated, in the words of those most concerned in the making of it, I shall now read; the contract having been made on the plaintiffs' behalf, not by themselves, but by a firm of capable insurance brokers; and on the defendants' behalf, by their manager for this Province.

The head of the firm of brokers did not make the contract, but

his testimony shews that it was not made on any written application, but was made verbally. He stated that thus:—

"Q. The matter was arranged by telephone before the written application was sent over? A. In the ordinary course of business it likely would be.

"Q. Don't you know? A. I should think so."

Then the defendants' manager, with whom this contract was made, after saying that it was made verbally by telephone, states thus what it was: "He asked if I would issue a cover note or interim receipt. I was reluctant to do this, but I said I would do it subject to inspection. I marked the requisition form in pencil when it came in, 'Subject to inspection.'"

And the broker who actually made the contract in the plaintiffs' behalf, after also stating that it was made verbally by telephone, gives this account of what it was:—

"Mr. Heighington: At any rate, you spoke to Mr. Corbould? A. I did; the matter was arranged with him.

"Q. I am instructed that Mr. Corbould at first declined the risk altogether, didn't want it at all. A. To us?

"Q. Yes, to you. A. Well, in his conversation he may have indicated that he thought it was a class that is unusual, asked for a lot of information. Finally I think it ended up something like this: Well, he wasn't going to refuse the risk, after I had described it, because others had refused it. He would go on and have an inspection made.

"Q. He said it ended up by you asking for a covering note? A. Exactly. The insurance was bound.

"Q. He said you asked for a covering note? A. An interim receipt.

"Q. And that he said, Yes, subject to inspection? A. Well, he indicated that he would want to inspect the risk, naturally.

"Q. That was before any application or binder from your office went over? A. Naturally, the insurance has to be arranged over the 'phone first.

"Q. Then you sent over a binder? A. Our term for that is a requisition for insurance.

"Q. That was the document you sent over? A. That is his copy. That is what went to his office."

After this verbal application and contract were made, the

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defendants, in evidence of it, prepared and sent to the brokers the interim receipt in question, and upon which this action is brought: and these experienced and capable brokers received it, and, after some length of time, sent it on to the plaintiffs, as the contract thus made.

The interim receipt is for insurance for not more than 30 days. The brokers knew this; they knew all about insurance in all its phases; and they *asked for an interim receipt* and accepted this receipt as a writing setting out truly what the contract was; and, as I have said, sent it on to the plaintiffs as such.

After the verbal contract was made, an application in writing for insurance for 12 months was sent by the brokers to the defendants: that is, after they had verbally applied for insurance for 12 months, but had succeeded in getting it for 30 days only.

The interim receipt recites an application for insurance for 12 months, but gives it for 30 days only.

During the 30 days, the defendants' manager for this Province took some steps towards obtaining from the head office of the company in the Province of Manitoba insurance for the 12 months; but nothing definite was ever done in it: the application was not sent on nor any policy ever issued: and under the terms of the interim receipt, unless a policy was issued in the 30 days, the insurance was not extended beyond that short-date or covering period.

During the 30 days, the defendants' manager asked the brokers in effect to get them released from their contract, which meant to place the insurance elsewhere: and, after the loss had occurred, it is said that the manager inquired whether they had been released.

Then, in these circumstances, what is proved?

The onus of proof is on the plaintiffs; and, in order to succeed on this appeal, they must have proved at the trial either: (1) that the contract of insurance was for 12 months; or (2) that, on an application for 12 months' insurance for them, the defendants, without pointing out in writing that their interim receipt was for 30 days at most, sent to them their interim receipt for that short-date only.

These questions are purely questions of fact; but, as the trial Judge does not seem to me to have quite so dealt with them, if the case had even now to be determined by me alone, I should

probably reach, without any great difficulty, the conclusion that the plaintiffs had failed to satisfy the onus of proof, resting upon them, in both respects.

The fact that the written application for a year's insurance was sent to the defendants' manager after the verbal contract had been made, does not seem to me to be at all inconsistent with the whole testimony as to short-date or covering insurance; having got the short-date or covering insurance, it was the most probable thing that the application for the long-date would be made: there were 30 days in which it might be obtained; and, as it had not been made plain that the defendants would not in the 30 days agree to extend the insurance, this written application is no more than would be expected: and, if there were no hope of an extension, what object could there be in sending it when the contract was already made and made for the short-date only?

Nor does the recital in the interim receipt conflict with the story of the contract for covering insurance only. The application, that is, the verbal application, was for 12 months; but, that being refused, the parties agreed upon the insurance for 30 days only; and so the interim receipt is correct in all its details in that respect.

So, too, as to the desire to be relieved: the defendants did not like the risk: they desired to be relieved from it, but from what risk? Why not the 30 days? All this is quite consistent with a risk for 30 days; and more than consistent with it; for, if the contract covered the 12 months, can there be any doubt that the defendants would have given the seven days' notice provided for in the Act and have relieved themselves: with a risk for 30 days only that was not worth while, the risk would run out as soon of its own accord. And insurance companies do not care to antagonise insurance brokers, through whom they may acquire much insurance.

And as to the inquiry after the fire, whatever it may have been, it was quite natural, even if the risk had been only for 30 days.

But, as I have said, the questions involved are purely questions of fact; and as, however it may have been at the trial, here the Judges have had the benefit of a full discussion of these considerations, and yet three of them at least are able to find in favour of the plaintiffs on one or both of the questions upon which the

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parties' rights depend, the judgment of the Court must be in favour of the plaintiffs.

The appeal must be dismissed.

RIDDELL, J.:—The plaintiffs, desiring to insure for $19,500 their building and contents, employed a firm of insurance brokers, Messrs. McLean, Szeliski & Stone, of Toronto, to place the insurance. The brokers proceeded to place it with their own companies and others. Amongst others applied to were the defendants, who issued an interim receipt for $2,000 dated the 30th April, 1915; a fire occurred on the 31st May; the plaintiffs furnished proofs of loss, &c.; and, the defendants refusing to pay, this action was brought. At the trial before my brother Britton at Toronto, in October, 1916, judgment was given for the plaintiffs for $1,897.44, interest, and costs. The defendants now appeal.

The only question to be determined is, "What was the contract of insurance?" And that involves both statutory law and fact.

Leaving aside immaterial detail, the facts are as follow:—

Brisley, the right-hand man of Mr. McLean, the head of the broker firm, took charge of placing the insurance; he spoke to a friend of his, one Knowland, in the office of the defendants' agency, and was referred to Corbould, the defendants' Toronto manager, "to discuss the hazards of the risk." The risk was an unusual one, and had been refused by other companies, but that circumstance did not prevent Corbould from considering insurance; he said "he would go on and have an inspection made." Then Brisley asked for "a covering note" or "an interim receipt;" and Corbould said, "Yes, subject to inspection."

This is Brisley's story; Corbould's is a little different. He says that, not receiving satisfaction from Brisley, he spoke to McLean, who gave him further information, and thereupon he (Corbould) said he would take it subject to inspection. "He (McLean) asked if I (Corbould) would issue a cover note or interim receipt. I was reluctant to do this, but I said I would do it subject to inspection."

Quâcunque viâ, there was an agreement on the part of Corbould to "issue a cover note or an interim receipt," "subject to inspection." If it were shewn that that agreement was implemented, and the interim receipt issued thereunder, the defendants might have a stronger case; but no one says that such was the fact.

An application in writing comes in for 12 months' insurance: the manager, Corbould, pencils on it, "Subject to inspection," and issues an interim receipt: "Messrs. A. R. Williams . . . having applied for insurance against fire for 12 months from this date for two thousand dollars . . . premium open . . . it is hereby agreed by the Canada National Fire Insurance Company that . . . the above property is hereby insured, subject to the conditions and stipulations of its policy, for 30 days from this date or until a policy is sooner delivered or notice is given that the application is declined by the company, in which event this interim guarantee shall become void and of no effect."

It seems to me that the insurance company, upon receipt of the application in writing, chose to accept the written application rather than to carry out the oral arrangement. Their manager, upon receipt of the written application, issued an interim receipt in answer and expressly referring to it. McLean swears positively that his firm delivered the application to the defendants and "obtained an interim receipt for it" (p. 31 of the notes of evidence). I think the company must be in the same position as if the written documents shewed the contract.

Especially is this the case when we find that the manager allotted to the application, a policy number, filled in the open rate, the premium, &c., &c.

When the application is for a 12 months' policy, any policy furnished "after such application" shall be deemed "to be in accordance with the terms of the application" for 12 months—the Insurance Act, R.S.O. 1914, ch. 183, sec. 194, statutory condition 8—unless the company take the prescribed precaution. An interim receipt is, by the combined effect of clauses 45 and 14 of sec. 2, a "policy;" the company did not point out in writing the particulars wherein it differs from the application; and I think the effect of the statute is to make this a binding policy for 12 months.

The decision of the Supreme Court of Canada in *Dominion Grange Mutual Fire Insurance Association* v. *Bradt*, 25 S.C.R.154, approving as it does *Barnes* v. *Dominion Grange Mutual Fire Assurance Association* (1895), 22 A.R. 68, prevents us from giving any advantage to the company from the terms of the interim receipt.

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I have not taken into consideration in this judgment the subsequent conduct of Corbould; it does not assist, but, as I think, weakens, the case of the defendants.

The appeal should be dismissed with costs.

ROSE, J.:—The interim receipt issued by the defendants purported to grant insurance for 30 days from the 30th April, 1915, or until a policy was sooner delivered or notice was given that the application was declined. The fire in respect of which the claim sued upon was made occurred on the 31st May, 1915, i.e., one day after the expiration of the 30 days. The plaintiffs say that, nevertheless, they are entitled to recover because the receipt was issued after application for insurance for a year, and, as the defendants failed to point out in writing the particulars wherein the receipt differed from the application, the 8th statutory condition has the effect of extending the term of the insurance that the interim receipt purports to grant.

In endeavouring to solve the question whether the 8th condition has the effect contended for, the first thing to do is to determine what the application was that led to the issue of the receipt. This apparently simple question of fact has caused me great difficulty. The insurance in question forms part of a total insurance of some $19,500, represented by the policies or interim receipts of a number of companies. The plaintiffs did not themselves place the insurance, but entrusted the business to brokers, Messrs. McLean, Szeliski & Stone, and all the communications with the defendant company were through those brokers. The risk was an extra-hazardous one, and, apparently, it was not easy to procure the whole of the required insurance; indeed, some companies seem to have declined it before the offer of a portion of it, $2,000, to the defendants. Mr. Brisley, "Mr. McLean's right-hand man," thought he would offer some of the business to his friend Mr. Knowland, the Toronto agent of the defendants. Accordingly, he spoke on the telephone to Knowland, whose office is in the same room or suite of rooms as that of Mr. Corbould, the manager of the defendants' Ontario branch. Knowland referred the matter to Corbould "to discuss the hazards of the risk." Brisley then spoke to Corbould. His account of the result of the conversation is, that Corbould "wasn't going to refuse the risk, after (Brisley) had described it, because others had refused. He would go on and

have an inspection made. The insurance was bound." Brisley asked for an interim receipt. Corbould "naturally indicated that he would want to inspect the risk." The insurance being thus arranged, a requisition for insurance was sent to the defendants The "requisition", which is an exhibit, is on a printed form of the brokers, addressed to F. S. Knowland, and saying in part: "*Please bind for us the following insurance: Name of company*—Canada National. *Interim No.*....., *Policy No.*.....*replacing*—new.....*Amount*..$2,000, *Rate*—open; *Term*—12 *months*. *From* April 30, 1915, *to* Apr. 30, 1916....." The words above printed in italics are printed in the requisition. The other words are typewritten.

Mr. McLean adds that the requisition was delivered to the company, and that the brokers "obtained an interim receipt for it."

Mr. Corbould says that, when the matter was referred to him by Knowland, he spoke on the telephone first to Brisley, who could not give him all the information he wanted, and then to McLean. After getting additional information from McLean, he said he "would take it subject to inspection." The time at which the inspection could be made was discussed, and then McLean "asked if I would issue a cover note or interim receipt. I was reluctant to do this, but I said I would do it subject to inspection. I marked the requisition form in pencil, when it came in, 'subject to inspection.'" There is no evidence as to exactly what Corbould meant by taking the insurance or issuing the interim receipt "subject to inspection;" but it is plain that he did not mean that he would not bind his company until he had made an inspection, because he, personally, issued the interim receipt. There never was an inspection of the premises by or on behalf of the defendants; but on the 25th April, the brokers having furnished the form for the written portion of the policy, there was apparently a conversation on the telephone between some one in the office of the brokers and some one in Mr. Corbould's office, and a letter was written by Mr. Corbould's instructions, and in his name, to the brokers, saying: "We wish to be relieved of liability in this connection as soon as possible, as, upon inspection, we find that this is a class of risk which our company prefer to avoid. Please return interim receipt, when we will calculate the premium for time on risk. Thanking you for the offer of this business . . . . . "

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The brokers apparently made some efforts to get another company to go on the risk instead of the defendants, but did not succeed. Two or three days before the fire, Mr. Corbould's assistant asked them on the telephone whether they "had relieved the Canada National of liability," and, being told that the brokers were "doing (their) best to relieve them at the earliest possible moment," "replied to the effect that he wished (the brokers) would get them off as soon as possible."

I think the foregoing is practically all the evidence as to what was done, and the only other bit of testimony that need be referred to is Mr. Corbould's statement of the practice. He says that probably "ninety-five per cent. of all the (fire) insurance written is written first on an interim receipt . . . that is, the company or one of its agents issues an interim receipt to the man who makes the application for the insurance, . . . and that is followed usually by a policy written some time afterwards, if the risk is accepted." The policy may not issue for thirty, sixty, or ninety days, "depending on the amount of business in hand or on how soon you get your forms."

Upon this evidence, the defendants' argument is, that there was an application for insurance for a period longer than a month, presumably a year, which was declined; and thereupon an application for insurance, in the form of an interim receipt for a month, which was accepted; and that the requisition which was sent in, and which was in the same terms as the application that had been declined, has no bearing upon the case; and that, therefore, there is no difference between the real "application" and the interim receipt, and no case for resorting to the 8th statutory condition, even if that condition might otherwise be applicable.

If the fact is, as the defendants contend, that the parol application for insurance for the full term was refused, and that thereupon there was a parol application for insurance for a month, which was accepted, I think the decision must be in the defendants' favour. The 8th condition is applicable to parol applications: *Davidson* v. *Waterloo Mutual Fire Insurance Co.* (1905), 9 O.L.R. 394; and, if the written requisition was not acted upon, there is no difficulty in holding that, although the interim receipt (which is a "policy," within the meaning of the condition—*Coulter* v. *Equity Fire Insurance Co.* (1904), 7 O.L.R. 180, 184), was "after"

the written requisition in point of time, it is controlled, not by it, but by the parol application.

After a great deal of consideration, and, I must confess, with some hesitation, I have come to the conclusion that the evidence does not support the defendants' argument. It seems to me that the fair result of the evidence, especially when Mr. Corbould's statement of the practice is kept in mind, is, that there was a parol application for and granting of insurance for the extended period "subject to inspection," and, as incidental to and part of that insurance, a request for and the issue of the interim receipt, as evidencing the agreement that had been made. I have reached this conclusion upon the evidence as to what was said, and without regard to the wording of the receipt, and without regard to the evidence to which I have referred as to the efforts of the defendants to get off the risk. But I think, in addition, that, with perfect fairness to the company, some slight effect may well be given to the fact that the receipt recites an application for insurance for 12 months.

Upon my finding as to the facts, there remains to be considered whether, because of the 8th condition, or even without reference to it, the defendants are to be held to have entered into a contract for a year, from which they could escape only by terminating the insurance in the way prescribed by the Act. I think it ought almost to be held that there was a valid parol contract for insurance for a year, and that the mere delivery of a receipt for insurance for a month was ineffective to reduce the term: *Coulter* v. *Equity Fire Insurance Co.* (1904), 9 O.L.R. 35; but, without going that far, I should hold that there was an application for insurance for a year, followed by the receipt in question, and that the plaintiffs' case is, therefore, made out, unless, as Mr. Heighington argues, the 8th statutory condition is not effective to extend the term for which the interim receipt purports to bind the company. Mr. Heighington said, and, I think, correctly, that in every case cited as authority for the proposition that where there has been an application for a year followed by a receipt for a month, the receipt is, by reason of the condition, to be treated as valid for the year, you find some additional fact sufficient to sustain the judgment. For instance, in *Coulter* v. *Equity Fire Insurance Co.*, 9 O.L.R. 35, it was found as a fact that there was a valid parol

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contract for a year (p. 40), and, after delivery of the receipt, the company accepted a year's premium and retained it for ten months: in *Dominion Grange Mutual Fire Insurance Association* v. *Bradt*, 25 S.C.R. 154, it was held, on the construction of the document itself, that there was a completed contract for 4 years. However, one of the grounds taken by the present Chief Justice of Ontario in his judgment in the *Coulter* case, 7 O.L.R. 180, at p. 184, was, that the condition has the effect contended for, and, no doubt having been cast upon this decision when the case came before the Court of Appeal, 9 O.L.R. 35, I think that, notwithstanding the doubt raised by Anglin, J., in *Sharkey* v. *Yorkshire Insurance Co.*, 54 S.C.R. 92, 32 D.L.R. 711, the matter is hardly open for discussion in this Court. Moreover, with what Anglin, J., said in *Sharkey's* case is to be contrasted what was said by Idington, J., in *Laforest* v. *Factories Insurance Co.* (1916), 30 D.L.R. 265, 53 S.C.R. 296, at p. 301: "The obvious purpose of the condition . . . was to meet the not infrequent cases of a variation in or departure from the description of the subject-matter insured, as given in the application, or *the time to run*, or rate (if any) specified therein. Such like errors sometimes might creep in, and the insured was thus protected."

It was argued that the ownership of the goods was not proved. I think the evidence on this point was sufficient to justify the learned trial Judge's finding in favour of the plaintiffs.

It was also argued that, because there do not appear on the face of the interim receipt all the particulars that sec. 193 of the Ontario Insurance Act requires to be set forth on the face of the policy, the receipt in question cannot be considered a "policy" within the meaning of the 8th statutory condition. I do not think this objection is open to the company.

I would dismiss the appeal with costs.

LENNOX, J.

LENNOX, J., agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

MAN.

K. B.

KILGOUR v. ST. JOHN.

Manitoba King's Bench, Galt, J. June 21, 1917.

PLEADING (§ I S—145)—STRIKING OUT—DISCRETION—REINSTATEMENT ON APPEAL—AMENDMENT.

An appellate court has the right to re-instate statement of defence struck out for insufficiency by a master in chambers, though within his discretion to do so, if it sufficiently appears that the defendant is entitled to have the case tried in court rather than summarily dealt with in chambers; the insufficiency may be amended.

APPEAL from an order made by the Referee in Chambers striking out the defendant's statement of defence, and allowing the plaintiff to sign judgment. Reversed.

W. H. Trueman, K.C., for plaintiff; *C. D. Bates*, for defendant.

GALT, J.:—The action is brought upon a promissory note made on February 22, 1916, for the sum of $1,000, payable 3 months after date, together with interest thereon amounting to the sum of $40.15.

The defendant has filed the following defence:—

2. The defendant says that prior to the making of the said promissory note, one Fred T. Gilroy, of the City of Winnipeg, was in the City of New York seeking to secure contracts for munitions of war and other supplies for the British and French Governments, and was in need of funds for the purpose of carrying on the work of securing said contracts; and to enable him to enter into said contracts. To secure said money said Gilroy wired to the plaintiff that the plaintiff should send to him $1,000 and in said wire he represented to the plaintiff that he had certain profitable contracts in view which he required said money to cover. The plaintiff shewed said wire to the defendant and told defendant that if he would make a promissory note for $1,000 he would give the defendant one-half the profits that would be made from sending said sum to Gilroy. The defendant, acting upon said statement, signed said promissory note, and the plaintiff sent said $1,000 to said Gilroy. The defendant says that there was no agreement by defendant to pay said promissory note, and that it was the expectation of plaintiff that the same would be paid by moneys to be received from said Gilroy. In the alternative the defendant says it was the intention and meaning of said arrangement entered into between him and the plaintiff that in event of the proceeds and profits from the investment of said $1,000 in manner aforesaid not being sufficient to pay off said promissory note the same should be paid equally by the plaintiff and defendant. On the maturity of said promissory note the plaintiff and defendant had not received any moneys from the said Gilroy with which to pay said promissory note and thereupon the same was renewed by the promissory note sued upon. The defendant says by reason of the premises he is not liable to pay more than said sum of $500 on account of said last mentioned promissory note, which sum the defendant is willing and hereby offers to pay to the plaintiff.

3. The defendant denies that he is indebted to the plaintiff in the amount of said promissory note.

The material filed by the parties on the motion is fragmentary and fails to shew some material facts. It was argued by the defendant that the transaction in question really constituted a partnership between the parties in respect to the venture, but this fact has not been explicitly pleaded, nor does the material shew to what extent, if any, Gilroy's speculation in New York succeeded, or whether it has hopelessly failed.

But it is alleged that the defendant was not expected to pay

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the note, as it was anticipated that the amount would be paid by moneys to be received from Gilroy. In the alternative the defendant says that he was not liable to pay more than $500 being half the amount of the note.

The question as to the liability of a defendant to have his defence (or appearance as the case may be) struck out has been dealt with in many cases of highest authority, and those cases shew, that, notwithstanding the exercise of the discretion of a master or judge of first instance, the court is at liberty to reinstate the defence if it be satisfied that the circumstances justify it. The principle on which the court should act may be gathered from the following authorities:—In *Yorkshire Banking Co.* v. *Beatson* (1879), 4 C.P.D. 213; Lord Coleridge, C.J., says, at p. 215:—"The cases shew that the true view of O. XIV., is that if there is a *bonâ fide* defence . . . . not necessarily a good one, and not necessarily a right one. . . . the defendant is not liable to be put on terms." In *Jones* v. *Stone*, [1894] A.C. 122, a judge in chambers in Western Australia made an order allowing the respondent to sign final judgment in an action of ejectment. The judge held that the appellant had disclosed no reasonable ground of defence. The Supreme Court of Western Australia affirmed this judgment. On appeal to the Privy Council this order was reversed. In delivering judgment Lord Halsbury says, at p. 124:—"The proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay. The present case is not one of that kind; and their lordships cannot do otherwise than regret that the action was not allowed to be defended on its merits in the ordinary course, in which event the expense and delay of the present appeal to the Privy Council would have been avoided."

In *Jacobs* v. *Booth's Distillery Co.*, 85 L.T. 262, the master had ordered the amount claimed by the plaintiff to be paid into court within 7 days, with judgment if the sum was not so paid, and this order was affirmed on appeal by the judge in chambers and by the Court of Appeal. The House of Lords reversed the order. In giving judgment Lord James of Hereford says:—

The view which I think ought to be taken of Order XIV. is that the tribunal to which the application is made should simply determine: "Is there

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a triable issue to go before a jury or a court?" It is not for that tribunal to enter into the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order, "You have no defence. You could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact." We are not expressing any opinion whatever upon the merits of the case. It appears to me that there is a fair issue to be tried. On which side the chances of success are, it is not for this House to determine; but thinking as I do that there is a fair issue to be tried by a competent tribunal, it seems to me to be perfectly clear that the order of the Court of Appeal ought to be reversed.

Annual Practice, 1917, pp. 178, 179.

The alternative defences on which the defendant relies are not set out as fully and clearly as they ought to be, but I think sufficient is set out to shew that the defendant is entitled to have the case tried in court rather than summarily dealt with in Chambers. For this reason I am of opinion that the order made by the referee should be set aside. But inasmuch as the defendant has presented his defence in such an incomplete and fragmentary manner, the statement of defence should be amended, setting forth the grounds which were raised on the argument, but which are not sufficiently alleged in the pleading.

The costs of this appeal will be the costs in the cause.

Appeal allowed.

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REX v. YOUNG KEE.

(Annotated.)

Alberta Supreme Court, Hyndman, J. April 17, 1917.

CRIMINAL LAW (§ II G—79)—QUASHING OF FIRST CONVICTION—FORMER JEOPARDY—SUMMARY TRIAL—CR. CODE SECS. 228, 773, 774.

An order discharging the accused on *habeas corpus* and quashing on *certiorari* his conviction made by a magistrate on a summary trial upon the ground that the defendant was not properly before the magistrate as he had been arrested without warrant for keeping a disorderly house and that consequently the magistrate was entirely without jurisdiction to try him, will not constitute a bar to a subsequent prosecution for the same offence to answer which the accused was regularly brought before the magistrate by warrant.

[*R.* v. *Weiss and Williams*, 22 Can. Cr. Cas. 42, 13 D.L.R. 632, and *Atty.-General* v. *Kwok-a-Sing* (1873), L.R. 5 P.C. 179, referred to; and see Annotation at end of this case.]

Statement.

MOTION to quash a conviction made on a summary trial under secs. 773 (*f*) and 774 of the Criminal Code.

The defendant was convicted before Walter S. Davidson, Esq., Police Magistrate for the City of Calgary, on the 19th of March, 1917, for that he on the 14th day of January, 1917, and some

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time previous thereto at Calgary did unlawfully keep and maintain a disorderly house, to wit, a common bawdy house, by keeping and maintaining certain premises situated (the street address was here stated) in Calgary, for the purposes of prostitution, contrary to sec. 228 of the Criminal Code of Canada, and was adjudged to be imprisoned in the Provincial Gaol at Lethbridge for the term of four months with hard labour.

The defendant now moves to quash the said conviction on the following grounds:—

(1) That the said Walter S. Davidson had no jurisdiction to try the said case or make the said conviction by reason that the said Young Kee was illegally arrested and improperly before the Court;

(2) That the said Walter S. Davidson had no jurisdiction to make the said conviction, he the said Young Kee having been previously convicted for the same offence by the said Walter S. Davidson on the 19th of January, 1917.

(3) That the said Walter S. Davidson had no jurisdiction to try the said Young Kee or make the said conviction, the conviction made by the said Walter S. Davidson on the 19th of January 1917, for the same offence having been quashed on the 28th of February, 1917, and the said Young Kee discharged from custody and acquitted. (*R.* v. *Young Kee* (No. 1), 28 Can. Cr. Cas. 161.)

(4) That the said Walter S. Davidson had no jurisdiction to make the said conviction, there being no evidence to support it.

(5) That the said conviction is bad by reason of there being no evidence:

(*a*) that the said premises were kept or maintained for the purpose of a disorderly house or common bawdy house,

(*b*) that the said premises were kept or maintained for the purpose of a disorderly house or common bawdy house by the accused,

(*c*) that the said accused had the management or control or assisted in the management or control of the said premises,

(*d*) of any offence at law.

The applicant relied chiefly on the 3rd objection above set out.

F. E. Eaton, for accused; *J. J Trainor*, for the Crown.

Hyndman, J.

HYNDMAN, J.:—The material facts are that the said defendant had been previously convicted on the same charge by the said

magistrate and sentenced to imprisonment for six months at hard labour in the Provincial Gaol at Lethbridge. A motion was made before me in Chambers to quash the said conviction, and I did so only on the ground that the defendant not having been properly arrested on a warrant was illegally brought before the Court and consequently the magistrate had no jurisdiction to try him. This was the only ground upon which I quashed the conviction. He was accordingly released from custody, but almost immediately afterwards was again arrested on a warrant issued by the said magistrate on the 2nd of March, 1917, for the same offence, was tried, convicted and sentenced t four months' imprisonment with hard labour.

The question, therefore, to determine is whether or not under the circumstances above related the second conviction should stand. If I had to determine the case solely on the merits, I would not have disturbed the conviction as I was satisfied there was ample evidence before the magistrate on which to convict. Can then a person discharged on an application by way of certiorari be again properly convicted on the same charge?

After examining the authorities referred to by counsel for the applicant my opinion is that a distinction ought to be drawn between a case where the conviction has been quashed on the merits and where it has been quashed on a pure technicality. In this case the objection to the first conviction was that the defendant was not properly before the magistrate and consequently the magistrate was entirely without jurisdiction to try him. Exception was taken squarely to the right of the magistrate even to sit on the case. A clear distinction in my opinion must be drawn between a case of that character and where the magistrate being clothed with jurisdiction to try a case proceeds to do so in an illegal or improper manner or finds the accused guilty on no legal evidence. In the latter instance I think the quashing of the conviction after consideration of the evidence ought to be looked upon as a bar to any further prosecution, but where a conviction has been set aside on the sole ground of want of jurisdiction on the part of the Justice who tried the case it seems to me it should be looked upon as a mere nullity, as though someone not a magistrate at all had assumed the right to try it. In Hawkins Pleas of the Crown, vol 2, p. 521, sec. 8, I find the following passage:—

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Tyndman, J.

"I take it to be settled at this day wherever the indictment, or appeal, whereon a man is acquitted, is so far erroneous (either for want of substance in setting out the crime, or of authority in the Judge before whom it was taken) that no good judgment could have been given upon it against the defendant, the acquittal can be no bar of a subsequent indictment or appeal, because in judgment of law the defendant was never in danger of his life from the first; for the law will presume *primâ facie* that the Judges would not have given a judgment which would have been liable to have been reversed. But if there be no error in the indictment or appeal but only in the process it seems agreed that the acquittal will be a good bar of a subsequent prosecution, notwithstanding such error, the best reason whereof seems to be this, that such error is salved by the appearance."

In Paley on Convictions, 8th ed., p. 167, it is laid down as follows:—

"Consequently, at common law a former conviction or acquittal, whether on a criminal summary proceeding or an indictment, will be an answer to an information of a criminal nature before Justices founded on the same facts. The true test to shew that such previous conviction or acquittal is a bar, is whether the evidence necessary to support the second proceeding would have been sufficient to procure a legal conviction on the first. If, however, by reason of some defect in the record, either in the indictment, place of trial, process or the like, the accused was not lawfully liable to suffer judgment for the offence charged, the former proceeding will be no bar. The previous proceeding, if used as an answer, should have been a decision on the merits, and not in the nature of a mere nonsuit."

In *Rex* v. *Weiss and Williams*, 22 Can. Cr. Cas. 42, 13 D.L.R. 632, 6 A.L.R. 264, Mr. Justice Stuart says:—

"It seems to me that the plea of autrefois convict is quite impossible, because there is now no conviction, but I think the situation must be different in regard to a plea of autrefois acquit. My regret is that my brother Beck did not go on to consider whether there were not, in effect, an acquittal. The exact point which troubles me seems not to have presented itself to his mind. The original conviction was not

quashed for any defect in the record, nor for any mere mistake in the judgment pronounced, but on the simple ground that there had been no evidence at all from which an inference of guilt could reasonably be made. In other words, the conviction was quashed on the merits of the case. It is true that there never was an acquittal by the Court which originally tried the accused, but all the proceedings in that Court were brought into the Supreme Court by certiorari and the Judge of that Court assumed charge and jurisdiction over the whole matter, and, having done so, he quashed the conviction on the merits of the evidence. Surely this must be treated as equivalent to an acquittal. There is a strange lack of precedent on the question of a position of a person whose conviction has been quashed on certiorari. Certainly, in practice, no matter what the ground of quashing, there is seldom, if ever, an attempt to proceed before the magistrate again. It may be that, on the principle of *Rex* v. *Drury*, 18 L.J.M.C. 189, 3 Car. & K. 190, cited by Mr. Justice Beck, where the conviction has been quashed by certiorari, for some mere technical defect, the accused is still liable to be brought before the magistrate again. However that may be, I cannot see how he can be so liable where the conviction has been quashed for lack of evidence to support it."

Mr. Eaton laid considerable stress on the case of *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (1873), L.R. 5 P.C. 179, but I do not think that this case assists him very much. There the defendant was arrested on certain charges against the laws of China, and the Court held that the charge as laid was not an offence against the law of China for which the prisoner could properly be handed over to the Chinese Government, and released him. He was afterwards arrested on a different charge arising out of the same state of facts and again discharged on *habeas corpus*, but the latter decision was reversed by the Privy Council, which held that the first order of discharge was correct, but that the second was not. Had the second charge been similar in terms to the first, I have no doubt he would have been properly released, but the Court in that case would have to deal with precisely the same charge and state of facts. There would be in my opinion, in effect, a determination of the case on the merits.

With regard to the other grounds set out in the notice of

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motion, I am satisfied that the magistrate had jurisdiction to try the defendant and that there was ample evidence upon which to convict.

The application is therefore dismissed with costs.

Motion dismissed.

Annotation. **Annotation—Criminal law (§ II G-79)—Prosecution for same offence after conviction or commitment quashed on certiorari.**

A defendant, pleading a former acquittal in answer to a summary proceeding for an offence, must show that the two charges are identical and where the offence is that of keeping liquor for sale between certain dates, the mere fact that the prior charge was for keeping liquor for sale between the same dates will not alone prove the identity of the offences. *The King* v. *Johnson*, 17 Can., Cr. Cas. 172.

The test is whether the same evidence would be required on both occasions. If fresh evidence is adduced and the charge is different there is no bar. *Bollard* v. *Spring* (1887) 51 J.P. 501.

Section 907 of the Criminal Code, 1906, is as follows:

"On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* to any count or counts, if it appear that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made which might then have been made, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded, the court shall give judgment that he be discharged from such count or counts.

"(2) If it appear that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged."

Where a person has been acquitted on the merits by a Court of competent jurisdiction the acquittal is a bar to all further proceedings to punish him for the same matter, although a plea of *autrefois acquit* may not be allowed because of the different nature of the charges. *R.* v. *Quinn*, 10 Can. Cr., Cas. 412, 11 O.L.R. 242, but see *R.* v. *Weiss and Williams* (No. 1), 21 Can. Cr. Cas. 438 at 441, 13 D.L.R. 166, where it is said that the rule was extended too far in Quinn's case.

The rule is also that, when a prisoner has been discharged *upon the merits* of the charge laid against him, by reason of the conviction or order of detention founded on the charge being

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set aside as unfounded in law, the prisoner thus discharged cannot lawfully be arrested and imprisoned again for the same offence upon the same state of facts, but that, when the prisoner is discharged merely by reason of a defect in the commitment or in consequence of the want or excess of jurisdiction in the committing court, or in the committing magistrate, he can be again arrested and tried for the same cause before a competent magistrate. *Ex parte Seitz* (1899), 3 Can. Cr. Cas. 127, 131, 8 Que. Q.B. 392; *Attorney-General for Hong Kong* v. *Kwok a Sing*, L.R. 5 P.C. 179, 42 L.J.P.C. 64, 12 Cox C.C. 565; *R.* v. *Young Lee* (No. 2), 28 Can. Cr. Cas. 236; Tremeear's Criminal Code, sec. 906.

If on the previous occasion the information or complaint was dismissed merely upon a point of form and not adjudicated upon, the plea will not avail. *R.* v. *Ridgway* (1822), 5 B. & Ald. 527; *R.* v. *Harrington* (1864), 28 J.P. 485. So, too, where an information was laid by a person not entitled to lay it and was dismissed on that ground it was held no bar to an information subsequently laid by a qualified person. *Foster* v. *Hull* (1869), 20 L.T. 482; 19 Hals. 598.

A plea of *autrefois acquit* or *autrefois convict*, or both pleaded together, shall be disposed of before the accused is called on to plead further; and if such plea is disposed of against the accused he shall be allowed to plead not guilty. Code sec. 900. This is commonly termed pleading "over." By sec. 1079 of the Code, it is provided that, when any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice in any case in which such justice may discharge such person, he shall be "released from all further or other criminal proceedings for the same cause."

There is the further statutory provision of sec. 909 of the Code, that when an indictment charges substantially the same offence as that charged in the indictment on which the accused was given in charge on a former trial, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to such subsequent indictment.

A previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter; and a previous conviction or acquittal on an indictment for manslaughter shall be a bar to a second indictment for the same homicide charging it as murder, sec. 909 (2).

It is not open to the Crown to proceed on a second charge in which a conviction could only be had by the second jury overruling the contrary verdict of the first jury. *The King* v. *Quinn*, 10 Can. Cr. Cas 412, 11 O.L.R. 242.

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A conviction for an offence punishable summarily is a bar to proceedings upon indictment on the same facts. *R.* v. *Walker* (1843), 2 M. & Rob. 446; R. v. *Miles*, 24 Q.B.D. 423; but if, after a summary conviction, the act of the defendant results in further consequences calling for a more serious charge, the summary conviction is no bar to such a charge being brought. *R.* v. *Morris* (1867), L.R. 1 C.C.R. 90; 36 L.J.M.C. 84, 10 Cox C.C. 480; *R.* v. *Friel* (1890), 17 Cox C.C. 325; 19 Hals. 598.

If a justice adjudicating upon a summary matter under Part XV. of the Code after hearing the evidence (Cr. Code sec. sec. 726) dismisses the complaint he may make an order of dismissal and give the defendant a certificate of dismissal. Cr. Code sec. 730. The production of this certificate is made a statutory bar to a subsequent complaint "for the same matter" against him. Cr. Code sec. 730; *Hall* v. *Pettingell*, 18 Can. Cr. Cas. 196.

The discharge of the prisoner from custody on habeas corpus does not amount to a quashing of the conviction. *Hunter* v. *Gilkison*, 7 O.R. 735.

To support a plea of *autrefois convict* the accused must show that the offence for which he is on trial is the same as that for which he was convicted, and the plea will not be allowed merely on the ground that the second offence *might* have been proved instead of the first on the trial of the first information. *The King* v. *Mitchell*, 19 Can. Cr. Cas. 113, 24 O.L.R. 324 (a summary conviction matter).

In *R.* v. *Weiss and Williams* (No. 2), 22 Can. Cr. Cas. 42, 13 D.L.R. 632, the accused were charged before a police magistrate and consented to summary trial. They were convicted of cheating at playing a game with dice, contrary to sec. 442 of the Code. Certiorari proceedings were taken, and the conviction was quashed by Mr. Justice Beck, upon the ground that there was not sufficient evidence on which the magistrate could properly convict. Five new informations were then laid before the same magistrate against both defendants; one for an attempt to commit the offence for which they had been convicted, and others against each defendant separately for conspiring with the other in the one case to cheat (sec. 573), and in the other case to defraud (sec. 444.) The defendants were brought before the same police magistrate and by the agreement of counsel for the Crown and for the defendants, the evidence taken on the former hearing was treated as having been repeated. No additional evidence was given. Counsel for the accused raised objection to their being again proceeded against on any of the charges on the ground that, having once been convicted of the offence of cheating (sec. 422) and having succeeded in having that conviction quashed, they were entitled to the benefit of a plea of *autrefois convict* or *autrefois acquit*. The magistrate, however, committed for trial on all of these new charges, An application for writs of habeas corpus to review the warrants of committal was dismissed by Beck, J. *R.* v. *Weiss and Williams* (No. 1), 21 Can. Cr. Cas. 438, 13 D.L.R. 166.

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Mr. Justice Beck said (21 Can. Cr. Cas. at 440): "There is, of course, no doubt that the applicants on the charge of cheating under sec. 442 might have been convicted of an attempt to commit that offence had the evidence established an attempt (C.C., sec. 949) and, therefore, so long as the conviction for the actual cheating remained in force a plea of *autrefois convict* would have been a complete defence to the charge of an attempt. (C.C., sec. 907.) So, too, if they had been acquitted on the charge, inasmuch as they might have been convicted of an attempt, the plea of *autrefois acquit* would have been a good plea to a subsequent charge of an attempt: *Ib.*: *R.* v. *Cameron*, 4 Can. Cr. Cas, 385. The offence, however, of conspiracy was not one upon which they could have been convicted on the charge of cheating, without amendment, and I should think that the change of the latter to the former charge is not such a "proper amendment" as is contemplated by sec. 907. As to the allied defence of *res judicata* where the same facts constitute several offences, in regard to which I was referred to *The King* v. *Quinn*, 10 Can. Cr. Cas. 412, 11 O.L.R. 242, and the English decisions there cited, it seems to me that that doctrine to its full extent is now embodied in the Criminal Code, sec. 15, "where offence punishable under more than one Act or law." It seems to me that where there has been an acquittal the defendant may be again prosecuted on a charge setting up another legal aspect of the same facts: that the principle is that he must not be punished more than once for the same acts or omissions. See Russell on Crimes, 7th ed., pp. 4, 6, 1911. I think, therefore, that *R.* v. *Quinn* extends the rule too far."

Mr. Justice Beck, however, took the view that as the conviction for cheating had been quashed, it was as if no conviction had been made, and he referred to *R.* v. *Drury*, 18 L.J.M.C. 189, 3 Car. and K. 193.

A second habeas corpus motion was made to Mr. Justice Stuart. He held that the doctrine of *Reg.* v. *Drury* did not apply and that the accused, whose conviction for cheating had been quashed for lack of evidence to support it, was thereby actually acquitted of the charge of cheating and was entitled to the benefit of the plea of *autrefois acquit* when charged with an attempt to commit the same offence, *R.* v. *Weiss and Williams* (No. 2), 22 Can. Cr. Cas. 42 at 47. But the other charges were distinct and the commitments being valid as to them, the habeas corpus application was refused.

The offence of conspiring to commit an indictable offence is quite distinct from the offence itself. One person alone may cheat at a game. Two out of three persons playing a game may cheat the third without any previous arrangement, and may be jointly indicted, although the evidence might not disclose any prearranged plan.

"In the offence of conspiracy, the essential ingredient is the concocting of a common plan or design. Not a single step towards accomplishment is necessary. The evidence necessary to

Annotation. support the second indictments for conspiracy would clearly not be sufficient to support a verdict on the charge of cheating, or even of attempting to cheat." *R.* v. *Weiss* (No. 2), 22 Can. Cr. Cas. 42 at 49, 6 A.L.R. 264, 13 D.L.R. 632, 5 W.W.R. 48 and 460. In that case Mr. Justice Stuart said: "It is not merely a different legal aspect of the same facts. Certain evidence was given on which the first conviction was made. That evidence was taken as repeated on the present preliminary. It is true that it it to be the same evidence. But when you infer from the facts stated in that evidence that there was, in fact, a conspiracy to cheat, you go in quite a different direction from that in which you go if you infer that there was, in fact, a cheating . . . . In the first case you infer the existence of one set of facts not directly sworn to. Instead of a different legal aspect of the same facts, we have a different inference of fact from the same evidence. Therefore not only do I think the plea of *autrefois acquit* not available, but think the common law plea of *res judicata* not available either. On the first trial there was no question raised as to whether the men had previously formed a common design to cheat. The question was—had they in fact cheated."

Semble, that *Reg.* v. *Drury*, 18 L.J.M.C. 189, goes no further than to declare that a conviction set aside for some *mere technical defect*, is to be considered the same as no judgment upon the question of former jeopardy. This would apply to some defect in the record, either in the indictment, place of trial, process, or the like, as the result of which the accused was not liable to suffer judgment for the offence charged on that proceeding, *R.* v. *Drury*, 18 L.J.M.C. 189, 3 C. and K. 193, 3 Cox. C.C. 546.

So the discharge of a jury without a verdict being given has been held insufficient to prevent a subsequent indictment. *R* v. *Charlesworth*, 9 Cox. C.C. 44, 1 B. and S. 460, 31 L.J.M.C. 25.

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PASQUINI v. MAINVILLE.

Quebec Court of Review, Fortin, Greenshields, and Lamothe, JJ., March 2, 1917.

LANDLORD AND TENANT (§ III A—40)—LIABILITY OF TENANT—NUISANCE—NEGLIGENCE.

The noise, odour and vibrations resulting from the operation of a sausage factory, not attributable to any negligence, will not render a lessee, who rented the premises for such purpose, liable to the lessor for the damage resulting therefrom.

Statement. APPEAL from a judgment of Dunlop, J., Superior Court, maintaining plaintiff's action. Reversed.

April 5, 1915, Renaud leased to the plaintiff No. 566 Notre Dame St. E. On May 20 following the latter sublet the house to the defendants who agreed to pay their rent to the original landlord, to free the plaintiff of such. The house was sublet for the purpose of carrying on a butcher shop, and to manufacture black puddings and sausages. Renaud had leased the top flat of the house to one named St. Michel. The latter entered action

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against his landlord complaining of the bad odour and smoke which were caused by the manufacture carried on by the defendants; moreover, his machines shook the house, which made it uninhabitable. The plaintiff demanded cancellation of his lease and damages. Renaud prosecuted the plaintiff in security. The action of St Michel and the action in security were maintained, and the plaintiff Pasquini was condemned to pay in damages and costs a total of $138.45.

Being satisfied with this judgment he entered action against the present defendants and claimed from them this amount. His methods were the same as those of St. Michel. He alleged the shaking of the house, smoke and bad odours resulting from the manufacture carried on by the defendants. He accompanied his action with an execution by way of security for the house rent in virtue of which the furniture of the plaintiff was seized and placed under the care of a legal guardian and their manufacture was stopped. The defendants denied their responsibility. Their defence was that they had rented the house for the purpose of carrying on the butcher trade and the manufacture of black puddings and sausages. Their manufacturing process, they add, has been conducted with care and prudence, and that they are not guilty of negligence.

G. H. Mariotti, for plaintiff; *T. Rhéaume*, K.C., for defendants.

Greenshields, J.

GREENSHIELDS, J.:—It will be at once noticed, that in this case the issue is squarely between the plaintiff and the defendants, and the rights of no third party are in any way involved, nor can be affected by the present judgment.

Whether the plaintiff had a right to sublet or not, he did sublet to the defendants, and the defendants were given peaceable possession and occupation of the premises without objections from any one. It is in proof that the present defendants did sublet to a company or firm known as the Independent Provision Co., but this lease is not in the record, and there is no proof as to its terms.

The trial judge condemned the defendants jointly and severally to pay the amount claimed, and that judgment was based on *considérants*, as follows:

Considering that, through defendants' negligence in the way they conducted their business, the plaintiff was made a party to an action in the Superior Court, wherein he was defendant in warranty, and in which he was condemned;

Considering that the defendants are legally responsible to the plaintiff for

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the sum of $138 45, which represents the amount of damages caused to the present plaintiff by reason of the defendants' negligence in conducting their business.

A reversal of this judgment is sought by the defendants inscribing, and in effect the defendants submit: that by the terms of their lease they received full authority from the plaintiff, their lessor, to carry on the business of dealers in meat in general, and the manufacture of blood puddings and sausages;—and if they carried on that business in a proper way, and were guilty of no negligence in carrying on the business, and in no way abused the right given to them under the lease, they cannot be held, as between their lessor and themselves, responsible for any damages which may have resulted from the carrying on of the business. It is submitted by the defendants that attending the manufacture of sausages in its different branches, and the carrying on of a meat business and the manufacture of blood puddings, there must necessarily be a certain amount of smoke and odours, but they did not in any way aggravate any of the attendant consequences of such a business.

The judgment *a quo* would not seem to decide this question, but determines the liability of the defendants on the ground of negligence, and that negligence, of course, is a question of fact; and to determine that question careful consideration must be given to the evidence. Again, to observe, the plaintiff nowhere in his declaration charges that the defendants in the carrying on of their business were guilty of negligence.

St. Michel was the first witness called by the plaintiff: he proves that smoke to a considerable extent penetrated his premises above: he proves that it was objectionable, and, at least, so far as his wife was concerned, his premises were uninhabitable; he proves vibration to a certain extent; but he admits that his principal complaint was the smoke. In cross-examination he is asked if he found the place improperly kept (*malpropre*), and he says—"I never found it so."

Villeneuve is the second witness: he proves also the presence of smoke; he says that he never went into the cellar; that he only went a few steps into the store above, and he does not suggest that the presence of smoke was due to any fault or any negligent act or failure to take any proper precautions on the part of the defendants.

Dr. Pellerin gives his testimony to the effect that owing to the condition of the health of St. Michel's wife, that he ordered her to leave the premises; that they were not fit for her to occupy; but he does not in any way attack the manner in which the defendants carried on their business.

Morin is the last witness examined by the plaintiff; he was the inspector for Maisonneuve; he visited the premises once or twice a week: he says that everything was properly conducted: he made suggestion for a change, and that change was made: he said that the house in the condition in which it was, that is to say, the building, it was impossible in carrying on of a business of that kind, to prevent smoke from penetrating into the houses: he says the meat used was first class-fresh; that the machinery used was of the first class, and that everything, apparently, was conducted properly.

Now, this is the whole testimony of the plaintiff to entail or engage the responsibility of the defendants. There is not a tittle of proof that the defendants or their sub-tenants caused more smoke in that building than any other person would have caused: there is no proof, in my opinion, to justify the statement that the defendants or their sub-tenants failed to do anything which their lease did not justify them doing.

The witness for the defendants, Schernoff, worked there 8 months, in the factory, and he says that it was properly conducted.

I am of opinion that the one charge upon which the judgment is based, viz.: the aggravation of what may be called, if you will, a nuisance, or negligence on the part of the defendants, or their sub-tenants, has not been established, and I should reverse the judgment.

Judgment: "Considering that the defendants under their lease with the plaintiff were fully authorized and entitled to carry on the operations which were by them carried on in the premises, 566 Notre Dame St., Maisonneuve;

"Considering that in the carrying on of the said operations the said defendants were guilty of no act of negligence, but the said operations were carried on in a proper manner and there was no abuse of right by the defendants and the defendants violated no obligation under said lease; and as between the plaintiff and the defendants the defendants are not liable towards the plaintiffs for the amount sued for or any part thereof;

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PASQUINI v. MAINVILLE.

"Considering there was error in the judgment *a quo;* Doth quash and annul the said judgment;

"Proceeding to render th.. judgment which should have been rendered: Doth dismiss the plaintiff's action, with costs."

Judgment reversed.

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S. C.

CULLIGAN v. THE GRAPHIC.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. March 16, 1917.

1. LIBEL AND SLANDER (§ II D—41)—OF LEGISLATIVE OFFICER.
A publication by a newspaper falsely charging a member of a legislature with using his public office in furtherance of his personal or private interests is defamatory and libelous.

2. NEW TRIAL (§ II—7)—IMPROPER ADMISSION OF EVIDENCE—AUTHOR OF LIBEL.
An improper admission of evidence disclosing the authorship of a libelous letter in a newspaper, which is corrected by the trial judge in his charge to the jury, is no ground for a new trial.

3. DAMAGES (§ III H—155)—EXCESSIVENESS—LIBEL.
An award by a jury of $500 damages, for libeling a legislative officer, will not be interfered with on the grounds of excessiveness.

Statement.

APPEAL from the judgment of Barry, J., and motion to set aside verdict for plaintiff and for new trial in a libel action. Affirmed.

A. T. Leblanc, supporting motion.

McLeod, C.J.

MCLEOD, C.J.:—The plaintiff is a lumberman, carrying on business in the county of Restigouche, in partnership with his brother, John Culligan, under the name of J. & A. Culligan. I gather from the evidence they also carry on business as merchants, keeping what would appear to be a general store. The plaintiff also represents the county of Restigouche in the House of Assembly of New Brunswick, "The Graphic, Limited," is a corporation that publishes a paper in the town of Campbellton in the county of Restigouche, called "The Campbellton Graphic." The defendant company, on August 26, 1915, published a letter in its paper which stated as follows:—

We will refer first to a bridge called the McGregor Bridge, on the road leading into the Becketville Settlement, where a great amount of money is being spent this season. Any person who will not accept orders on the Culligans, where they are supposed to take goods out of their store in payment, are not allowed work on the job. A short time ago some of the men working on the job wanted some advance, and applied to the boss for money or an order, and who agreed to give them orders on the Culligans, but the men refused to accept any order on the Culligan store, but said they would take orders on Miss Ultican's store or Mr. Melanson's store. However, one man in particular, was put off the job just as soon as Arthur Culligan, M.L.A.,

heard of it. He went to see this particular man and told him that if he would accept orders on their store he could go back to work and work as long as he liked.

The plaintiff complains that this was a libel on him, and in October of the same year gave the defendant company notice under the Libel Act, C.S.N.B. 1903, c. 136, of his intention to bring an action to recover damages for the alleged libel. The defendant company did not retract or apologize for what it had written, but on October 21 published the notice so served on it with some further remarks and said: "The matter is now up to Mr. Culligan. If he thinks the article is a libel on him, it is for him to proceed in the regular way. If the case should ever come up for trial, interesting developments in the political arena are looked for, and it is hinted that there will be some surprising developments."

An action was accordingly brought by the plaintiff and the defendant pleaded justification that the alleged libel was only a fair and honest comment and criticism on a matter of public interest and that the said words were published without malice and in the public interest, and it further pleaded that the alleged libel was true in point of fact, and by an amendment allowed at the trial it pleaded that the words complained of were not defamatory in themselves and that no circumstances were alleged shewing that they were used in any defamatory sense, and that they were insufficient in law to sustain the action. The action was tried before Barry, J., and a jury in August, 1916, and resulted in a verdict for the plaintiff for $500 damages. The defendant company now moves that a verdict be entered for the defendant or a new trial on various grounds. It claims first that there was not sufficient proof of the service of the notice of action. Having examined the evidence there appears to be no doubt that there is sufficient proof of the service. The object of the notice is to give the defendant company an opportunity, if it desires, either to retract the alleged libel or make an apology for it. That the notice was served on the defendant is clear, because the defendant itself published the notice and made some comments on it. The defendant company also complains that Mr. Anslow was asked as to who wrote the letter that was published. The question was allowed and Mr. Anslow directed to answer. I am not prepared to say that this was an improper question or was

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improperly allowed. In any event, however, I do not think that if it was improperly allowed it would be the subject for a new trial. It appears that the judge in the afternoon of the day the evidence was given stated that this evidence in his opinion was improperly admitted, and he says, "My ruling was wrong and in so far as I may correct it, I wish to correct it," and no further reference appears to have been made to it, and it does not appear to have had any effect on the verdict and no substantial wrong was done the defendant company by the answer to the question, so that under O. 39, r. 6, it would be no ground for a new trial. Several other objections were taken to the admission of evidence, but I do not think that any of them can prevail. There was also objection taken to the charge of the judge; but having examined it carefully, I think no substantial objection can be taken to it. He appears to have left the question entirely to the jury; indeed if any exception at all were taken to the charge it might more easily be taken on behalf of the plaintiff, in his charge as to damages. It was strongly urged, and this I think was the strongest case put forward by the defendant company, that the damages were excessive. In the first place, in actions of libel the damages are a question peculiarly for the jury. In *Davis & Sons* v. *Shepstone* (1886), 11 App. Cas. 187, Lord Herschell, L.C., in speaking of damages says as follows: "The only question that remains is as to the amount of damages. The assessment of these is peculiarly the province of the jury in an action of libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove."

Odgers onLibel and Slander, 5th ed., (1912), p. 373.

The judge in charging the jury rather intimated or stated that the libel complained of was not a very serious one. I do not take that view of it. The plaintiff was a representative in the House of Assembly for the county of Restigouche. As such representative he had the disposition of the patronage of the county, and apparently of directing where public moneys that were spent on the roads or other public works should be spent, and this libel charges that he in his capacity as representative stipulated that men who were doing work for the government on the roads or other public works should take their pay by orders on him and be paid by goods out of his store. It also charges that

when one man refused to do that he had him discharged from the work. The plaintiff had no right to contract with the government or to sell goods to the government, and whilst in this letter he is not charged with dealing directly with the government, he is charged with using his position as a representative of the county to compel people who are employed on government works and who are paid by the government to trade at his store, that is to accept in payment for their work orders on his store, and in one case with having a man discharged because he refused to accept pay in that manner. This would be using his position to make profit for himself from Government work, and in my opinion is a serious charge against a representative of the county, and if true or if believed to be true, it would affect, or at all events should affect his standing, and affect it seriously in the minds of all right thinking men. So that, it seems to me, the charge itself is a serious one. Then the jury had a right to consider how the defendant company acted when notice of this action was given. It didn't retract and it didn't apologize for it. It practically reiterated the charge and continued to do so down to the trial, and at the trial attempted to prove it was true. I have examined the evidence carefully and it appears that the defendant entirely failed to prove it true and the jury could only find a verdict for the plaintiff. The assessment of damages was entirely for the jury, and so far as the defendant was concerned, was left very fairly by the judge to the jury. In my opinion the appeal fails and should be dismissed with costs.

Grimmer, J.

GRIMMER, J.:—The language the plaintiff says was used by the defendant to convey the meaning that he used his public position as a member of the legislature to improperly procure persons labouring on the public works of the province to trade and deal with the firm of which he was a member, whereby he was injured in his credit and reputation. In my opinion the language of the publication is quite sufficient to maintain the action, and I also think there is sufficient evidence of the service of the notice upon the defendant, particularly as its manager admits the receipt thereof, and an issue of the paper containing the notice in full was placed in evidence. It is contended that on the trial the evidence of the name of the writer of the libelous article was wrongfully admitted, and that the verdict of the jury was influenced and their finding magnified thereby: but as this evidence was withdrawn by the judge from the consideration of the jury,

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the question of the propriety or impropriety of its admission does not become part of this case: *Stewart* v. *Snowball* (1880), 19 N.B.R., 597.

I am, however, from an examination of the authorities, by no means assured the question was an improper one. This matter is very fully discussed and considered in the cases of *Elliott* v. *Garrett*, [1902] 1 K.B. 870, *White & Co.* v. *Credit Reform Association*, [1905] 1 K.B. 653, *Plymouth Mutual* v. *Traders Publishing Assoc.*, [1906] 1 K.B. 403, and in an older case, *Parnell* v. *Walter* (1890), 24 Q.B.D. 441, which seem to me to establish the propriety of permitting the evidence to be given. The defendant here pleaded truth and fair comment, or privilege, and it is held that under these conditions the state of his mind in publishing the libel becomes material.

This language (of Collins, M. R., in the *White & Co.* case, [1905] 1 K.B. 653, at 658) is quoted with approval in the *Plymouth Mutual Society* case, by Vaughan-Williams, L. J., at p. 413. And in the older case of *Parnell* v. *Walter*, *supra*, where it was sought by interrogatories to obtain the name of the person or persons by whom the fair and accurate reports mentioned were made or taken, and of the person or persons who transmitted them to "The Times." Denman, L. J. says, p. 452, that O. 31, r. 1 (which contains a proviso "that interrogatories which do not relate to any matters in question in the cause or matter, shall be deemed irrelevant, notwithstanding they might be admissible on the oral cross-examination of a witness") "was not intended to extend the principle on which discovery depends, and it is not admissible to ask such a question as an interrogatory, although no doubt the question could be asked on cross-examination."

I would therefore as now informed, if it were pertinent to this case, be disposed to hold the question was a proper one, and was properly admitted.

It was also contended the damages are excessive and should be reduced. There is, however, no principle of law that I am aware of, applicable to this case, under which the court may proceed to reduce the damages found by the jury, or by which it may properly alter their finding, and say what would be a suitable or proper amount under the circumstances.

This present case, it seems to me, comes peculiarly within these rules [Odgers Libel and Slander, 5th ed., 1912, p. 373],

and that the plaintiff is entitled to damages I think is perfectly clear. The jury had the advantage of having the witnesses before them, of hearing them testify, of observing their attitude and demeanour on the stand, and no doubt arrived at their conclusion with the purpose and object of doing what under the circumstances they considered to be fair, just and reasonable, taking into consideration the position and standing of the plaintiff in the community, the failure of the defendant to offer any apology, or prove or establish the truth of the statements published, or the defence relied upon. I am not able to come to the conclusion that the verdict is both unreasonable and unjust, or that the evidence so preponderates against the verdict as to shew that it is unreasonable and unjust. There is no principle at stake, and nothing involved in the case save the amount of the verdict, which I think should not be disturbed.

The following cases were also considered: *Metropolitan R. Co.* v. *Wright* (1886), 11 App. Cas. 152, *Webster* v. *Friedeberg* (1886), 17 Q.B.D. 736; *Kelly* v. *Sherlock* (1866), L.R. 1 Q.B. 686.

White, J.

WHITE, J.:—(dissenting). The ground upon which the defendants claim to have the verdict entered for them is that set forth in the amendment allowed at the trial, namely, that the words complained of are not actionable in themselves. As no attempt was made at the trial to show that these words were used or understood, or intended to be used or understood, in any sense other than that which the words, construed according to their ordinary and natural meaning, would imply, the question is simply whether the words thus construed are in themselves defamatory. The defendants claim that the words complained of do not allege or imply that the plaintiff either exacted or received anything beyond the fair ordinary and market value for the goods sold upon the orders given on his firm; or that any public interest suffered by his requiring that such orders should be given upon his store instead of, as had been the custom, upon the local stores generally; that the giving of orders upon local stores is a common method of payment for public work, and is a benefit to the workmen, as it enables them to receive pay for their services sooner than they would otherwise do; that as the plaintiff, in the exercise of the patronage which he controlled as a member of the legislature, could properly give or

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refuse employment upon public works to such persons as he saw fit he was doing nothing illegal or disreputable in refusing such employment to any person who did not deal at his store; that, under our party system of government, the members of the legislature, or patronage committees under their direction, control government patronage and use it for the benefit of such persons as they select, and that this practice has become so well established and generally known and accepted that the words complained of as libellous are not such as must, by their publication, disparage the plaintiff and bring him into contempt; while there is no evidence that the publication of the words complained of did have any such effect.

I cannot assent to that contention. A member of the legislature is in a position of public trust. He has no more right to use that position to further his personal and private interests than has an ordinary trustee to so use his fiduciary position. The words complained of charge, in effect, that the plaintiff used his position as a member of the legislature to increase the business and profits of his firm by requiring those seeking employment on public works to trade at his store as a condition of their getting such employment. Although the words do not expressly allege, or necessarily imply, that the plaintiff demanded or received any more for the goods sold on these orders than the like goods could have been bought for elsewhere, that does not affect the fact that the plaintiff is, by the words complained of, charged with using his position of public trust to increase the profits of his firm, and, therefore, in a manner which is not consistent with the public interest. The charge is, I think, upon its face a defamatory one, although it was for the jury, under proper directions from the trial judge, to say whether the charge, assuming it to be untrue, was so calculated to injure the reputation of the plaintiff as to constitute a libel. The motion, therefore, to have a verdict entered for the defendants should be refused.

The motion for new trial is based upon several grounds. I propose to deal with one of these only. The defendants claim that the evidence that John Carr was the writer, or purported to be the writer, of the letter complained of, was wrongly admitted: First, because it was not admissible in any event; and secondly, if it was admissible, the evidence was entirely hearsay. It is with the

latter branch of the claim alone that I propose to deal. The admission of this evidence at the trial was objected to, and strenuously resisted by the defendants' counsel, and a material portion of it was pressed in against the opinion of the trial judge.

I think it quite clear from the evidence, that as the witness had not seen the name attached to the letter, and had no personal knowledge who the writer of the letter was, his evidence, directed to show that it was written by John Carr, was based entirely upon hearsay, and was, therefore, improperly admitted.

It is impossible to say that by the admission of this evidence the defendants have sustained no substantial wrong. The persistence with which the plaintiff's counsel urged the admission of the evidence and the fact that, in order to get the evidence before the jury, he pressed much of it in against the express opinion of the trial judge, and offered to assume all risks attendant upon its admission, would alone suffice to shew the importance which the plaintiff attached to this testimony. The Attorney-General, during the discussion at the trial as to the admissibility of this evidence, expressly stated that he wished to shew by it what care the defendants had used. He quoted a passage from Odgers on Libel and Slander, upon which he commented as follows:—

> As to the truth of the pleadings a great deal must depend on whether the publisher actually got the letter under circumstances that made him think he had a right to publish it and that it was fair comment. If he got it from a man that everybody knew was worthless, or from a man that everybody knew was a bitter political opponent, or from a man that everybody knew was unreliable, or from a man of high standing whose word was reputable, it would make a great deal of difference.

Added to all this, we have the amount of the damages awarded by the jury. Even if we assume that these damages are not so excessive that a jury of reasonable men could not properly have awarded them under all the evidence, and as to that I do not think it is necessary to express an opinion, yet the damages the jury have found are so large that it is difficult to understand how they could have awarded such an amount had they based their award simply upon the evidence properly before them. There is no evidence that the plaintiff had sustained any actual damage from the publication complained of. The charge imputes to the plaintiff nothing that is immoral, dishonest or disreputable. The judge in his charge said to the jury, "Still I think the words published are calculated, though perhaps in a very narrow and

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restricted way, to reflect upon or defame the plaintiff, and I therefore leave it to you to say whether they do or do not constitute a defamation." And later on in his charge, he says, referring to the alleged defamatory publication, "It approaches very nearly to the mark between an innocent expression and a libel."

Since the decision of this court in *Jackson* v. *McLellan*, 15 N.B.R. 83, I have always understood the rule to be, that where improper evidence is pressed in against the opinion of the trial judge, a new trial will be granted unless it is clear that the evidence did not influence the jury. Especially should this rule apply when, as is the case here, the counsel obtained the admission of the evidence by expressly offering to assume all risks.

But it is contended that the judge withdrew the evidence wrongly admitted from the jury, and that under the authority of *Wilmot* v. *Van Wart*, 17 N.B.R. 456, and *Stewart* v. *Snowball*, 19 N.B.R. 597, and Cassels' Supreme Court Digest (1875-93) 570, it must be assumed that the jury did not take this evidence into consideration in rendering their verdict. But, in *Wilmot* v. *Van Wart*, the improper evidence was expressly withdrawn by the trial judge from the jury. In *Stewart* v. *Snowball*, the evidence as to what one Sutherland had said, was admitted upon a statement of counsel that he would connect the defendant with it. This he failed to do, and the trial judge, in charging the jury, expressly told them that if the case depended upon that evidence he would have instructed them that the plaintiff had failed to shew any right to the land, and that the plaintiff's right to recover *must depend wholly upon the other evidence of the case.*

In the present case the trial judge did not either in his charge, or at any time, instruct the jury that in arriving at their verdict they must not consider the evidence which was improperly admitted. After recess, on the same day on which the evidence had been admitted, the judge said: "I wish to say, with regard to Mr. Leblanc's proposed amendment, I have no doubt about its being proper to allow it and therefore it is added to the record. I wish also to state, in regard to the question that arose this morning, as to the right of the plaintiff to have disclosed the name of the correspondent who furnished this information, in looking over the authorities I think it is perfectly plain that he had not that right,

and I don't see how counsel could have overlooked it. My ruling was wrong, *and in so far as I may correct it, I wish to correct it.* It says here (Odgers on Libel and Slander, 4th ed., p. 562), the 'plaintiff cannot, in such action, compel the proprietor to produce the original manuscript so that he may recognize the hand-writing. Nor can he, in the absence of special circumstances, interrogate the proprietor or editor as to the name of the author.' "

"The Attorney-General: That is as to the practice of discovery, as preliminary to the action."

"The Court: No, it is laid down generally in *Hennessy* v. *Wright* (No. 2) (1890), 24 Q.B.D. 445, and *Gibson* v. *Evans*, (1889) 23 Q.B.D. 384."

I do not intend to discuss the question, whether or not the learned judge was right in this ruling. Possibly, if his attention had been drawn to the case of *Plymouth Mutual, etc. Society* v. *Traders' Publishing Assoc.*, [1906] 1 K.B. 403, and to the case of *White & Co.* v. *Credit Reform Assoc.*, [1905] 1 K.B. 653, therein referred to, he might have arrived at a different conclusion.

From what was thus stated, the jury would, no doubt, understand that the trial judge had erred in admitting the evidence objected to, and that he wished to correct the error as far as he had power to correct it. But the jury, not being lawyers, would not, necessarily, understand from that statement, that they were bound to treat this evidence as not having been given, and to entirely dismiss it from their minds in arriving at their verdict. Indeed, when important evidence, calculated to impress itself upon the jury, has been improperly admitted, I doubt whether the ordinary juryman is always able, even when expressly instructed so to do, to wholly eliminate from his mind the effect produced by such evidence. Therefore, I do not think there should be any hard and fast rule, that in no case where evidence, improperly admitted, had been withdrawn from the jury, can a new trial be granted on the ground of its improper admission, and especially, when, as here, the evidence was forced in against the opinion of the trial judge.

In the present case I think it is quite possible and indeed probable that the jury were influenced in arriving at their verdict by the evidence improperly admitted, and that there should be a new trial. *Appeal dismissed.*

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BRENNAN & HOLLINGWORTH v. CITY OF HAMILTON.

Ontario Supreme Court, Clute, J. April 13, 1917.

CONTRACTS (§ IV A—321)—CITY SEWERS—EXTRA WORK—CERTIFICATE OF ENGINEER—FINALITY—MISREPRESENTATION.

Where a contract for the construction of city sewers stipulates against any claim for extra work unless on the written order and approval by the city engineer, whose decision shall be final, the contractor will be entitled to recover for extra work if the engineer's decision was influenced by the city's Board of Control; but not on the ground of an innocent misrepresentation as to the depth of the rock to be encountered in course of the work, it being the duty of the contractor to satisfy himself thereof from the plans and specifications.

Statement. ACTION to recover the actual value of work done by the plaintiffs for the Corporation of the City of Hamilton, the defendant, under a contract, or, in the alternative, for payment for extras in addition to the contract-price.

R. McKay, K.C., and *Gideon Grant*, for the plaintiffs.

I. F. Hellmuth, K.C., and *F. R. Waddell*, K.C., for the defendant corporation.

Clute. CLUTE, J.:—The plaintiffs are engineers and contractors, and in November, 1915, contracted with the defendant corporation for the construction of sewers on McAnulty boulevard and Stapleton and Kenilworth avenues in the city of Hamilton. The plaintiffs allege that the corporation, through its engineers, made certain representations as to the depth of rock to be encountered in the construction of the sewers; and, relying upon these representations, the plaintiffs were induced to enter into the contract for the price and on the terms therein appearing. The plaintiffs further charge that the representations so made were untrue and misleading; that there was much greater depth of rock encountered in the construction of the sewer than was represented by the defendant corporation, whereby the cost was very greatly increased. They further charge that the line of the sewer was materially altered, in spite of the protests of the plaintiffs, and the ground through which the plaintiffs were required to construct the said sewers was much more difficult than that through which the sewers were originally laid out; and the contract was in fact abrogated; and claim to recover as upon a *quantum meruit* for the value of the work done; and, in the alternative, the plaintiffs claim for extras under the contract.

With respect to the claim of misrepresentations as to the quantity of rock, I find the facts to be as follows. The plaintiff Hollingworth, who is an engineer, and who had formerly been

employed for a number of years by the city corporation as assistant engineer, applied to Mr. Gray, the assistant engineer of the city, and asked him what rock there was through which the sewers would pass. Gray replied that he did not know; he said he would call in a man, Stoddard, to give him the information asked; Stoddard not being in, Mr. Taylor, an engineer in charge of the subway, was called in, and he was told by Gray to give Hollingworth all the information he had regarding the rock. There is a dispute as to where the rock would be struck. Hollingworth says Taylor told him that the rock would be found 13 feet below the Grand Trunk rails at Kenilworth avenue subway, and that the rock at the end of Gertrude street would be about the bottom of the pipe of the old Gertrude street sewer; and that it was safe to say the rock would run approximately between these two points on McAnulty avenue in a straight line. Taylor agrees with this, except that he puts it at 12 feet instead of 13 feet below the surface of the Grand Trunk rail at Kenilworth subway. Subsequently, when the dispute arose as to the extra rock to be cut, Taylor was asked by the plaintiff Hollingworth to give a letter as to what occurred at the time application was made to him as to the quantity of rock to be cut, and he did so, and in the letter it is stated to be at a depth of 12 feet. In the view I take, it is unnecessary to settle this dispute as to the depth.

I further find that the representations made by Taylor as to the depth of rock were acted on by the plaintiffs in fixing the amount of their tender and of the contract; but I do not think that the plaintiffs are entitled to rely upon these representations as a ground of claim and damage against the defendants. There were plans and specifications upon which the tender was based, and which formed a part of the contract. The city corporation was under no obligation to give further information. The plaintiffs were bound to satisfy themselves as to the depth of rock, by digging pits, or otherwise. The plaintiffs received such information as the defendant had, and such information was given *bonâ fide*. There is no suggestion of fraud or intentional misleading in any way. The defendant's officers themselves were misled as to the quantity of rock. They had estimated the cost of the sewers for which the plaintiffs contracted at about $5,000, whereas it is said that the engineer, after the sewer was constructed, said that it would have

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cost the city corporation $10,000 had it done the work. I therefore dismiss this portion of the plaintiffs' claim.

The claim that the contract was abrogated by a change of the line of the sewer is also untenable. The sewer was constructed upon the streets mentioned in the contract; but, after the plaintiffs had commenced to dig for the sewer, though very little work had been done, it was ascertained that the line of the sewer passed over a portion of the water-pipes, and the line was changed to ten feet west of the centre of the street where the original line of the sewer was laid down upon the plan. This, I find, was quite within the province of the city engineer to do within the terms of the contract and of his powers in respect thereto. If, by reason of such change, the cost had been increased, that might form a ground for extras.

It is said that a spring was struck on the new line, which would not have been encountered upon the line as originally laid down. This I will consider further in dealing with the extras claimed.

The contract was in fact not changed, and this case must be disposed of under the contract, as, in fact, the work was carried on and completed under the contract.

I dismiss this portion also of the plaintiffs' claim.

There remains the alternative claim for extras. The contract-price was $3,399, which has been paid in full; and a further sum of $435 in addition thereto, after action brought, was paid for unstated extras. The actual cost of the work done under the contract, which was declared by the defendant's engineer to be a first-class job, in every respect, was $9,782.93. The extras claimed fall mainly under extra rock-cutting: (1) by reason of misrepresentations as to the quantity of rock, which is disallowed under the above ruling; (2) extra depth of sewer below that called for by the contract; (3) the use of the templet in measuring the cement work, and other minor claims hereinafter referred to.

The first question is: Did the city's engineer, under the contract, deal with these extras, and is his action final? It is objected that, under clause 11 of the specifications, it is provided that "any additional work required by the engineer must be ordered in writing, and no claim for extra work will be allowed except on production of such written order." What took place was this: when the plaintiffs found that there was a large amount of rock more than they had expected to find under the contract, and that, as they alleged, it was ordered to be put one foot lower than the contract

called for, and that the templet was to be used, they immediately made objection; and I find as a fact that they were requested by the engineer to go on with the work, and they would be paid what was fair and right under the contract. On the 29th December, 1915, the plaintiffs wrote Mr. Macallum, the engineer, referring to the dispute as to the aligning of the sewers and protesting against the same; the letter then proceeds:—

"Your department is insisting on this work being done in a manner not called for in the specifications governing this work, namely:—

"(1) The amount of concrete around pipes is shewn as six inches on the sides of the pipes, and the department is insisting on a minimum of six inches, which brings the average thickness up to at least nine inches. To obtain the result asked for, a templet is being used (something which was never done before in this class of excavation), making necessary a large overbreak in the rock and excess concrete.

"(2) We have been prevented from laying pipe and constructing gulleys at the same time (but fail to find authority for this in the specifications). This has occasioned delay and extra expense to us.

"(3) We are required to joint all pipes from inside as well as the outside (not provided for in specifications).

"(4) There has been considerable change made in length of pipe in gulley-drains, and gulleys have been relocated after construction has been commenced on same.

"(5) Six inches of earth has been demanded on top of concrete surrounding pipes—before ordinary back-filling commences.

"(6) No outlet was provided as shewn in contract drawings.

"As your department has wholly varied the contract as above pointed out and in other ways, and to get rid of contentious extras, without prejudice, we suggest some basis of settlement satisfactory to both parties."

In reply to this letter, Mr. Macallum wrote the plaintiffs as follows:—

"In reply to your favour of the 29th December, 1915, I beg to say that I have consulted Mr. Gray in regard to your statement that the department is insisting on the work being done in a way not called for in the specifications.

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"While not admitting that your firm is entitled to be allowed for any extras, I may say that, after completion of the work, any just claims for extras will be duly considered by me, as is usually done in such cases."

On the completion of the work, the plaintiffs were asked to send in a statement of their extras, which they did (see part of exhibit 4), amounting to $5,179.65. The engineer endeavoured to have this claim passed, and laid it before the Board of Control of the City of Hamilton; while it was favoured by some members of the Board, the majority rejected the claim. This brings me to a consideration of the position Mr. Macallum, as engineer for the city, occupied under the contract, and whether or not he acted in such an impartial manner and free from control of the Board as to make his acts in respect of the extras final and binding upon the plaintiffs.

After the Board of Control had refused to allow the plaintiffs' claim, he went over the claim, and, without stating the items which he allowed, reached the conclusion that he should allow $300 for extras. This was increased afterwards to $435. He was not able to state in the box how much, nor was there any evidence as to how much, was allowed for particular claims, although he was able to state as a matter of recollection that on certain claims as put forward by the plaintiffs he made certain allowances, but how much he could not say. It is from his own evidence, as well as that of the other witnesses, but mainly from his, that I have reached the conclusion that he was not an indifferent and impartial arbitrator as between the parties, nor was he free from the continual pressure brought to bear upon him by the Board of Control. I refer to portions of the evidence of Mr. Macallum, the city's engineer. He states that he was in favour, personally, of paying the contractors their actual cost of the work:—

"Personally, if I could have done so, I would have done so. As a matter of friendship, because I said the city did not want to get anything done for nothing. It was a first-class sewer, and we were satisfied with the work, that anything I could do I would do to assist them in having the Board of Control consider matters.

"Q. Then you took it up with the Board of Control in that view? A. Yes. . . . . I stated that good work had been done, that they had lost money on the matter, and the City of

Hamilton was big enough not to try to get something for nothing, and could we help them out, although it would make a precedent; but they did not consider it.

"Q. Then it seems that, in regard to your acting and dealing with the matter of the extras, that too you submitted to the Board of Control? A. Yes, to see if they could allow extras that I could not allow. I brought up the different extras and stated the position they took, to see if they would agree to them having them.

"Q. And the Board of Control directed what extras should be and what should not be allowed? A. I went into each item with them, and, as far as I could, advanced their point of view.

"Q. Advanced the point of view of the contractors to the Board? A. Yes; in fact, I went a little out of my way, to the extent of giving the impression to them that I was interfering in the behalf of the contractors.

"Q. And the Board of Control negatived all the recommendations, except such as you said absolutely had to go; is that it? A. That is it.

"Q. And that is the way that the bill of extras was finally dealt with? A. Yes.

"His Lordship: Then you allowed them what the Board of Control were willing to give? A. Yes, more than that; I allowed them all the extras I could fight through the Board of Control. I had brought up some things that they would not agree to. But everything I thought I had a chance to get through I brought up, to give them the biggest margin I could.

"Q. Do you mean if they had sanctioned your recommendations you were willing to allow the extras claimed? A. No, no. I came up to $430; had the Board of Control been standing by themselves, they probably would not have allowed the half of that. Those extras, you can see what they look like.

"Q. I took down, 'I went over each item and advanced the contractors' views.' A. Yes.

"Q. They ignored it? A. No, they ignored everything except about $200 worth of items; and altogether I managed to get it raised up to $300 odd, and finally it went up to $430.

"Q. How much did you recommend altogether? A. $435.

"Q. I mean at first? A. About $300.

"Q. Then they did come to what you recommended? A.

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$300 I first recommended; then some things we had discussions about; then there was $135 more that I added on that they finally agreed to, but they were very doubtful about it."

Reference is then made to the various items in the plaintiffs' claim for extras, and it will be seen that Mr. Macallum had no clear recollection of which items he allowed, or what proportion of each. He was then asked:—

"Q. Does the contract provide the extras must be approved by the Board? A. Yes. It is not in the contract, but it is our routine of business—any financial matter must be passed by the Board of Control, and anything I allow for any contract has to be approved by the Board of Control.

"Mr. Hellmuth: All items have to pass the Board of Control.

"His Lordship: In the contract?

"Mr. Hellmuth: No.

"His Lordship: I have taken down this: 'It is our routine of business that anything I allowed must be approved by the Board.' A. Yes, and it generally goes then to the city council to be finally passed.

"Q. Did that apply to the extras in this case? A. Yes.

"Q. Well, could it be said fairly then, do you think, that you were quite an independent judge in matters of this kind? A. Oh, yes.

"Q. If you always had in mind that you had to meet the approval of the Board? A. Approved is hardly the word. I bring these matters up and say, 'These are extras,' and they may question me on these different items, or may pass them without a question. Generally question me, if the items are large.

"Q. Before you give your certificate? A. I never give a certificate for extras. They would say, 'Why do you allow this, and why do you allow something else?' And they generally passed them, unless some item came up that they wanted further information.

"Mr. McKay: As a matter of fact, did you find from the head of the corporation in this particular instance very definite animosity to anything being allowed these contractors at all, and some very definite effort by himself to you in regard to any proposed allowances? A. Well, I do not think that the head of the corporation was too friendly.

"Q. Which, being interpreted in the very polite and careful way you put it, means? A. That any item that I brought up to be passed as an extra had to be strictly and absolutely without blemish as far as the correctness of it was concerned.

"Q. In other words, let me put it—you say he was not too friendly; to an onlooker in the position of Brennan and Hollingworth, they would not be wrong if they interpreted his actions and language as decidedly unfriendly? A. Well, I would not say that it was a bosom-chum attitude, but anything that I brought up that had to be paid he would certify to.

"Q. In other words, it was just in that position, and Mr. Macallum found himself in this position, that anything that he could absolutely force through and pass he might get, and anything that he could not absolutely force he could not get allowed? A. No, that anything I could get through that had any basis upon which to work I could carry through, but anything I was trying to carry through from a standpoint somewhat of sentiment would not go through.

"Q. From the standpoint of the sentiment of fairness of Mr. Macallum, the sentiment which Mr. Macallum had of fair dealing between the contractor and the city was not allowed to have play; he had to be able to shew line, verse, and absolute legal authority, or the item could not pass? A. I had to shew that the cost had been incurred.

"Q. And incurred strictly in accordance with the interpretation which the head of the council, the Board of Control, and the solicitor, were able to put on the contract and specifications? A. No, my own interpretation.

"Q. But they held you up to that interpretation; Macallum's interpretation would have been wider than theirs; but they brought you to the strict terms of the contract and specifications as they regarded them?

"Mr. Hellmuth: I object.

"His Lordship: I will allow that to be answered.

"Witness: I don't know that they had much weight with me, as far as causing me to hold back any item that I thought I could bring through, because at that date, and for a month or so before, I had no intention of remaining in the city, so they carried no weight with me. And it did not make much difference whether I antagonised them or not.

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"Mr. McKay. But the antagonism over this matter was fairly definite and pronounced? A. Well, I don't think I would say that. The only thing is, I knew I had to, in presenting things that were absolutely not certain, that I had to put it in a very smooth way.

"Q. And the consequence of not putting it in a smooth way would be that it would be promptly negatived by the Mayor and the Board? A. By one or two of the Board. The Board were not all together.

"Q. But by sufficient of them to make it impossible to pass the item? A. Yes, but I brought, I think I got through everything that I could conscientiously get through, that I could conscientiously sign my name to."

In my view, where, as in this contract, clause 17, "All works are to be done to the engineer's entire satisfaction, he is to be the sole judge of the work and materials, in respect both to the quantity and quality, and his decision on all questions in dispute with regard to work or materials, or the meaning or interpretation of the specifications and plans, is to be considered final and binding on all parties," it is requisite that such engineer shall not be under the influence of the Board of Control, one of the parties to the contract. Although he may think that he would act independently in this case, because, as he says, he was about to leave the city corporation's employ, it does not seem to me to be in the interests of common justice to permit a decision under a contract to rest in one who has to submit his action to the approval or disapproval of any body of men who are interested in the contract. I have only referred to a portion of the evidence bearing upon this question, and I find as a fact that Mr. Macallum was not an impartial and indifferent arbitrator between the parties; and, saying this, I do not desire at all to impugn his integrity. I consider the Board's method in this regard improper and such as not to bind the plaintiffs. I therefore hold that the plaintiffs are not bound by the action of the engineer in respect of any dispute arising under the contract between the parties, and refer to the following authorities in support of this view.

In *Hickman & Co.* v. *Roberts*, [1913] A.C. 229, a building contract provided that the decision of the architect of the building owners on all matters relating to the work should be final and

that payments should be made on the certificate of the architect. The architect, under a misapprehension of his position, allowed his judgment to be influenced by the building owners and improperly delayed issuing his certificate in accordance with their instructions. After the completion of the work and the expiration of the period of maintenance the contractor sued the building owners for the final balance alleged to be due under the contract, but the final certificate was not issued until after the commencement of the action:—Held, that the building owners were precluded from setting up as a defence to the action either that the issue of the certificate was a condition precedent to the bringing of the action or that the certificate was conclusive as to the amount of the claim. Fletcher Moulton, L.J., referring to the architect, said in the Court below: "He is no longer fit to be a judge, because he had been acting in the interests of one of the parties, and by their direction. That taints the whole of his acts and makes them invalid, whatever subsequent matter his decision is directed to." Lord Loreburn, L.C., referring to this statement, says (p. 233): "I agree with that, but it is not in my opinion a case to which the terms 'turpitude' or 'fraud' are apt. I think the real error of Mr. Hobden was that he mistook his position; that he meant to act as a mediator; that he had not the firmness to recognise that his true position was that of an arbitrator, and repel unworthy communications made to him by the defendants." Lord Alverstone said (p. 234) that the position of arbitrators in a case of this kind is very important, and that the system could not have been allowed to exist, had it not been that it had been found that persons in the position of engineers or architects are able to maintain, and do maintain, a fair judicial view with regard to the rights of the parties; it has to be remembered that in the great majority of cases they are the agents of the employers, and that not infrequently they have to adjudicate upon matters for which they themselves are partly responsible. "It is therefore very important that it should be understood that when a builder or contractor puts himself in the hands of an engineer or architect as arbitrator there is a very high duty on the part of that architect or that engineer to maintain his judicial position."

In *Bristol Corporation* v. *John Aird & Co.*, [1913] A.C. 241, the same principle is acted upon. In that case the contract contained a provision for the reference of disputes to the engineer of

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the defendants, and upon the settlement of the final account there arose a *bonâ fide* dispute of substantial character between the contractors and the engineer, involving a probable conflict of evidence between them. The fact that the engineer, through no fault of his own, must necessarily be placed in the position of judge and witness was said to be a sufficient reason why the matter should not be referred in accordance with the contract; and the Court refused to stay an action by the contractor for payment of the account. In that case an action had been brought and an application was made under the 4th section of the English Arbitration Act of 1889 (sec. 8 of the Ontario Arbitration Act, R.S.O. 1914, ch. 65) to stay the proceedings upon the ground that there was no sufficient reason why the matter should not be referred in accordance with the contract. The House affirmed the Court of Appeal in affirming an order refusing to stay the proceedings. Lord Atkinson said (pp. 247, 248) that there was no dispute as to the law applicable. If a contractor chooses to enter into a contract binding him to submit the disputes which necessarily arise, to a great extent, between him and the engineer of the persons with whom he contracts, to the arbitrament of that engineer, he must be held to his contract. "Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But, though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and, if it be shewn in fact that there is any reasonable prospect that he will be so biassed as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the 4th section of the Arbitration Act vests in them, 'We are not satisfied that there

is not some reason for not submitting this question to the arbitrator.' . . . . I am utterly unable to get rid of the notion that upon two of the most important matters, namely, this filling and the excavation between the monoliths, Mr. Squire will necessarily be at once in the position of a judge and a witness. I think he must necessarily be in that position. I cannot imagine any position more unpleasant, any position more undesirable. If he be really a witness, then he must, in effect, be examined before himself, and cross-examined before himself, and he must decide upon his own veracity or reliability. I think there could be no stronger reason to induce the Court not to exercise their discretion to stay the action than that any gentleman who has taken upon himself the duties of arbitrator should be put in such an entirely anomalous position."

In *Hill* v. *South Staffordshire R.W. Co.* (1864), 12 L.T.R. 63, 65, Lord Justice Turner said: "In my opinion, companies must, no less than individuals, be answerable to the jurisdiction of this Court in cases of fraud; and I think that, in the eye of this Court at least, it would be a fraud on the part of this company to have desired, by their engineer, these alterations, additions and omissions to be made, to have stood by and seen the expenditure going on upon them, to have taken the benefit of that expenditure, and then to refuse payment on the ground that the expenditure was incurred without proper orders having been given for that purpose." He next considered a clause of the contract providing that any dispute or difference as to the contract itself, or the specification, or the plans and sections, should be left to the principal engineer, etc. (see a somewhat similar clause in the present contract, clause 17). The company relied upon this clause as barring the plaintiff's right of suit, relying upon *Scott* v. *Avery* (1856), 5 H.L.C. 811; but his Lordship thought that the clause was intended to apply only to cases of dispute during the progress of the works, the more so because the specification provided that, if any question arose 'in the final settlement of accounts', it should be referred to arbitration in the usual way.

See also *Wallace* v. *Temiskaming and Northern Ontario Railway Commission* (1906), 12 O.L.R. 126, affirmed in *Temiskaming and Northern Ontario Railway Commission* v. *Wallace* (1906), 37 S.C.R. 696. It was there held that the employer has the right to direct

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the attention of the certifying official, before he certifies, to alleged defects of performance, and to ask for care and diligence in the discharge of his duty, but he has no right to dictate or impose his own opinion; and any attempt by the employer to do so, especially if yielded to by the servant, is in the nature of a fraud, or is at all events evidence of fraud which will, if established, relieve the plaintiff from the necessity of obtaining the certificate. See also *Price* v. *Forbes* (1915), 33 O.L.R. 136, 23 D.L.R. 532.

I find that the plaintiffs are entitled to the extra cost in respect of the following items:—

1. Extra depth at which the sewer was placed. The dispute arose under the construction of the plan, as to whether the depth should be measured to what is called the "invert," that is, the inside of the pipe, or to the actual depth of the sewer. I find, in construing the meaning of the contract and plan itself, and upon the evidence, that what is called the "black line" shewn on the plan, exhibit 7, indicates the bottom of the sewer, and that under the instructions of the engineer in charge the depth was increased, and to the extent of this extra depth the plaintiffs are entitled to be allowed.

2. The plaintiffs are entitled to the increased cost caused by the plaintiffs being compelled to use the templet in the construction of the sewer; both in respect of the width of the sewer and of the extra overbreak.

3. They are entitled also to the cost of cementing the pipes on the inside; the cost of removing the water and otherwise caused by the spring struck on the changed line, and in extra gulley-drain-pipe and construction cost due to the change in the width of the roadway and to re-location of the gulley-drain; extra pumping not provided for in specifications; extra expense of leak water in the water-main. Various items of expense in constructing the sewer were recommended by the city's engineer, and were not, as I gathered from his evidence, disputed.

No doubt, there may be further evidence offered on both sides in case of a reference, but from the evidence already in I am able to form a fair idea of what would be a reasonable allowance for extras on the contract; and, if counsel desire, in order to save the expense of a reference, that I should give expression to my views, I will do so.

If I am not requested so to do within a week, there will be a reference to the Master at Hamilton as to the matters in dispute between the parties in respect of extras as above indicated, the Master taking into consideration in reaching the final amount the sum of $435, already allowed, and paid after action.

Further directions and costs reserved. *Judgment for plaintiff.*

CAPITAL LOAN CO. v. FRANK.

Manitoba King's Bench, Galt, J. June 15, 1917.

PLEADING (§ VI—355)—COUNTERCLAIM—THIRD PARTY.

Where in a counterclaim by a defendant against a plaintiff and a third party, the matter thereof may be set up against the plaintiff as a complete defence without the third party, and the plaintiff is not interested in what is claimed from the third party, the counterclaim is improper; in such case the relief against the third party must be had under third party procedure.

Statement.

APPEAL on behalf of the plaintiff from an order made by the Referee in Chambers dismissing a motion to strike out a counterclaim. Reversed.

F. J. Sutton, for plaintiff; *E. R. Siddall*, for defendant.

Galt, J.

GALT, J.:—The plaintiff sues the defendant for certain moneys alleged to be due under the terms of a morgtage made between one Crooks as mortgagor and Blackwood as mortgagee, and under the terms of a certain extension agreement entered into between one Kennedy and the said Frank and Blackwood and Mrs. Alloway, who had become assignee of the mortgage. Subsequently Blackwood obtained an advance of $10,311.77 from the plaintiff company for the purpose of paying off the moneys due to Mrs. Alloway under her assignment, and in order to procure the re-assignment to him (Blackwood) of the said mortgage. The said Kennedy and Frank appear to have been interested in the land in question, and they joined in the extension agreement as sureties to a limited extent in favour of Mrs. Alloway. Under the terms of the extension agreement the original mortgage was to be considered as amended so as to include the terms provided for in the extension agreement. The re-assignment of the mortgage from Mrs. Alloway to Blackwood provided that: "The said assignor doth hereby grant, assign, transfer and set over to the said assignees, his heirs, executors, administrators and assigns, the said agreement dated the 22nd day of November, 1913, the benefit of all covenants therein contained, all moneys due, owing or payable

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thereunder and all the right, title and interest of her, the said assignor thereunder and therein," etc.

In the present action the Capital Loan Co., Ltd., sue Frank upon the covenant he had given to the extent of $5,000 in the extension agreement, together with interest thereon. Frank, in his statement of defence, sets forth all the facts relating to this rather complicated transaction and then counterclaims against Blackwood and the Capital Loan Co., Ltd., for a number of alternative declarations by the court in respect of his alleged rights.

It appears to me that under the assignment made by Blackwood to the plaintiffs on December 14, 1916, for the sum of $10,311.77, the plaintiffs became entitled to relief against all or any of the parties to the extension agreement aforesaid.

Under our procedure claims by a defendant against a plaintiff or against a plaintiff and a third party, may be set up by counterclaim; but this right is subject to certain restrictions:—for instance, where the matter of the counterclaim may be set up against the plaintiff as a defence without the third party, and the plaintiff is not interested in what is claimed from the third party, the counterclaim is improper: See *Torrance* v. *Livingstone*, 10 P.R. (Ont.) 29.

This decision was affirmed on appeal by the Divisional Court.

The various declarations by the Court as claimed in the counterclaim all appear to me to be defences to the action in so far as they affect the plaintiff, but in so far as they affect Blackwood (the party added in the counterclaim) the relief falls under our procedure regarding third parties. "Where the relief claimed by the defendant is not claimed against the plaintiff at all (or is improperly claimed against him) and is for contribution or indemnity, recourse must be had to the third party procedure." See Annual Practice, 1917, 379.

The defendant has mistaken his rights and has resorted to the wrong procedure.

For the above reasons, the appeal must be allowed and an order made striking out the counterclaim. But the defendant should be at liberty to secure his alleged rights against Blackwood by third party procedure if he be so advised. The plaintiff is entitled to the costs of the appeal. *Appeal allowed.*

SMITH v. CITY OF MONTREAL.

QUE.

C. R

Quebec Court of Review, Lafontaine, Greenshields and Lamothe, JJ. April 27, 1917.

MUNICIPAL CORPORATIONS (§ II G—210)—LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR.

A municipal corporation is not liable for the negligent acts of an independent contractor in the course of carrying out a work for the city, notwithstanding that the workmanlike execution of the work was supervised by the city.

Statement.

APPEAL from the judgment of the Superior Court rendered by Panneton, J. Reversed.

The plaintiff, lessee of a farm at St. Laurent, sues the City of Montreal and the Harris Construction Co., in damages on the following grounds: The City of Montreal decided to construct a drain in the centre of O'Brien road through St. Laurent to Cartierville. On February 3, 1913, the contract was given to the Harris Construction Co., which was to build it according to plans, specifications and conditions set forth in the deed passed between them for a determined sum. The action in damages against both defendants is for $6,812. The plaintiff complains that the company took an absolute possession of part of the plaintiff's land and trespassed over the rest of the farm; and that illegally, uselessly, by its want of skill and negligence, caused considerable damage to his crops, his soil, his fences, his fruits, his house and furniture, for which losses the defendants are jointly and severally responsible. The City of Montreal denies all responsibility. It alleges that there is no privity of contract between the city and the plaintiff; and, moreover, that the action is prescribed. It complains also of the irregularity of the notice of action. The company pleaded practically a general denegation. The Superior Court condemned the defendants jointly and severally to pay plaintiff a sum of $1,425 for damages, and the company a further sum of $75.

Laurendeau & Archambeault, for City of Montreal.

Murphy & Perrault, for Harris Cons. Co.

The judgment in review was delivered by

Greenshields, J.

GREENSHIELDS, J. (after having explained the facts and the points in issue between the parties, proceeds to examine the evidence, finds that the Harris Construction Co. was responsible, but that there was error in the assessment of the damages made by the Superior Court. The Court of Review assessed the damages at the sum of $701 instead of $1,500).

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As to the condemnation against the defendant, the City of Montreal, I cannot see my way to maintain this condemnation.

The question was not submitted to the trial Judge, and he was not called upon to decide the question as to the joint and several liability. It was seriously urged before this Court; in fact, it was practically the only question upon which the counsel for the city relied, which, if sound, of course, is conclusive, viz.: that the Harris company being an independent contractor, doing work for the city according to specifications, and for a fixed price, any negligent act on its part in the carrying out of the work and which caused damage to a third person, is not chargeable against the city; in other words, there is no joint or several responsibility between the contractor and the city.

Indeed, to lay down a different rule would be placing a burden upon the city, the consequence of which would be serious and far reaching.

The city had determined, for public purposes, to construct the sewer in question and specified the manner in which it wished that sewer to be constructed: it called for tenders, and accepted the tender of the Harris Construction Co., and gave a contract to the company to do the work as called for by the specifications.

If the fact of doing the work, the fact of constructing the sewer, as distinguished from the manner in which the work was done, caused damages to a third person, the city might be responsible for that damage, but when the damage is not due to the fact that the work was done, but is due to the manner in which it is done, it is difficult to see why the city should be held responsible.

The plaintiff's counsel urges that the city had control over the work. This is not correct in my view. The city inserted in its contract the condition attached thereto, that its representative should at all times have the right to supervise the execution of the work, not with a view of controlling the actions of the contractor with respect to any negligent act *quoad* a third party, but only and solely for the purpose of securing to the city a proper workmanlike execution of the contract.

Indeed, in the absence of any such stipulation in the contract, I am of opinion that the city, as the proprietor, would have the right, in law, to send its representative engineer on the works to

see that the work was being so done that when completed it would conform to the requirements of the specifications.

If a man, for instance, in the employ of the Harris company, through the company's negligent act, had been killed or injured, it would be difficult to say upon what principle the city could be held liable for this *quasi delit*, and in like manner, if the Harris company by its negligent act damages an adjoining property, it is hard to see the reason for condemning the city.

In a word, and to conclude, I hold that the city is not liable for the manner which the contractor did his work, unless that manner was ordered by the city.

The city took no part whatever in bringing about the damages of which the plaintiff complains. It was no act of the city, it was not an incident of the construction of the sewer properly speaking. The contractor, uncontrolled by the city, chose its own way of doing the work, as it had a perfect right to do. A person or a municipality who wishes to construct a house or a public improvement, may, by a contract, entrust that work to another at a price fixed and free himself or itself from all responsibility for any negligent act committed by the contractor, and in this case such was done by the City of Montreal.

I should reverse the judgment and should dismiss the action as against the City of Montreal.

Proceeding to adjudicate upon the issue between the plaintiff and the City of Montreal:

Considering that the defendant, the City of Montreal contracted with the other defendant, the Harris Construction Co., to execute certain works according to specifications and at a price fixed;

Considering that the other defendant, the Harris Construction Co. was an independent contractor and had complete control as to the manner in which the said works should be carried out, provided the said works were completed in accordance with the specifications forming part of the said contract;

Considering that the damages claimed by the said plaintiff were in no way caused by any act of the defendant, the City of Montreal, or its employees, and the said defendant, the City of Montreal, had no control and exercised no control as to the manner in which the said work should be carried on and executed by the defendant, the Harris Construction Co., and if the said works

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were carried on in a negligent manner by the defendant, the Harris Construction Co., the defendant, the City of Montreal, was in no way responsible therefor;

Considering there was error in the judgment condemning the defendant, the City of Montreal, jointly and severally with the other defendant, the Harris Construction Co., and that the plea of the defendant the City of Montreal is well founded; doth cancel and annul the said judgment;

And proceeding to render said judgment which should have been rendered, doth dismiss the plaintiff's action against the defendant, the City of Montreal, with costs in both Courts and it is ordered that the record be remitted to the Court below.

Judgment reversed.

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JOHNSON v. MUSSELMAN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Beck and Walsh, JJ. March 9, 1917.

MISCHIEF (§ I—15)—WILFULLY KILLING A HORSE—INDICTABLE OFFENCE—COMPENSATION UNDER AGREEMENT NOT TO PROSECUTE.

If the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it; consequently a promissory note, unless held by a transferee in due course and for value, is not enforceable if given in consideration of stifling a criminal prosecution for the indictable offence of wilfully killing a horse, the property of another (Cr. Code sec. 510).

Statement.

APPEAL by plaintiff from the judgment of Winter, D.C.J., who dismissed the plaintiff's action on a promissory note made by the two defendants on the ground that it was given for an illegal consideration, namely, the stifling of a criminal prosecution and that the plaintiff endorsee took with notice of the defect.

R. Ure, for plaintiff, appellant.

W. C. Robinson and *F. W. Griffiths*, for defendants.

Harvey C.J.

HARVEY, C.J., concurred with WALSH, J.

Walsh, J.

WALSH, J.:—The note sued on was made on the faith of the written agreement of the payee Tibbetts "to drop all proceedings against Ed. Musselman for the alleged shooting of a horse, my property." The learned trial Judge has found that the note was given in pursuance of this agreement and "with the view of preventing criminal proceedings being taken." I take his judgment as a whole to be a finding that the agreement of the payee on the strength of which the defendants made this note was that he would not criminally prosecute the defendant E. Musselman for having

killed his horse. That finding is, in my opinion, amply justified by the evidence. It is in fact, I think, the only finding that it was open to the learned Judge to make. The written agreement is "to drop all proceedings," a term not only broad enough to include, but upon its grammatical construction clearly meaning both criminal and civil proceedings. Though in fact none had then been set on foot, those which Tibbetts contemplated were of a criminal character. The Mounted Police were notified and came and cut off the head of the horse. He consulted the police before agreeing to take the note. In answer to the question "what were you going to do?" he said "why if you had a horse shot in a man's yard you would have that man arrested" and in answer to another question he said "they wanted to give the note because they did not want to be prosecuted for shooting that horse."

The defendant Alvin Musselman says that he was to pay this money if there was no arrest made and that the note was given so "that he wasn't to arrest me." It is very plain to me that this note was given as the result of an agreement that there would be no criminal prosecution of the defendant suspected of having killed the horse. In my view of the law such an agreement is against public policy and illegal and payment of this promissory note founded upon it cannot be enforced at the suit of the plaintiff who admittedly is not a holder of it in due course.

I think it was quite open to Tibbets to make any compromise of his civil claim against Musselman that he saw fit though the Act which involved the defendant in the liability thus settled also brought him within the pale of the criminal law and even if the compromise was induced by a threat of criminal proceedings. If Musselman in fact shot the horse and under such circumstances as brought him under criminal liability for it Tibbetts' right to be paid the damages resulting from it could not be denied and it would clearly be open to him to make a settlement of his claim for these damages. It is the agreement not to prosecute at which the law baulks, and once the fact of such an agreement having been made is established there is an end to any liability founded upon or arising out of it: *Flower* v. *Sadler*, 10 Q.B.D. 572; *Jones* v. *Merioneth Bg. Soc.*, [1892] 1 Ch. 173; *Williams* v. *Bayley*, L.R. 1 H.L. 200; *McClatchie* v. *Haslan*, [1891] W.N. 191, 17 Cox C.C. 402.

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I cannot agree with my brother Beck's view that the fact that a constable of the Mounted Police told Tibbetts that there was no objection to this arrangement being made validates it if in truth it rested upon an agreement on his part not to prosecute. The evidence does not establish a communication by Tibbetts to the constable of the fact that he was agreeing not to prosecute. All of the evidence upon the point is that of Tibbetts who says that when the defendant offered to give a note for the horse, "I says I will do that if the police says it is all right and I went and seen the police and he says 'sure, take pay for your horse if you can get it," which while perfectly sound advice on the part of the constable is far short of proof of knowledge by him of an agreement on Tibbetts' part not to prosecute. Even if the constable with full knowledge of all the facts had told Tibbetts that such an agreement was all right I do not think that would make it so. In *Whitmore* v. *Farley*, 14 Cox C.C. 617, Baggallay, L.J., at p. 622 says: "It is wholly immaterial that such agreement has received the sanction in Court of the magistrate before whom the charge was brought. The sanction of the magistrate cannot render valid a transaction which would otherwise be illegal."

In *Morgan* v. *McFee*, 14 Can. Cr. Cas. 308, 18 O.L.R. 30, a Divisional Court held that an agreement for the withdrawal of a criminal charge which was entered into with the approval of the Crown attorney and which was communicated to the police magistrate who was trying it and who thereupon directed that the proceeding should be dropped was void and could not be enforced and that the plaintiff's action which was founded on it was not maintainable. *A fortiori* the concurrence of a constable in such an agreement could not give validity to it.

These words also make it clear that it is immaterial whether the charge attempted to be compromised was under the old law a felony or only a misdemeanor, so long as it was a crime committed against the public. There are some cases as my brother Beck points out in which the law permits a compromise though they might be made the subject of criminal prosecution, but Lord Denman, C.J., says in one of the cases he cites (*Keir* v. *Leeman*, 6 Q.B. N.S. 308, at p. 321), "but if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it."

And surely in this country at any rate it must be that the killing of a horse under circumstances which bring the offender within the penalties of the Criminal Code and subjecting him to the danger of punishment by imprisonment for fourteen years is an offence of a public nature.

In my opinion the judgment appealed from is right and this appeal from it should be dismissed with costs.

BECK, J. (dissenting):—The note is dated March 1st, 1914, and is for $250 with interest payable March 1st, 1916, to E. Tibbetts and is made by the defendants, Edward Musselman and Alvin Musselman. On or about the 23rd February, 1914, Tibbetts acting on information he had received went to the Musselman farm where the defendants with their father and mother lived and found a horse of his lying dead near the Musselman barn. It had been shot. Tibbetts went in and saw the Musselmans. The father said the matter ought to be settled. Ultimately, Tibbetts says, "They came to my place and we made arrangements that they should give me a note to pay for the horse and I says I will do that if the police says it is all right, and I went and seen the police and he says: 'Sure take pay for your horse if you can get it.'" The note was accordingly given and at the same time Tibbetts signed a memorandum as follows:—

"Agreement between E. Tibbetts and Ed. Musselman. In consideration of the sum of two hundred and fifty dollars, I, E. Tibbetts, hereby agree to drop all proceedings against Ed. Musselman for the alleged shooting of a horse, my property."

No proceedings, civil or criminal, had then been commenced. Two or three days after the signing of the note and memorandum an information was laid by a policeman, who had succeeded the policeman who had told Tibbetts to take pay for his horse if he could get it. The proceedings were ultimately dismissed. We are all familiar with the expression "compounding a felony." In 9 Hals. 503, it is said that "it is a misdemeanour at common law to compound a felony, *e.g.*, to agree in consideration of the return of goods stolen or of any other advantage not to prosecute a person who has committed a felony; the punishment for the offence is fine and imprisonment without hard labour. It is no offence to abstain from prosecuting or simply to promise not to prosecute, or to take back goods which have been stolen unless they are

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returned in consideration of a promise to favour the thief either by not prosecuting him or otherwise."

In Stephen's History of the Criminal Law it is said (p. 503), "It is not quite clear whether an agreement not to prosecute an offender is in itself a crime. It is commonly said to be a misdemeanour to agree not to prosecute a person for felony, but there is singularly little authority on the subject."

In the Criminal Code, Part IV. is devoted to offences against the administration of law and justice, but this case is not dealt with, though sec. 181 deals with the case of compounding penal actions.

It was never suggested that compounding a misdemeanour was a criminal offence; and sec. 14 of the Code abolishes the distinction between felony and misdemeanour.

One would conclude from this that framers of the Code were not inclined to keep alive this particular crime if indeed it ever existed; though probably if it was a crime at common law the mere fact of its omission from the Code would not prevent its continuing to be so. (See Crankshaw's notes to sec. 16.)

Again, in Stephen's History of the Criminal Law 503, it is said: "Till very lately it was considered that where a private person was injured by a felony the civil remedy was suspended till the felon was convicted. On the other hand, upon his conviction the remedy ceased to be worth having as his goods were forfeited. As forfeiture for felony has been abolished, this last remark no longer applies, and the case of *Wells* v. *Abrahams* (L.R. 7 Q.B. 334; and see *Osborne* v. *Gillett* L.R. 8 Ex. 89) has thrown a good deal of doubt on the general doctrine of showing that even if the rule exists it is practically impossible to enforce it, unless special circumstances made it necessary to do so in the public interest."

The Code sec. 13, however, expressly provides that: "No civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence."

First, then, it appears to be open to question whether it is a criminal offence to compound an indictable offence; but, secondly, assuming that it is, the fact that a transaction which gives a right of civil action constitutes also a criminal offence on the part of the defendant is no ground for interfering with

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the due progress of the action. There can, therefore, be no reason why the claimant should not obtain his full civil rights and remedies without taking proceedings in Court. It is true, no doubt, that in the case of some indictable offences a positive agreement, intended to be binding, not to prosecute is an illegal consideration, but it is not enough to show that the creditor was induced to abstain from prosecuting because he had obtained satisfaction of his civil claim. A threat to prosecute does not necessarily vitiate a subsequent agreement by a debtor to give security for a debt, which he justly owes. Nor does any expectation that the defendant may have entertained that, if he gave the required security, he might escape prosecution, vitiate the security. *Ward* v. *Lloyd*, 7 Scott N.R. 499; *Flower* v. *Sadler*, 10 Q.B.D. 572; *Jones* v. *Merionethshire, Etc., Socy.*, [1891] 2 Ch. 587.

There are certainly some cases even of indictable offences where, there being a right to sue for damages by reason of the very thing which constitutes the criminal offence, an agreement of settlement may comprise an agreement not to prosecute.

Stephen's History of Crim. Law 503; *Keir* v. *Leeman*, 6 Q.B. 308; 9 Q.B. 371; *Kneeshaw* v. *Collier*, 30 U.C.C.P. 265; *Fisher* v. *Apollinaris Co.*, L.R. 10 Ch. 297.

Where such an agreement would be invalid the essence of it surely is that it is an attempt to interfere corruptly with the due course of the administration of justice. Here that essential element was lacking, for the evidence shews that Tibbetts refused even to accept "pay for the horse" until he had gone and seen the Royal North West Mounted Police Constable on duty in the locality and in effect was assured that there was no objection. I think at all events that the defendants failed to prove a positive agreement not to prosecute for the alleged criminal offence, and that therefore the plaintiff was entitled to recover. I would, therefore, allow the appeal with costs and direct judgment to be entered for the plaintiff for the amount sued for with interest and costs.

Appeal dismissed, BECK, J., *dissenting*.

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Quebec Court of Review, Archibald, A.C.J., Greenshields and Lamothe, JJ. March 31, 1917.

CONTRACTS (§ IV A—321)— BUILDING — EXTRA WORK — AUTHORITY OF ARCHITECT.

An architect employed to prepare plans and supervise a building is not thereby given the power of a general agent to bind his employer beyond the limits of the contract for the work; he cannot bind him for extra work without his authorization.

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CAISSE v. BESSETTE.

APPEAL from the judgment of the Superior Court, in favour of plaintiff, in an action to recover for extra work. Reversed.

C. Champoux, for plaintiff.

C. Rodier, K.C., and *Bessette, Dugas & Lanctot*, for defendant.

The judgment in review was delivered by

Greenshields, J

GREENSHIELDS, J.:—There is no writing signed by the defendant authorizing any extra work, and fixing the price thereof, and the defendant, examined as a witness, denies absolutely that he ever authorized any work whatever.

The trial judge found, that, there being no specifications accompanying the plans, and the plans having been from time to time changed, art. 1690 of the Code does not apply or prevail, and he maintained the plaintiff's action, less one item.

I agree with the trial judge that the contract entered into between the plaintiff and the defendant does not come within the terms of the contract referred to and covered by art. 1690; but that does not dispose of the case.

It is true that the architect employed by the defendant ordered the works, but it is not proven that the defendant ever authorized the ordering of these extras, or even knew that they were ordered or being done.

The defendant denies it; the plaintiff asserts it. The architect does not support the plaintiff, or anywhere states that he ever notified the defendant that these extra or supplementary works had been ordered or were being done, at least, till about the time of the institution of the present action, or even after it was instituted.

Therefore, the rules covering such matters must be applied, and it must be concluded that the fact is not proven. Indeed it is not established that these supplementary or extra works claimed were for the benefit or advantage of the defendant or his building. The architect is asked the question, and his answer is: "It is difficult to say that they were for the advantage of the defendant."

Now, if this be a correct statement of the facts, in order to support the judgment we have to find that in law, where a man engages an architect to prepare plans for a building, and supervises the carrying out of the plans, and the proprietor enters into a contract with another to do a part of the work for a fixed sum, the architect, without any authorization whatever from the pro-

prietor, may order works which will involve the responsibility of the proprietor for an amount largely in excess of the amount of his contract. I am not prepared to subscribe to such a proposition of law.

The mere fact that an architect is chosen by a proprietor to prepare plans and supervise his building, does not make that architect the general agent of the proprietor to bind him beyond the limits of the contract that he entered into.

So far as the three items which refer to the demolition and rebuilding of the foundations, the facts would seem to be as follows: A certain concrete foundation had to be made upon which the brick walls or foundations were to rest. One Vanturo had this contract, and he finished placing his cement between five and six o'clock on the afternoon of a certain day. The following morning the plaintiff started to build his brick wall, although he was told that it was against the rule, and that the concrete required at least 48 hours to set or harden; but the brick walls were placed upon it; he continued his work and had done a certain amount when the building inspector of the municipality notified him that the work would not be accepted or permitted, and he had to demolish the work which he had done.

I see nothing in this to render the proprietor liable for such work. I am of opinion that the plaintiff did this work without any authorization from the defendant, and without the knowledge of the defendant, that he, the plaintiff, never considered the said work extras and intended to charge therefor, and I hold that the architect in ordering the said work without the defendant's authorization exceeded his authority, and the defendant is not liable. I should reverse the judgment.

Considering that the plans prepared by the defendant's architect were not accompanied by specifications, and the contract entered into between the plaintiff and the defendant is not subject to the provisions of art. 1690 of the C.C.;

Considering that the architect of the defendant ordered the plaintiff to do certain extra work, as per written order filed, but said order was given without the knowledge and authorization of the defendant, and in giving said order the architect exceeded his authority, and his act did not bind the defendant for the payment of said extra work so ordered;

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Considering the defendant's plea is well founded, and the plaintiff's claim is unfounded in law;

Considering there was error in the judgment *a quo* condemning the defendant to pay to the plaintiff the sum of $209.50; doth quash and annul the said judgment, and proceeding to render the judgment which should have been rendered; doth dismiss the plaintiff's action, with costs, in both courts. *Judgment reversed.*

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Re SMALL DEBTS RECOVERY ACT.

(Annotated.)

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Stuart, and Beck, JJ. October 30, 1917.

CONSTITUTIONAL LAW (§ I E—130)—AS TO JUDICIARY—APPOINTIVE POWERS —JUSTICES OF PEACE.

The Small Debts Recovery Act (Alta.), which confers a limited civil jurisdiction on Justices of the Peace, is within the legislative powers of a province, under sec. 92 (14) of the B.N.A. Act, as to its administration of justice, and is no encroachment upon the Dominion appointive powers as to the judiciary under sec. 96 of the B.N.A. Act.

[See also *Polson Iron Works* v. *Munns* (Alta.), 24 D.L.R. 18 (annotated); *Colonial Investment* v. *Grady*, 24 D.L.R. 176, 8 A.L.R. 496; *Kelly* v. *Mathers*, 23 D.L.R. 225, 25 Man. L.R. 580; *Re Farmer's Bank*, 28 D.L.R. 328, 35 O.L.R. 470.]

Statement.

APPEAL by way of reference as to the constitutionality of the Small Debts Recovery Act. Act sustained.

H. H. Parlee, K.C., in favor of Act.

Frank Ford, K.C., *contra*.

Harvey, C.J.

HARVEY, C.J.:—This is a reference by His Honor the Lieutenant-Governor-in-Council for an opinion as to whether a *proposed* Act of the above name is within the authority of the legislature to enact.

In general terms the proposed Act confers on justices of the peace a jurisdiction to try actions for debt within certain limited areas, defined by reference to the judicial districts, when the amount claimed does not exceed the sum of $50.

The objection suggested to the Act is that it is one which, in effect, appoints judges and thus infringes upon the rights exclusively reserved to the Dominion authorities. A consideration of the provisions of the proposed Act satisfies me that if this objection is not sound the Act is unobjectionable, because the other provisions seem to be confined entirely to matters of procedure which are exclusively assigned to the provinces.

By sec. 91 of the British North America Act, power is exclusively given to parliament to legislate in respect to:—

(27). The criminal law except the constitution of courts of criminal jurisdiction but including the procedure in criminal matters,

and by sec. 92, the provincial legislatures are given exclusive authority to legislate respecting:—

(14). The administration of justice in the Province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction and including procedure in civil matters in those courts.

At different times judicial opinions have been expressed to the effect that if clause 14 stood alone it would empower the provinces for the purpose of properly and completely constituting the courts to appoint, not merely the administrative officers, as they do, but also the judicial officers to preside over the courts, but it is provided by sec. 96 that:—

The Governor-General shall appoint the judges of the Superior, District and County Courts in each province except those of the courts of probate in Nova Scotia and New Brunswick.

The provisions of secs. 97 and 98 which direct that the judges shall be selected from the bars of the provinces for which they are appointed and of sec. 100 which provides for the fixing and payment of the salaries, allowances and pensions of these judges by parliament, appear to me to be of much importance also. The last provision suggests an aspect which has not been generally considered either by the courts or by the legal advisers of the respective governments when conflict has arisen on this point though it has not been entirely overlooked. Usually the question has been considered strictly as one of the invasion or infringement of the exclusive right of the Dominion and not as one of the assumption of or relief from a burden imposed upon the Dominion. It may be well to argue that the province cannot appoint its own justices of the peace to preside over civil tribunals, but there is no doubt that it may create such tribunals, and under the scheme of confederation, it is the sole judge of the need for such tribunals. On it alone is imposed the burden of and responsibility for the administration of justice, and when in its wisdom it has determined that certain tribunals are necessary for the due administration of justice and has created them, if it has not the right to make these tribunals effective by the appointment and payment of the proper functionaries, it is clearly the duty of the Dominion to assume that burden, or so much of it as is imposed upon it by the constitution. In the present case it would be

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staggering even to suggest that the Dominion could be required to appoint and pay the multitudinous judicial officers who would be required as substitutes for the justices of the peace under the proposed Act, but that conclusion would seem to follow if the objection to the Act is a valid one.

Naturally a very careful examination of the distribution of powers and duties under our constitution is required by the suggestion that such a result may be reached. For this purpose it seems important to consider the then existing conditions which the above provisions of the B.N.A. Act were required to affect in order to arrive at the intention of the Act in this regard.

It is of course well known that the Act itself was the outcome of an arrangement made between representatives of the Provinces of Canada, New Brunswick and Nova Scotia. The matter was first discussed at a conference held at Quebec at which representatives of the above provinces as well as of the colonies of Newfoundland and Prince Edward Island were present. Later, the last two colonies having dropped out, representatives of the others met in London, England, when some modifications were made to the resolutions of the Quebec conference. Then conferences were held with the legal officers of the Crown, out of which a draft bill was prepared, which was submitted to the Imperial parliament and became law as the British North America Act in 1867.

It is apparent that while the Act is one of the Imperial parliament, it is one which deals with conditions in the colonies, and therefore to a considerable extent the colonial conditions are the ones to be looked to for guidance as to its meaning. So far as I have been able to ascertain, no authentic record in detail of any of the conferences exists. In a general way the proceedings are reported in Gray's Confederation of Canada, the author of which was one of the delegates from New Brunswick to the Quebec conference.

The modifications to the original resolutions are recorded in that work but no mention is made of anything relating to the sections now under consideration.

It is stated in that work, at p. 63, referring to the Quebec conference, that: "The question of the judiciary led to long and animated discussions," and that it was finally decided that until

the laws in civil matters were made uniform the judges should be selected from the respective bars of the provinces for which they were to be appointed; "the power of appointment of the judges in all being placed in the hands of the general government to which already the duty of paying their salaries had been assigned."

What is now sec. 96, however, did not come from the Quebec Conference in its present form. It stood in the original resolutions as follows:—"33. The general government shall appoint and pay the judges of the superior courts in each province and of the county courts of Upper Canada, and parliament shall fix their salaries." The provisions of secs. 91 and 92 above quoted are in effect as they came from the Quebec Conference.

Pope's "Confederation Documents," p. 32, gives the original motion of Hon. John A. Macdonald as follows:—"That the judges of the courts of record in each province shall be appointed and paid by the General Government and their salaries shall be fixed by the General Legislature." It appears from Pope's work that slight changes were made in this provision from time to time during its progress through the various stages, and not until the fifth and final draft of the bill does there appear any reference to the Courts of Probate. In that draft, it appeared as follows:—"94. The Governor-General shall appoint the judges of the Superior, District, County and Recorders' Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

It appears also from Pope (p. 112), that at the London Conference the following conclusion was reached regarding resolution 33:—"It is suggested that County Courts be established and appointed in all the provinces."

In the first draft bill no mention whatever is made of judges, but the following memorandum appears in the schedule:—"Nos. 31-7 (Courts, Judges, etc.) might be left for colonial legislation unless there is some special reason for having them inserted in the Imperial Act."

In the third draft, provision was made for payment of judges' salaries by the Dominion, but no provision for appointment, which suggests that the financial burden was considered of more importance than the appointments.

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I have experienced much difficulty in satisfying myself as to the meaning of the term "district and county courts," as contained in sec. 96.

There were in Upper Canada counties in which there were various courts, one of which was known by the name of the county court. I have not had access to the statutes of Canada relating to Lower Canada, but it appears from some of the authorities that in it there were some districts with courts at least similar to the county court. Now it is apparent that the word "county" or "district" may have reference either to the character of the court or to the territorial area of its existence. If the former, "county courts" would mean more than one of the courts designated by the name "county court," while, with the latter meaning, county courts would be simply courts of the county, and would then include the other courts such as the surrogate courts and division courts which existed in the Upper Canada counties.

It is apparent from the form of sec. 96 that the Courts of Probate of Nova Scotia and New Brunswick were deemed to be included within the description "superior, district and county courts" since they are declared to be excepted, and if they were not considered superior courts then the word "county" must have been used with reference to the territorial division. For the purpose of reaching a proper conclusion on this, I am not so sure that the Canadian and not the English conditions should be looked at for guidance. As I have already shewn the provision excepting the Probate Courts did not appear in resolutions emanating from the Quebec Conference or until the last draft of the Act which was passed by the Imperial parliament and drafted by the Imperial law officers. The Court of Probate in England had then recently been established by 20-21 Vict., c. 77 (1859), taking over jurisdiction from the Ecclesiastical Courts. A reference to that Act and to the Act establishing "the Court for Divorce and Matrimonial Causes," passed in the same year. 20-21 Vict., c. 85, shows clearly that the English Court of Probate was deemed a superior court of the same importance as the old superior courts of law and the Court of Chancery, and a few years later upon the passing of the Judicature Act it became one of the divisions of the High Court. Within the knowledge then of the law officers and the members of the

Imperial parliament a Court of Probate was a superior court, and it seems not unreasonable to conclude that it is so considered within the meaning of sec. 96, but even a reference to the Nova Scotia Act does not satisfy me that the Nova Scotia Courts of Probate would be improperly described as superior courts. The recital of the English Act shews that the court was established to exercise "jurisdiction in relation to the grant and revocation of probates of wills and letters of administration," and the Probate Courts of Nova Scotia, and probably of New Brunswick, though I have not had access to the statutes of that province in force at that time, exercised a similar jurisdiction. The territorial limitation to the county in the colonial courts would not apparently in itself reduce the courts from superior to inferior courts, though the surrogate courts of Upper Canada which exercised somewhat similar jurisdiction in the Upper Canada counties are provided for in the statutes under the title "inferior courts."

The meanings of "superior" and "inferior" in this application do not appear to be very clearly defined. In 11 Cyc. 658, we find it stated that "a superior court is a court with controlling authority over some other court or courts and with certain original jurisdiction of its own. Inferior courts are those which are subordinate to other courts or those of a very limited jurisdiction," while Wharton's Legal Dictionary under the head of "superior courts" states that "they are all controllable by writ of prohibition if they exceed their jurisdiction." Cyc. also states that in England "an inferior court is a court which is not one of the four great courts of the realm; that is, the Court of Chancery and the three great common law courts sitting at Westminster," quoting Tomlin's Law Dictionary as its authority. When that was written it was probably correct, but in 1867 I feel no doubt that it was not so. It is quite apparent that a statutory court such as the Court of Probate might neither have any control over any other court nor be subject to any control as inferior courts are by another court, and I have no doubt that no one in England for a moment doubted that the Court of Probate was a superior court. For these reasons, I think it cannot at least be said that sec. 96 contemplates the Courts of Probate of Nova Scotia and New Brunswick as District or County Courts and that the reference to them therefore furnishes no assistance in the determination of the real meaning of the expression "District

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and County Courts." The reason for their exclusion seems in all probability to be in the fact that under the Nova Scotia law, and I presume under the New Brunswick one, the provisions for payment of salaries of judges are limited to the judges of the Supreme Court, the judges of the Court of Probate no doubt being paid by fees as were the judges of the Surrogate Courts of Upper Canada.

If this view be correct, it suggests that the financial burden was considered as of more importance than the right to select the judges, and that is supported by the third draft Bill.

The Surrogate Courts and Division Courts of Upper Canada were courts of the county, but the selection of the judges to preside over them has since Confederation been made by the province, though it was till recently made by statute in the person of the county court judge, who, of course, was appointed by the Dominion. The Division Courts Act, however, also authorized the county court judge to appoint a barrister as deputy and conferred on such deputy all the authority of the county court judge as judge of the Division Court. At present also the Ontario law provides that the Surrogate Judge shall be appointed by the Lieutenant-Governor-in-Council.

In *Wilson* v. *McGuire* (1883), 2 O.R. 118, Hagarty, C.J., with the concurrence of Cameron, J., stated that he assumed the authority of the right of the Province to appoint the Division Court judges. I do not find that this legislation has been questioned by the Dominion authorities, and it is apparent that it assumes that the term "County Courts" in sec. 96 does not mean courts of the county. If that is so, then it would seem to be intended to apply to the courts designated by the name County Courts.

In one of the first controversies that arose between the Dominion and provincial authorities which took place in 1869 on this subject between Sir John A. Macdonald, Att'y Gen'l of Canada, and Hon. John Sandfield Macdonald, Att'y Gen'l of Ontario, which is recorded in Hodgins' "Dominion and Provincial Legislation," at p. 82, *et seq.*, both use the expression "County Court Judges" instead of "Judges of the County Courts," thus apparently indicating that in their opinion "County Courts" refers not to all the courts of the county but only to those des-

ignated as County Courts. Now Sir John A. Macdonald was one of the Attorneys-General of the earlier Province of Canada. He was one of the delegates to the Quebec Conference, and to all the subsequent ones. He moved the adoption of the resolution in the legislature and was probably the person chiefly responsible for the form of sec. 96 and no doubt knew perfectly what was intended, and in view of the fact that the expression is ambiguous and the Act itself does not furnish sufficient evidence of the meaning which should be attached to it, the interpretation put upon it only two years later by Sir John A. Macdonald and the Hon. John Sandfield Macdonald, who took part in the debate upon the resolution in the Canadian legislature, seems entitled to some consideration.

The suggestion, mentioned, of the London Conference seems to point to the same conclusion.

It would appear then that the County Courts intended were only those of that name and the establishment of a court with a limited territorial jurisdiction and a jurisdiction limited in subject matter to an amount not exceeding $50, which is a much more restricted jurisdiction than one of a like amount in 1867 would have been, would not make it a County Court as understood by sec. 96 either in name or in essence, for I do not wish to suggest that by adopting the name of County Court the province could impose upon the Dominion the burden of appointing and paying the judges or that by changing the name it would relieve it of that burden or deprive it of the right.

There is moreover another matter for consideration. The Act in my opinion must be deemed to have had regard to the then conditions. The only courts which the Act deals with specifically are courts which the framers of the Act considered must be presided over by a member of the bar.

There were Superior Courts in all the provinces. There were County Courts so designated in Upper Canada and District Courts so designated existed in Quebec, Weldon, J., states in *Ganong* v. *Bayley* (1877), 17 N.B.R. 324, at 326, for the districts of Gaspe, of Saguenay and of Chicoutimi. As stated before, it has been held in more than one case that but for the reservation contained in sec. 96, the right and duty of appointing the judges would fall upon the province under its duty to administer justice.

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It is clear that it was not intended that the Dominion should appoint and pay all the judges for some are specifically excluded and all others that do not come within the general character of those described are impliedly excluded.

Now justices of the peace have never been selected exclusively or even generally from members of the bar and indeed in some cases members of the bar are excluded, but at the time of Confederation, both in New Brunswick and Nova Scotia, all justices of the peace exercised a civil jurisdiction in respect of claims of a small amount and in Upper Canada justices of the peace had a criminal jurisdiction not merely for inquiring into indictable offences but for finally adjudicating by summary conviction.

I think it has not of late years been suggested that the appointment of justices of the peace rested with the Dominion authorities. In *Reg.* v. *Bush* (1888), 15 O.R. 398, it was held that the right to make such appointments rested with the provinces, and in *Rex* v. *Sweeney*, 1 D.L.R. 476, 45 N.S.R. 494, it was held that the power to appoint stipendiary magistrates rested with the province, while in *Ganong* v. *Bayley*, *supra*, the right of the legislature to provide for the appointment of commissioners who were justices of the peace to preside over Parish Courts was upheld.

As far back as 1875, the Dominion parliament authorised the Lieutenant-Governor of the North-West Territories to appoint justices of the peace for the Territories. It is true that at that time he was merely an official of the Dominion government acting under its instructions, but the power was continued after responsible government was acquired by the Territories, and he acted upon the advice of the Ministers responsible only to the people of the Territories. The Parliament of Canada has since Confederation from time to time increased the jurisdiction of justices of the peace in criminal matters under its power to regulate criminal procedure. Parliament has thus acted on the view that the province may appoint the judges of a court of a considerable jurisdiction and there is no distinction made in sec. 96 between courts of civil and courts of criminal jurisdiction.

I feel no doubt, therefore, that the British North America Act should be deemed to recognize the existence of judicial tribunals, which did not come within the contemplation of sec.

96, and that the courts of justices of the peace exercising both civil and criminal jurisdiction were such tribunals. It follows then that the establishment of any such court where it did not then exist would not create a court within the description in that section. The proposed Act now under consideration does not give justices of the peace any larger jurisdiction than was exercised by justices of the peace at the time of Confederation, and there would appear therefore to be no ground for concluding that the tribunal of the justices thus created, even if called in terms a court, is one of the courts included in sec. 96 over which a member of the bar appointed by the Dominion should be called on to preside.

Harvey, C.J.

I am accordingly of the opinion that the proposed Act is within the authority of the Provincial Legislature.

Scott and Stuart, JJ., concurred with Harvey, C.J.

Scott, J.
Stuart, J.

Beck, J.:—Pursuant to an Act for Expediting the Decision of Constitutional and other Legal Questions (c. 9 of 1908), the Lieutenant-Governor-in-Council has referred to us for consideration a Bill entitled, an Act Respecting the Recovery of Small Debts, asking our opinion whether it is in whole or in part within the powers of the Legislature of Alberta.

The fundamental provision of the Bill is sec. 3, which provides in effect that every justice of the peace and every police magistrate shall have jurisdiction in the judicial district in which he resides over any action of debt whether payable in money or otherwise where the amount claimed does not exceed $50, and over any such action where the amount originally claimed exceeds $50 but has been reduced by payment or abandonment to that sum; such action not being one to which the King is a party or in which the title to land is involved and the defendant or some one of several defendants residing or carrying on business in the judicial districts.

The proceedings before the justice are to be commenced by the plaintiff filing particulars of his claim with the Justice who thereupon issues a summons.

There can be no doubt that the provincial legislature may establish any Court of civil or criminal jurisdiction, limited of course to the province or any portion of it and provide the procedure in civil matters in such Courts; for this power is expressly conferred by clause 14 of sec. 92 of the B.N.A. Act.

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So that if the Bill is to be understood as constituting a court, as no doubt it must be, the question is whether the legislature can—as is proposed to be done by the very words constituting the court—appoint the judges of such a court as the proposed Small Debts Court. It is this aspect only of the question which I find it necessary to discuss although it was urged that the proposed legislation could be supported on the ground that the office of justice of the peace is one existing in the province; that it is a judicial office; and that further judicial duties may be added to their present jurisdiction.

Sec. 96 of the B.N.A. Act reads:—

> The Governor-General shall appoint the judges of the Superior, District and County Courts in each province, except those of the Court of Probate in Nova Scotia and New Brunswick.

In some of the earlier cases the view was expressed that it was the Governor-General of Canada alone who could exercise the Royal prerogative throughout Canada and that the appointment of judges was an exercise of the Royal prerogative. This view has become untenable since the decision of the Judicial Committee of the Privy Council in the *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, [1892] A.C. 437, in which it was held that the Lieutenant-Governors of provinces are as much the representatives of the Sovereign for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.

There are a large number of cases in several of the Provinces in which judicial opinions are expressed upon the question now before us and there are also a number of opinions of Ministers of Justice dealing with the same question, but to advert to them all or even to the more important would call for more time than is at my disposal.

The questions involved were well and ably argued by counsel and I am left in no doubt as to the answers which ought to be given to the questions submitted to us.

At the date of the coming into force of the B.N.A. Act, there were in existence, in all the Provinces, Superior Courts; in all I think except the Province of Quebec County Courts; and in the Province of Quebec a Court which, though not legally designated a District Court, was under the name of the Circuit Court, a Court whose territory was divided into districts, whose juris-

diction was restricted with reference to its several districts and which corresponded in general character and extent of jurisdiction with a County Court in any other Province. (See Stats. Canada (1849), 12 Vict., c. 38.) As far as I have been able to ascertain there was neither in the Province of Quebec or in any other province any court whose legal appellation was District Court.

Concurrently there were also in existence in several and I think in all the provinces inferior Courts of civil jurisdiction which were not Superior Courts; which were not designated either County Courts, Circuit Courts or District Courts; which in fact had a much less extensive jurisdiction than any such courts and which in all the provinces were preceded in the scale of dignity by a court of inferior jurisdiction between themselves and the Superior Courts.

When the three kinds of Courts, Superior, District and County are mentioned in sec. 96, it is clear to my mind that the character of the Court is not to be determined by the name by which the provincial government chooses to designate it, but I think by a consideration of its character, of the extent and nature of its jurisdiction both absolutely and relatively to other courts of the province.

This is clear from the use of the word Superior, which unquestionably is intended to apply to such courts as are commonly designated not Superior Courts but Supreme Court, Court of King's Bench, Court of Chancery, etc.; in other words, the word "superior" is used generically and the same principle must certainly be applied in interpreting the words "district" and "county." In other words, these words are to be taken generically and therefore applicable to courts of like character and jurisdiction.

There is little if any difficulty in deciding whether a particular court is or is not a Superior Court. No doubt there may be difficulty whether or not a particular court is a District or County Court. It seems to me, however, that where there is a Superior Court and also County Courts and where, on the constitution of a new inferior court, inferior in its jurisdiction to the County Courts, these County Courts are still allowed to remain with the substance of their former jurisdiction, we need not enquire whether this new inferior court is in reality a County Court or a

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District Court under another name; the County Court remaining, *its* jurisdiction being inferior to theirs, the new inferior court is clearly, I think, one which does not come within any of the designations of sec. 96. Sec. 96 allotting to the Governor-in-Council the right of appointing the judges of Superior, District and County Courts the necessary inference is that the right of appointing judges of other courts, *i.e.*, courts inferior to those mentioned, lies with the provincial authorities.

If the provincial authority, apart from legislation, is the Lieutenant-Governor by virtue of the Royal prerogative that authority is subject to the legislative power of the province and so the power to appoint or to provide for the appointment of judges to these inferior courts exists in the provincial legislature.

I have already said all that is necessary to indicate what my answer is to the principal question submitted to us. But the difficulty was suggested during the course of the argument of the supposititious case of the legislature ultimately by amendment increasing the jurisdiction of such an inferior court as we are now dealing with to such an extent as to give it all the jurisdiction which any District or County Court had at the date of the B.N.A. Act, or in any way making it substantially a District or a County Court. Personally my answer to this difficulty would, I think, be as follows: If the inferior court were placed next in dignity to a Superior Court, and if its jurisdiction were in any way restricted by reference to counties or other districts, I think it would be open to the courts to declare that it came within the generic designations contained in sec. 96 and that it was therefore *ultra vires* of the provincial authorities to appoint the judges of the court.

If courts fulfilling the descriptions of District or County Courts remained next in dignity to a Superior Court, then, I think the courts would be powerless to declare that it was *ultra vires* of the provincial authorities to appoint judges to Courts inferior to them, and that the only remedy against the provincial legislation would be by means of disallowance—a power, the exercise of which in my humble opinion was never intended to be confined to cases where the legislation of a province is *ultra vires*.

Being asked whether the legislature has authority to enact the bill in question, I would, for the reasons indicated, answer yes. *Act sustained.*

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The Alberta Act for expediting the decision of constitutional and other legal questions is as broad in its terms as our own Ontario Act, R.S.O. 1914, c. 85, authorizing the Lieutenant-Governor-in-Council to refer to the Supreme Court 'any matter which he thinks fit to refer'; and the Act referred in the principal case is, not an actual existing statute, but only a proposed Act. I merely mention this to save any future investigator wasting as much time as the writer of the present note wasted in hunting for the statute among the Alberta Acts. True, Harvey, C.J., says in his opening sentence that it is only "a proposed Act"; but sometimes the things one is most likely not to notice are those which lie immediately under one's nose.

It is a strange thing that although over fifty years have passed since the Confederation Act came into force, no authoritative and comprehensive interpretation of s. 96 which provides as follows:—

> 96. The Governor-General shall appoint the judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick,

has yet been given. The ambition of the present writer is to contribute something towards that end. In the meanwhile the judgments which come the nearest to a comprehensive interpretation appear to be those of the principal case, and that of Weldon, J., in *Ganong* v. *Bayley* (1877), 1 P. & B. 324, which is referred to only very slightly in the above judgment of Harvey, C.J. None of these judgments, however, state the jurisdiction possessed at Confederation by the courts referred to in s. 96 as "District and County Courts;" and, with submission, an examination of the pre-Confederation statutes shews one or two errors of fact.

Weldon, J., in *Ganong* v. *Bayley*, says:—

> "At the time of the passing of the Confederation Act, there were Superior Courts in all the provinces which were embraced in the Confederacy. There were District Courts in Canada. In Lower Canada there were the districts of Gaspe, of Saguenay, and of Chicoutimi; there were the County Courts existing in Upper Canada, and (*sic*) subsequently were established in New Brunswick, Nova Scotia, and Prince Edward Island. It appears to me these were the courts that the Governor-General was to appoint the judges to, when established, or as vacancies may occur, and to provide for them salaries, allowances, and pensions. There were, also, at the time of the passing of the Confederation Act, Commissioners' Courts for the summary trial of small causes in what is now the Province of Quebec, and there were Division Courts in Ontario. No reference is made to them in the said Act."

To expand this passage in the judgment of Weldon, J., may be said to be the principal object of this note. I shall not dwell on the subject of "Superior Courts." I dealt with that portion of the section to the best of my ability in an annotation to the case of *Polson Iron Works* v. *Munns* (1915), 24 D.L.R. 18. I may, however, supplement what is there said by a reference to *Colonial Investment and Loan Co.* v. *Grady* (1915), 24 D.L.R. 176, 8 A.L.R. 496; and *Re Public Utilities Act, City of Winnipeg* v. *Winnipeg Electric R.W. Co.* (1916), 30 D.L.R. 159, 26 Man. L.R. 584. Neither shall I labour the point taken by Sir John Thompson in his famous Report on the Quebec District Magistrates Act, 1888 (Hodg. Prov. Legis. 1867-1895, p. 358 *seq.*), that the words "Judges of the Superior, District and County Courts," include all classes of judges

Annotation. like those designated, and not merely the judges of the particular courts which at the time of the passage of the Federation Act happened to bear those names. The judgments in the principal case support this, if anything more than common sense need be appealed to; and reference may also be made to *In re Small Debts Act* (1896), 5 B.C. 246; and *Burk* v. *Tunstal*, 2 B.C.R. 12; *King* v. *King* (1904), 37 N.S. 294; and Prov. Legisl. 1901-3, p. 33.

My object in the present note is to deal with the meaning and effect of the words "District and County Courts in each province," in the section. Incidentally it will, I think, appear that Beck, J., has erred in supposing that there were County Courts in all the provinces when the Confederation Act was passed on March 29th, 1867; and also in supposing that there was, at that time, "neither in the Province of Quebec or in any other province, any court whose legal appellation was District Courts."

There were District Courts, and District Court Judges in Upper Canada which I shall deal with first. That there were County Courts in Upper Canada is not disputed, and anyone who looks at the Canadian Almanac for 1867, which is in Osgoode Hall Library, can see their names and counties. And as to District Court Judges, C.S.U.C. 1859, c. 128, provides as follows:—

"92. The Governor may, from time to time, by proclamation under the great seal declare that from and after a certain day to be named therein, a certain part or certain parts or the whole of the unorganized tracts of country in this province bordering upon and adjacent to Lakes Superior and Huron, including the Islands in those Lakes which belong to this province, and also all other parts of Upper Canada which are not included within the limits of any County or Township, shall form a Provisional Judicial District, or Provisional Judicial Districts, and define the limits of such Provisional Judicial District or Districts . . .

94. The Governor may appoint in each such Provisional Judicial District a fit and proper person being a barrister of not less than five years standing at the Bar of Upper Canada *to be a judge therein*, and such judge shall have the same powers, duties, and emoluments, and be paid in the same manner as a County Judge in Upper Canada, and he shall hold his office during pleasure and shall reside within the limits of his Provisional Judicial District . . .

96. The laws now in force with respect to the holding of Courts of Quarter Sessions of the Peace, County Courts, and Division Courts in the several Counties in Upper Canada and to the composition, power *and jurisdiction* of such Courts respectively . . . shall extend and apply to such Provisional Judicial Districts, and such Districts shall be deemed and held to be Counties for all and every the purposes of such laws."

The jurisdiction of such Upper Canada District and County Court Judges on March 29th, 1867, the date of the passing of the British North America Act, 1867, is set out in C.S.U.C. (1859), c. 15, there being no amendment before Confederation. This Act provides as follows:—

"16. The said courts shall not have cognizance of any action:

1. Where the title to land is brought in question; or

2. In which the validity of any devise, bequest or limitation under any will or settlement is disputed; or

3. For any libel or slander; or

4. For criminal conversation or seduction; or

5. Of any action against a Justice of the Peace for any thing done by him in the execution of his office if he objects thereto. Annotation.

17. Subject to the exceptions contained in the last preceding section, the County Courts shall have jurisdiction and hold plea:

1. In all personal actions where the debt or damages claimed do not exceed the sum of $200;

2. In all causes and suits relating to debt, covenant and contract, to $400, when the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant; and

3. To any amount on bail bonds given to a sheriff in any case in a County Court, whatever may be the penalty; and

4. On recognizances of bail taken in a County Court, whatever may be the amount recovered or for which the bail therein may be liable.

33. The County Courts in Upper Canada shall possess the like jurisdiction and authority in respect of the matters hereinbefore mentioned as was possessed by the Court of Chancery on May 23, 1853.

34. Any person seeking equitable relief may (personally or by attorney) enter a claim against any person from whom such relief is sought, with the Clerk of the County Court of the County within which such last mentioned person resides, in any of the following cases, that is to say:

1. A person entitled to and seeking an account of the dealings and transactions of a partnership dissolved or expired, the joint stock or capital not having been over $800;

2. A creditor upon the estate of any deceased person, such creditor seeking payment of his debt (not exceeding $200) out of the deceased's assets (not exceeding $800);

3. A legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy (not exceeding $200 in amount or value) out of such deceased person's personal assets (not exceeding $800);

4. A residuary legatee, or one of the residuary legatees of any such deceased person seeking an account of the residue and payment or appropriation of his share therein (the estate not exceeding $800);

5. An executor or administrator of any such deceased person seeking to have the personal estate (not exceeding $800) of such deceased person administered under the direction of the judge of the County Court for the County within which such executor or administrator resides;

6. A legal or equitable mortgagee whose mortgage has been created by some instrument in writing, or a judgment creditor having duly registered his judgment, or a person entitled to a lien or security for a debt seeking foreclosure or sale or otherwise to enforce his security, where the sum claimed as due does not exceed $200;

7. A person entitled to redeem any legal or equitable mortgage or any charge or lien and seeking to redeem the same, where the sum actually remaining due does not exceed $200;

8. Any person seeking equitable relief for, or by reason of any matter whatsoever, where the subject matter involved does not exceed the sum of $200;

35. Injunctions to restrain the committing of waste or trespass to property by unlawfully cutting, destroying or removing trees or timber, may be granted by the judge of any County Court, and such injunctions

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shall only remain in force for a period of one month, unless sooner dissolved on an application to the Court of Chancery; but the power to grant such injunction shall not authorize the prosecuting of the suit in the County Court, and the injunction may be extended and the suit further prosecuted to judgment or otherwise in the Superior Court in the like manner as if the same had originated in that court."

The existence of such District Court judges as above mentioned in Upper Canada would alone account for the word "District" in s. 96.

In Quebec, however, the term "District" was an alternative to the term "Circuit," although the latter was generally used. Thus C.S.L.C. 1861, c. 76, provides:—

"5. Lower Canada is and shall be divided into twenty Districts, in the manner set forth in the following schedule . . .

6. [Established certain new Districts.]

7. There shall be the same officers connected with the administration of justice in each of the new Districts as in the old Districts, subsisting immediately before the time when the said new Districts were constituted . . .

C. 79, s. 1. A Court of Record to be called the Circuit Court and having jurisdiction throughout Lower Canada shall continue to be holden every year in each of the Districts and Circuits in Lower Canada, by one of the judges of the Superior Court.

S. 2. The Circuit Court shall have cognizance of and shall hear, try and determine all civil suits or actions, as well those where the Crown may be a party as others (those purely of Admiralty jurisdiction excepted), wherein the sum of money or the value of the thing demanded does not exceed $200, and wherein no writ of *capias ad respondendum* is sued out.

C. 82, s. 29. Whenever any real property is situate partly in one District or Circuit, and partly in another, the plaintiff may bring any real, or mixed action in regard to such real property in either of the said Districts or Circuits at his option . . ."

But, as Sir John Thompson tells us in his report on the Quebec District Magistrates Act, 1888, "the Circuit Court was at the time of the Union, in one sense, a branch of the Superior Court. The powers and duties of Superior Court judges included the powers and duties of Circuit Court judges. When the Governor-General appointed a judge of the Superior Court under s. 96 of the British North America Act, the appointment carried with it an appointment as Circuit Court judge." See Legislative Power in Canada, pp. 145-6.

Therefore, strictly speaking, I, perhaps, need not have referred to the Quebec Circuit Court here, but the fact that "District" was an alternative name to "Circuit" helps to explain the use of the word "District" in s. 96.

As to New Brunswick, County Courts were not established there until the passing of 30 Vict. c. 10, on June 17, 1867. This is entitled, 'An Act to establish County Courts.' But as it was passed before July 1, 1867, when the Federation Act came into force by proclamation, and it may, possibly, be contended that s. 96 of the latter Act extends to judges appointed under it, I will deal also with it. It provides, as follows, as to the jurisdiction of the new County Courts:—

"7. The courts shall not have cognizance of any action:

1. Where the title to land is brought in question; or

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2. In which the validity of any devise, bequest, or limitation is disputed except as hereinafter provided; or

3. For criminal conversation or seduction; or

4. For breach of promise of marriage; or

5. Of any action against a Justice of the Peace for any thing done by him in the execution of his office.

8. Subject to the exceptions in the last preceding section, the County Courts shall have jurisdiction and hold plea in all personal actions of debt, covenant, and assumpsit, when the debt or damages claimed do not exceed the sum of $200, and in all actions of tort when the damages do not exceed $100, and in action on bail bonds given to the sheriff in any case in a County Court whatever may be the penalty or amount sought to be recovered."

S. 25 adds jurisdiction in the case of over-holding tenants; and s. 35 a certain jurisdiction in criminal cases.

As to Nova Scotia; County Courts were not established till the Act, 37 Vict. c. 18, 'An Act to establish County Courts,' assented to May 7, 1874. I, therefore, am not called upon to deal with them here as they cannot, probably, affect the interpretation of s. 96, but it may be stated that the exceptions to their jurisdiction are the same as in the case of New Brunswick, while in actions *ex contractu*, the limit is $400, and in actions of tort the limit is $200.

Lastly, as to Prince Edward Island, there do not appear either on March 29, 1867, or on July 1, 1867, to have been any courts called "County Courts" or "District Courts," but 23 Vict. c. 16, passed on May 2, 1860, being "An Act relating to the recovery of small debts," empowered the Lieutenant-Governor-in-Council "to constitute and appoint within each of the Counties of this Island not more than seven courts for the recovery of small debts, and to appoint in each court *three judges or commissioners* to adjudicate in each court, each court to have jurisdiction only within the County in which it is held, except in the cases hereinafter mentioned; provided always, that if, by reason of sickness or other unavoidable cause, not more than two *commissioners* shall be present on any day appointed for the hearing of cases, in any of the said *Courts of Commissioners* . . ."

Throughout the Act these courts are called "Courts of Commissioners" (*e.g.*, secs. 6, 35, 47, 96, 98, 99), and the judges are spoken of as "Commissioners," or (s. 78) "Commissioners for the County."

Sec. 7 provides:—

"The said courts shall have jurisdiction in matters of debt and trover for the recovery of sums not exceeding £20 (exclusive of interest), but not in any action brought for the recovery of any sum arising upon any contract or case when the title to real estate or boundary lines must be adjudicated upon, nor to any sum won by means of any wages or gaming, nor to any penalty incurred by any Act of this Island, unless so directed by any such Act, nor to any debt whereof there has not been a contract, undertaking or promise to pay within six years before the commencement of the action."

Sec. 8 provides that:—

"No action or suit, except the same commences by *capias* as hereinafter mentioned, for any sum for rent due upon any lease or demise or agreement for a lease or demise of any lands, houses, tenements or heredita-

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ments in this Island, whereof the area shall exceed one acre of land, whether in writing or by parol, or for rent due between landlord and tenant, in respect of the occupation of any such lands, houses, tenements, or hereditaments shall be commenced in any court to be constituted under this Act, unless the sum or amount demanded cannot in any way be made the subject of a distress . . . ."

This Act was amended by an Act, 25 Vict. c.6., assented to on April 17, 1862, repealing certain sections of the original Act prohibiting the arrest or imprisonment of any person on *mesne* or final process unless the sum for which the person was arrested or imprisoned amounted to more than £10, and making some new provisions in that matter. In this Act the judges are spoken of as "Commissioners."

So in the subsequent P.E.I. Acts, 27 Vict., c. 16, passed May 2, 1864, 29 Vict., c. 15, passed May 11, 1866, and 30 Vict., c. 4, passed May 17, 1867, authorizing the establishment of additional Small Debts Courts at certain places, the judges are spoken of as "Commissioners," or "Judges or Commissioners," or, in a marginal note, as "Small Debt Commissioners."

Nowhere are these Prince Edward Island Judges spoken of as "District Judges" or "County Court judges," and, therefore, it seems safe to say that the jurisdiction exercised by them throws no light on s. 96; but that the jurisdiction which will bring a judge within what is meant by "Judges of District and County Courts," is to be measured by reference to that exercised by the County Court Judges and District Court Judges in Upper Canada at Confederation; and possibly by that exercised by County Court Judges in New Brunswick under the New Brunswick Act above referred to.

In conclusion, I may add that the power to appoint County and District Court Judges in s. 96 of the British North America Act appears to carry with it the power to remove, although s. 99 applies only to Superior Court Judges: *Re Squier* (1882), 46 U.C.R. 474. See also *Niagara Election case* (1878), 29 C.P. 280; an article on the constitution of Canada, 11 C.L.T. 145, *seq.*; Todd's Parl. Gov. in Brit. Col., 2nd ed., pp. 46-7, 827, *seq.*, who treats, also, of powers of removal still existing under Imp. 22 Geo. III., c. 75; and an article on the right to remove County Court Judges, 17 C.L.T. 445, R.S.C. 1906, c. 138, provides for the removal of County Court Judges by order of the Governor-General-in-Council in certain cases.

Toronto. A. H. F. LEFROY.

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MEDICINE HAT WHEAT Co. v. NORRIS COMMISSION Co.

Alberta Supreme Court, McCarthy, J. September 17, 1917.

PARTNERSHIP (§ III—14)—*Same members in several firms—Rights of creditors—Sale of grain—Offer and acceptance.*]—Action for the price of grain sold and delivered. Dismissed.

I. C. Rand, for plaintiff.

H. Phillips, for defendant.

MCCARTHY, J.:—The plaintiff's claim against the defendants the sum of $15,535.12, with interest, for goods (grain) sold and delivered to the defendants, or for goods received by them for sale as agents for the plaintiffs, and allege that the amount of the

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indebtedness in respect thereof has been stated by the defendants. The defendants, in effect, deny both allegations, and further, in effect, plead that any dealings they had with such grain were had with the F. M. Ginther Land Co., or F. M. Ginther, to the plaintiffs' knowledge, whom they claim to have paid in full before the commencement of this action. The defendants further say that F. M. Ginther represented to them that the businesses of the F. M. Ginther Land Co. and of the Medicine Hat Wheat Co. were, in fact, each the partnership business of W. B. Finlay and F. M. Ginther.

On June 30, 1914, a partnership agreement was entered into between F. M. Ginther and W. B. Finlay, the firm name to be F. M. Ginther Land Company, the trade or business to be real estate, fire insurance and commission agency business. Under the agreement the capital was to consist of $3,000, to be deemed to be brought in in equal shares, the partner Ginther transferring to the partnership certain office equipment.

On February 19, 1915, an agreement was entered into between the Canadian Wheatlands, Ltd., and F. M. Ginther, whereby the Canadian Wheatlands agreed to lease to the said Ginther 5,000 acres of land, 5 power outfits, and certain implements and accessories, the offer to be open for acceptance until March 10, 1915 (the date of the partnership agreement hereinafter referred to). Another agreement was entered into between the same parties on February 29, whereby the Canadian Wheatlands, Ltd., agreed to lease the same amount of land, and the 5 power outfits, implements and accessories, in connection therewith, and the use of the buildings upon the said lands for the sum of $10,000, the lands being situate in tp. 15, r. 7, w. of the 5th meridian; the 5,000 acres to be selected prior to the said March 10, 1915; the rent to be $10,000, $2,500 to be paid upon the execution of the agreement and $7,500 immediately after the threshing of the crop to be grown upon the lands or on the 1st day of October, 1915, whichever date be prior. In the said agreement the said Ginther covenants that he will not assign or sub-let the contract. Apparently there was never any written assignment of this agreement.

On March 10, 1915, a partnership agreement was entered into between F. M. Ginther, W. B. Finlay, and H. C. Yuill, all of

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Medicine Hat, Alberta. The name of the said partnership was to be the Medicine Hat Wheat Company. The partnership was formed for the purpose of performing certain farming operations during the season of 1915. The agreement provides that the said Ginther and Finlay shall be general partners, and that the said Yuill shall be a special partner, under the provisions of the Partnership Act of the Province of Alberta. Under the said agreement the capital was to consist of $18,000; the said Yuill was to contribute $9,000 as a special partner and the said Finlay was to contribute $9,000 as a general partner; the said Ginther to bring in the lease held by him from the Canadian Wheatlands, Ltd., of 5,000 acres near Suffield, Alberta, where the farming operations were to be carried on. A declaration of partnership dated March 10, 1915, of the Medicine Hat Wheat Company was filed in the proper office on June 4, 1915.

Subsequent to March 10, 1915, both firms occupied the same office in Medicine Hat, Alberta; employed the same book-keeper and the same stenographer. The matter seems to be further complicated by the formation of another partnership known as the Medicine Hat Flax Co., certificate of partnership of which was filed on June 2, 1915. Its office was also in the office of the Ginther Land Co., and the personnel of that company was the same as that of the Medicine Hat Wheat Co. Certain money transactions took place between the Medicine Hat Flax Co. and the Medicine Hat Wheat Co., but for the purpose of this judgment I do not see that the dealings between these two companies have any important bearing upon the case, other than to complicate a very chaotic situation. The witness Finlay in his evidence states that he treated the Medicine Hat Wheat Co. and the Medicine Hat Flax Co. as one and the same, but he did not know that the Medicine Hat Wheat Co. and the Ginther Land Co. were the same. It will be observed that the F. M. Ginther Land Co. consisted of F. M. Ginther and W. B. Finlay, and the Medicine Hat Wheat Co. consisted of F. M. Ginther, W. B. Finlay and H. C. Yuill.

From the evidence it would appear that the moneys brought into the Medicine Hat Wheat Co. by the said Finlay were borrowed from the said Yuill, viz., the sum of $9,000, which was to bear interest at 12%, the said Finlay giving the said Yuill security by

way of mortgage. The mortgage is dated on March 10, 1915, and is repayable on November 1, 1915. The defendants contend that the $9,000 brought into the Medicine Hat Wheat Co. by the said Yuill was, in fact, a loan to the said Ginther, urging in support of that contention that security had been given by the said Ginther to the said Yuill, and that upon a later date Finlay and Ginther called at the office of the defendant company to get some money. The witness Finlay emphatically denies that the $9,000 brought in by Yuill was a loan to Ginther; Yuill in his evidence corroborating him in this. His solicitor in his evidence says that Yuill intended in the first instance that it should go through as a loan, but on his advice ex. 2 was drawn up. Although Ginther was not produced as a witness on the trial, in his examination for discovery he says it was a loan.

The first question to be decided, therefore, seems to be, from whom did the defendants purchase the wheat in question, or whose agents were they in the disposition of the wheat in question; did they purchase or receive from the Medicine Hat Wheat Co. or did they purchase or receive from the Ginther Land Co?

After giving this much involved matter the best consideration I can, I have come to the conclusion that the exchanges of telegrams and letters contain offers and acceptances sufficient in law to make a binding contract between the defendants and the F. M. Ginther Land Co., regardless of where the grain actually came from or by whom supplied, to fill these contracts.

Much stress was laid in argument by counsel for the defendants that the two partnerships were one and the same; that in reality Yuill was not even a special partner in the plaintiff firm; and that Ginther and Finlay alone constituted the partners in both partnerships. Be that as it may, there are the rights of others than the individual partners to be considered.

It seems to me that as the law now stands, each separate partnership must be recognised as a separate entity. It is laid down in 30 Cyc. 555: "When different firms have common members each partnership is dealt with by the courts as having a joint fund of its own and its own set of creditors, who are as clearly entitled to the funds in preference to the creditors of any partnerships connected with it by the ties of a common partner, as they are entitled in preference to the individual creditor of its members."

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It therefore seems to me that as far as the evidence before me goes the F. M. Ginther Land Co., and not the plaintiffs, contracted with the defendants; that regardless of relations that may have existed between the land company and the plaintiffs, which may or may not have come out in evidence at this trial, it is the F. M. Ginther Land Co. and it alone which would appear to have any binding contractual relationship with the defendant company. In the result, therefore, as at present constituted, I cannot see how the plaintiffs in this action can recover. The action, therefore, should be dismissed with costs, but without prejudice to such further or other action being brought over the same subject-matter as may be advised.

It has been contended in reply to the defendants' plea of set-off of its accounts against the F. M. Ginther Land Co., that, in any event, this plea is bad in that that which was sought to be set-off was in the nature of a gambling transaction and should not be allowed to prevail. Taking the view I do as to the above evidence of the contract it does not become necessary for me to decide the effect of these contentions, while I should perhaps add, in the light of the decision of the Supreme Court of Canada in *Beamish v. Richardson and Sons*, 16 D.L.R. 855, 49 Can. S.C.R. 595, the defendants would find difficulty in establishing any such claim in a court of law. The costs will follow the event.

Action dismissed.

McKINNON v. LONDON SHOE Co., Ltd.

Alberta Supreme Court, Scott, J. September 12, 1917.

ASSIGNMENT FOR CREDITORS (§ VIII B—75)—*Release of claims—Mortgage—Satisfaction—Offer and acceptance.*]—Interpleader issue, the question being whether the claim of the defendant mortgagee against the assignor has been satisfied.

S. W. Field, for plaintiff; *G. B. O'Connor*, for defendant.

SCOTT, J.:—On November 3, 1915, the assignor gave the defendant a mortgage upon an undivided half interest in lot 5, block 18, river lot 12, Edmonton, for $1,500, the property being subject to a prior mortgage for $2,000.

On October 5, 1916, one Dostaler, who appears to have acted throughout as agent and interpreter for the assignor, wrote the defendant, at his request, the following letter:—

Owing to circumstances and being unable to finance my shoe store I have

decided to give up my assets for the benefit of my creditors and therefore I thought it would be wise for me to offer you the transfer of the undivided half interest in the house on which you have a mortgage of $1,500.

There may be some judgments against me after everything will be settled and as you would have to foreclose the property to protect your interest I thought it wise for me to offer you the transfer before there is anything against me. Awaiting your reply, J. E. DOSTALER, for L. E. MOREAU.

On October 10, following, the defendants wired Griesbach & O'Connor, their Edmonton solicitors, as follows:—

Moreau offers to transfer his interest in property to us. Take immediate steps to close as only information is for quick action.

On the same day they wrote Griesbach & O'Connor as follows:—

We wired you to-day that Mr. Moreau had offered to transfer to us his half interest in the property covered by our mortgage and requesting you to take immediate steps to have the transfer put through as, according to our information, there should be no delay, if we are to have the advantage of this protection. We hope, therefore, that you have already taken the necessary action to have the deal closed.

Moreau assigned to the plaintiff on October 11, 1916. On October 16, he and Dostaler went to Griesbach & O'Connor's office and there saw Drysdale, a member of that firm. Dostaler informed him that the letter of October 5 to the defendants was an offer to transfer the property, in full satisfaction of their claim, and that their letter of October 10 was an instruction to carry out that offer. The fact that Moreau had already assigned for the benefit of his creditors was referred to and it was assumed that, if the assignment had been registered, it was then too late for Moreau to transfer to the defendants. On the chance that it might not have been registered Drysdale drew up a transfer which was executed by Moreau but, upon searching in the Land Titles office that day, it was found that the assignment had already been registered.

On October 13, the plaintiff wired the defendant as follows:—

L. E. Moreau has assigned. Estate will pay very small. Did you accept mortgage in full settlement of your account? Wire reply.

To this message the defendants replied on October 15, as follows:—

We understand mortgage covered our account. Writing Griesbach & O'Connor to advise as to position.

Whatever may have been the intention of Moreau in making the offer contained in his letter of October 5, 1916, I am of opinion that it cannot be construed as an offer to transfer the property in satisfaction of their claim against him. The reasonable interpretation of it is that it was merely an offer to better their security

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for its payment. There is nothing in the evidence to point to the conclusion that the defendants considered that in accepting the transfer they would be releasing their claim against Moreau.

Even if Moreau's letter of October 5 were held to be an offer to transfer to the defendants in satisfaction of their claim and the offer had been accepted by them, Moreau had, by assigning to the plaintiff in the meantime, put it out of his power to fulfil the contract. He could not then transfer except subject to the interest of his other creditors and the plaintiff and the defendants were not bound to accept the transfer even if the plaintiff consented to it. It does not appear that he took the necessary steps to ascertain whether the other creditors would assent to his action and it may be that his consent would not be binding upon them. I attach no importance to the fact that in the transfer prepared by Griesbach & O'Connor they stated the consideration to be the release of Moreau from his covenant in the mortgage. The only instructions they had from the defendants were contained in their telegram and letter of October 10, and they contained no instruction to accept the transfer in satisfaction of their claim. The consideration was so stated in the transfer merely because Dostaler represented that Moreau's offer was to transfer in satisfaction of the claim. This representation may have been made in good faith, but I have already expressed the view that it was unwarranted.

The plaintiff's telegram to defendants of October 13 was so worded that they might reasonably doubt the nature of the information he desired to obtain from them. Their answer to it was not such as would justify the plaintiff in assuming that they would accept the transfer in satisfaction of their claim. It shews that he might have obtained the information he desired by applying to Griesbach & O'Connor but this he omitted to do.

Upon the issue directed, I hold that the claim of the defendants has not been satisfied.

The order does not make any provision for the costs of the trial of the issue. *Judgment for defendant.*

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K. B.

HARRIS v. DALGLEISH.

Manitoba King's Bench, Macdonald, J. August 21, 1917.

MORATORIUM (§ I—1)—*War Relief Act—Vendor and purchaser—Remedies—Parties—Joint debtors.*]—Action for re-possession of land under an agreement of sale. Dismissed.

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J. F. Kilgour, K.C., for plaintiff; *S. H. McKay*, for defendant.

MACDONALD, J.:—Under an agreement of sale entered into between the plaintiff as vendor, and the defendants and their son, Wilfred Dalgleish, as purchasers, the vendor agreed to sell, and the defendants and their son, Wilfred, to purchase three quarter sections of land in tp. 6, r. 18, w. of the principal meridian in Manitoba for the sum of $9,305, with interest at 6 % per annum.

The purchase price and interest were to be paid on a share of crop plan whereby the purchasers were to put in crop each year a certain quantity of land, and deliver in cars or elevator all the wheat and barley grown upon the said land, to be sold as agreed upon in writing, and half of the proceeds was to be applied towards the payment of the purchase price. First, all interest, second all unpaid taxes or other accrued charges, and the balance towards payment of the purchase price, the remaining half of the proceeds to be paid to the purchasers.

The agreement provided that the purchasers would sow in wheat in a good husbandlike and proper manner in each and every year, including the year 1914, at least 100 acres of the said land, and that they would break and back-set in a good husbandlike manner during the season of 1914, at least 10 acres and a further quantity of the uncultivated arable land in the same manner during the proper seasons as follows:—10 acres in 1915, 10 acres in 1916, 10 acres in 1917, until not less than 130 acres of land shall have been broken, all of which breaking shall be done in the respective years before July 5. The purchasers were to sow in wheat each and every year, including the year 1914, at least 100 acres.

Default was made in the agreement to break and set-back 10 acres in 1914, as well as in the fall plowing and summer fallowing agreed to be done in that year. Default was made in 1915, in summer fallowing and fall plowing and the defendants were in consequence late in getting the land plowed and sown in the spring of 1916. Default was made in 1916 in fall plowing according to the terms of the agreement. Default was made in accounting to the plaintiff for her share of the 1915 crop, to which she was entitled under the terms of the agreement.

The defendants made default in other particulars, and generally the husbandry was of an inferior quality, much of it owing to the lack of force in man and horse power and proper machinery.

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There were defaults made by the defendants in the terms and conditions of the agreement sufficient to entitle the plaintiff, under ordinary circumstances, to cancel and annul the agreement.

It is urged on the part of the defendants, and raised as a defence to this action, that Wilfred is a necessary party to the action, and that he has not abandoned or in any other way disposed of his interest in the said land or said agreement.

There is evidence that he was in possession together with the defendants on April 1, 1915.

There is no evidence that would justify the finding that Wilfred Dalgleish has abandoned the purchase.

There is evidence, and the fact is that since the date of the agreement he has enlisted and been mobilised as a volunteer in the forces raised by the Government of Canada in aid of His Majesty, and the defendants plead as a defence to this action the provisions of An Act respecting Contracts relating to Land, being c. 1 of 5 Geo. V., assented to on September 18, 1914, and c. 10 of 5 Geo. V., assented to on April 1, 1915, and all amendments to said Acts or either of them. S. 5 of c. 10, 5 Geo. V. provides, that "Notwithstanding any provisions contained in any such instrument, no action or proceeding in Court for the recovery or possession of the land charged by any such instrument shall be brought or taken until after the lapse of the period provided in s. 2 of the said Act."

The failure to hand over the crop or the proceeds thereof by the purchasers as provided for by s.s. (*a*) of s. 4, would entitle the vendor to an action in damages for breach of covenant, but would not entitle her to possession by reason of such breach.

The protection afforded by this Act is against default in payment of money, or in handing over the share of the crop as above stated.

There is no protection to the purchaser under this Act for other breaches such as breaches of which the defendants here are guilty.

Now to what extent does the War Relief Act and amendments thereto give protection? S. 2 of c. 88, 1915, provides that during the continuance of the war, and for one year thereafter, it shall not be lawful for any person or corporation to bring any action or take any proceeding either in any of the civil courts of this

MAN.

province or outside of such courts against a person who is or has been at any time since August 1, 1914, a resident of Manitoba, and has either enlisted and been mobilized as a volunteer in the forces raised by the Government of Canada in aid of His Majesty in the said war, for the recovery or possession of any goods and chattels and lands and tenements now in his possession, or in the possession of his wife or any dependent of his family.

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S. 5 provides that in case any person against whom any action or proceeding is prosecuted or stayed by this Act, is or would be according to law or practice, a necessary party to any action or proceeding against any other person or persons, such action or proceeding may, notwithstanding anything in this Act, be commenced and carried on as between such other person or persons and the party or parties commencing or carrying on such proceeding, etc. S. 5 is further amended by c. 122 of an Act to amend the War Relief Act (1916).

The provisions of this section shall not apply to the case of joint debtors who were such at August 1, 1914, one of whom is a person for the benefit of whom this Act was passed, but in such case the provisions of s. 2 hereof as amended shall apply for the relief of all the joint debtors and dependent members of the families.

This seems to me to be a bar to the plaintiff's rights, and an answer to the action, and there must therefore be judgment dismissing the action.

Considering, however, the many defaults made by the defendants in carrying out the agreement and the consequent hardships upon the plaintiff, the action is dismissed without costs. *Action dismissed.*

FISH v. FISH.

N. B.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. April 20, 1917.

S. C.

APPEAL (§ VII L—485)—*Conclusiveness of judge's findings upon questions of fact.*]—Appeal by defendant from the judgment of McKeown, C.J.K.B., in an action against defendant executrix to recover a legacy of $1,000. Affirmed.

The grounds of the appeal are as follows: (1) His Honour wrongfully found that the promissory note set up by the defendant in defence was a note given by the plaintiff for the accommodation

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of the testator. (2) That he drew wrong inferences from the facts in evidence, and improperly ignored other facts in evidence. (3) That evidence tendered on behalf of the plaintiff was wrongfully admitted, and evidence tendered on behalf of the defendant was wrongfully rejected. (4) That the judgment and verdict was against evidence and the weight of evidence and was contrary to law.

H. A. Powell, K.C., for defendant, appellant.

A. J. Gregory, K.C., *contra*.

WHITE, J.:—Admittedly, the onus rests upon the plaintiff to establish that the note specified in the counterclaim was given by him for the accommodation of the defendant's testator. If, upon the evidence before us, I were called upon, as trial judge, to decide whether the plaintiff had sufficiently discharged this onus, I confess I might have decided that he had failed to do so. But the Chief Justice of the King's Bench Division, who tried the case, and had the advantage, which we lack, of having the witnesses before him, has found upon this issue in favour of the plaintiff, and I am not prepared to say that this finding is so clearly wrong or unreasonable that we ought to set it aside.

It is well established that the court will not, on appeal, set aside a finding of fact made by a trial judge, merely because the judges hearing the appeal would, had they been trying the case, have reached a different conclusion from that arrived at by the court below. Before the finding of the trial judge upon a question of fact will be set aside as being contrary to, or unsupported by, evidence, it must appear clearly to be wrong. Many decisions to that effect might be cited, but I will mention only one: *Shaw* v. *Robinson*, 40 N.B.R. 473, and cases therein cited.

With regard to the refusal of the Chief Justice to receive in evidence the letter written by the plaintiff to the defendant's testator asking for help in meeting an interest payment falling due on the mortgage, which plaintiff alleges he gave to raise money wherewith to pay his father's debts, I think the letter should have been admitted as being proper evidence on cross-examination under the circumstances of this case. But although the letter is sufficiently relevant to make it admissible, it is not, I think, of so much importance or evidential value that its exclusion has worked such substantial wrong or miscarriage as to entitle the defendant to a new trial on that ground.

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The appeal should be dismissed with costs.

MCLEOD, C.J. (oral):—I agree that this appeal should be dismissed. I have examined the evidence very carefully and in my opinion it fully and amply warrants the judgment and findings of the Chief Justice of the King's Bench Division, and I have no hesitation in confirming his opinion that the plaintiff had established his claim that the note in question was an accommodation note.

GRIMMER, J., agreed with White, J. *Appeal dismissed.*

HUDSON BAY INSURANCE CO. v. CREELMAN.

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British Columbia Supreme Court, Morrison, J. July 12, 1917.

[See annotation on Ultra Vires in 36 D.L.R. 107.]

COMPANIES (§ IV D—76)—*Sale of land for no corporate purposes—Ultra vires—Rights of purchaser—Restitution.*]—Action to recover balance under agreement for the sale of land. Dismissed.

Douglas Armour, for plaintiff.

S. S. Taylor, K.C., for defendant Creelman.

H. S. Wood, for defendant Berg.

MORRISON, J.:—The plaintiff company by agreement in writing under seal, dated December 30, 1911, agreed to sell to the defendants, who at the time were directors of the said company, lot 8, block 15, district lot 185 in the City of Vancouver, for the sum of $35,025, payable both in instalments, and by the assumption of a certain mortgage to secure the repayment of $12,000, due in December, 1916. After paying certain sums the defendant defaulted and the plaintiffs now seek to recover the balance alleged to be due. For the defence is pleaded s. 14, c. 110, 9-10 Edw. VII., an Act respecting the Hudson Bay Insurance Co., assented to on May 4, 1910, which enacts that:—

> The new company may acquire, hold, convey, mortgage, lease or otherwise dispose of any real property required in part or wholly for the purposes, use or occupation of the new company, but the annual value of such property held in any province of Canada shall not exceed $5,000, except in the Province of British Columbia where it shall not exceed $10,000.

From the evidence, I find that the property in question was not required for the purpose, use or occupation of the new company and that the company had no power to sell it. The action is, therefore, dismissed with costs.

As to the counterclaim, I am of opinion that the moneys

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paid by the defendants must be returned, together with interest: *Re Phoenix Life Assur. Co.*, 2 J. & H. 441, 31 L.J. Ch. 749 (70 E.R. 1131); *Flood* v. *Irish Provident Assurance Co.*, [1912] 2 Ch. 597; *Hooper Grain Co.* v. *Col. Ass. Co.*, [1917] 1 W.W.R. 1226.

Action dismissed.

QUE.
C. R.

PROULX v. THE MONTREAL TRAMWAYS Co.

Quebec Court of Review, Martineau, Greenshields, and McDougall. February 3, 1917.

STREET RAILWAYS (§ III B—33)—*Duty of motorman when seeing person on or near track—Collision—Proximate cause.*]—Appeal from the judgment of the Superior Court rendered by Weir, J., in an action for $400 damages as the result of a collision between the plaintiff's sleigh and a street car, and having found both at fault, apportioned the damages, condemning the defendant to pay $190. Affirmed.

Pelletier & Létourneau, for plaintiff.

Meredith & Holden, for defendant.

Judgment in Review:—Considering there was no error in the dispositif of the judgment *a quo*, but the said judgment should be based upon the following *considérants* and not the *considérant* mentioned in the judgment *a quo;*

Considering that the motorman in charge of the tramcar which came in collision with the vehicle in which the plaintiff was seated, reversed the power and brought his car practically to a standstill when he saw the horse and vehicle about to enter upon the track, but believing that the driver of the vehicle had stopped the horse and was about to back the horse and vehicle away from the track, which was not the fact, applied the power and started his car, thereby contributing directly to the accident;

Considering that the proof shews that the horse was not stopped and, moreover, if the motorman had not applied his power and started the car, the accident could have been avoided;

And for the foregoing reasons, and not for those stated in the judgment *a quo*, doth confirm the said judgment, with costs.

JOHN PALMER Co. v PALMER-McLELLAN SHOE-PACK Co.
(Annotated.)

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S. C.

New Brunswick Supreme Court, Appeal Division, McKeown, C.J.K.B., and White and Barry, JJ. June 22, 1917.

1. TRADEMARK (§ II—8)—SURNAME—SECONDARY MEANING.
A surname which has acquired a secondary meaning as a trademark cannot be used as a trademark by another person without the latter clearly distinguishing his goods.
[See *Re Horlick's Malted Milk* (1917), 35 D.L.R. 516, and annotation thereto at p. 519.]
2. COMPANIES (§ I D—15)—CORPORATE NAMES—CONFLICT—DECLARATORY ORDER.
The use of a corporate name, as chartered, cannot be restrained merely because it resembles in part the name of another corporation and its trademark; it is no ground for a declaratory order.
3. ESTOPPEL (§ III G—85)—LACHES—INFRINGEMENT OF TRADEMARK—INJUNCTION.
A delay of several months in bringing an action for injunction, after the discovery of the infringement of a trademark, does not amount to such laches or acquiescence as will deprive the plaintiff of his remedy.

Statement.

APPEAL from the judgment of Sir E. McLeod, C. J., in Chancery, granting an injunction, restraining the defendant company from using the name "Palmer" as a trademark or corporate name. Varied.

M. G. Teed, K.C., and *A. J. Gregory*, K.C., for plaintiff.

H. A. Powell, K.C., and *P. J. Hughes*, for defendant.

McKeown, C.J.

McKEOWN, C.J.:—For some years prior to 1901, John Palmer, then of the City of Fredericton, had established and was carrying on a business which consisted of tanning, manufacturing and selling leather goods, larrigans, shoe-packs, moccasins, and other footwear. He claimed a special excellence for his product, arising, I gather, from the process of tanning used by him. In the year 1896, he adopted and registered a trademark the principal feature of which was a moosehead. This mark he stamped on certain of his goods which he then called the "Moosehead Brand."

Mr. Palmer carried on this business until August 1, 1901, when he transferred it to the plaintiff company which was incorporated by letters patent under the Great Seal of this province on June 13, 1901, under the name of John Palmer Company (Limited), and was created for the purpose of taking over and continuing this business which Mr. Palmer had so built up, and of acquiring the premises, plant, machinery and appliances upon and by which such business was carried on. It is unnecessary, I think, to go into the details of the organization of plaintiff company or of the transfer to it of Mr. Palmer's business interests,

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the fact is, such transfer was duly and legally made on August 1, 1901, by deed, by assignment of leases, and by bill-of-sale absolute, all of which conveyed to the newly organized company the lands and premises whereon the tanneries are situate, and the lands used in connection with such business, as well as the machinery, plant, stock-in-trade, orders and books of account of said business; and in consideration of such transfer the said company allotted 300 shares of its capital stock of a par value of $30,000 to the said John Palmer, and to his wife, Sarah C. Palmer, 50 shares of said stock, and to his son, Charles K. Palmer, an additional 50 shares thereof, making a total consideration paid to John Palmer and his family of 400 shares of the capital stock of the said company of a par value of $40,000, out of a total capitalization of $75,000. Upon the organization of the company, John Palmer became the president and managing director, which position he held until the year 1910, when having disposed of his stock in the same, he retired from the company; and it is of importance to note that upon Mr. Palmer's retirement a reorganization was made and a new directorate then chosen, consisting of Robert W. McLellan, managing director, W. A. B. McLellan, secretary, and John Kilburn, Charles K. Palmer, A. B. Kitchen and Edward Moore. In February, 1912, R. W. McLellan, W. A. B. McLellan and A. B. Kitchen retired from the company, the two former having sold their stock to John Kilburn, and in the following May the said John Palmer, together with the 3 above-named gentlemen, so previously associated with the business of John Palmer and Company, Limited, namely: R. W. McLellan, W. A. B. McLellan and A. B. Kitchen, and others, were incorporated under the Joint Stock Companies Act of New Brunswick under the name of Palmer-McLellan Shoe-Pack Company, Limited, for the purpose of building and operating tanneries, dealing in hides, leather and rubber goods, manufacturing rubber and leather goods and "to carry on the business of buying, selling, manufacturing, importing, exporting, warehousing and dealing in—(1) Boots, shoes, moccasins, larrigans, shoe-packs, gloves and all other kinds of leather and rubber hand and foot wear. (2) oils, greases, pastes, tallow; also (3) preparations and dressings for leather, etc."

The head office of both companies is in the City of Fredericton, and they are in every sense rivals in trade. The plaintiff company

has acquired two specific trademarks. The former is, as near as may be, that which was originated by John Palmer while he was carrying on the business alone and registered by him in October, 1896, as above explained. This original trademark, if it may be so termed, was cancelled on February 17, 1902, and on the 20th day of said month the John Palmer Company, Limited, registered its first trademark, which it describes as "a representation of a moosehead with the right profile exposed looking to the left through the inner of two concentric circles and showing part of the right and the whole of the left antler. Inside the inner circles are the words 'trademark' above and 'registered' below the figure of the moosehead, and between the circles the words 'John Palmer Co., L't'd.' above, and 'Moosehead Brand' below, and outside at the bottom of the outer circle the words 'Fredericton, N.B.'" The plaintiff company's second trademark was registered on July 16, 1912, and "consists of a circle with the words 'Palmer's Shoe Packs & Larrigans' enclosed therein, also the words 'Trade Mark Reg'd' in the centre of the circle," and the plaintiff company used these specific trademarks in its business, and it also appears that the footwear manufactured and sold by the plaintiff company was designated generally as Palmer's and the shoe-packs were called and known by the name of Palmer's Packs.

On December 16, 1912, the defendant company registered a specific trademark described as consisting of "a palm tree design combined with the word 'Palmer.'" To be a little more exact the trademark as stamped on the defendant company's publications and as used, consists of two concentric circles, the inner one enclosing a landscape with a range of hills in the background and in the centre of the immediate foreground is a large palm tree. On each side of this tree and somewhat to the rear is a smaller tree of the same kind and across the centre of the inner circle in large letters is the word "Palmer." In this trade mark as registered, nothing is shown between the outer and inner circles, but in its use by defendant company the words "Palmer-McLellan Shoe-Pack Co. Ltd., Fredericton, N.B." appear therein.

Now these two companies thus formed and equipped, with their several trademarks thus described, have been doing business side by side for several years and disputes have developed between

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them which culminated in this action in which the plaintiff company prays for an injunction:—(1) To restrain the defendant company from using the word "Palmer" as a trademark or part of a trademark or otherwise, in or upon any shoe-packs, moccasins, larrigans, or other oil-tanned footwear or goods similar to those manufactured by the plaintiff, which are or may be manufactured by or for the defendant and from in any other way representing such goods manufactured by or for the defendant to be Palmer's, and from selling or advertising for sale or causing the same to be sold or advertised as Palmer's or of Palmer's manufacture, any goods manufactured by or for the defendant which are of the same character as goods manufactured by the plaintiff, and from doing any act or thing to induce the belief that such goods manufactured by or for the defendant are Palmer's, or goods manufactured by the plaintiff. (2) To restrain the defendant from publishing or advertising in any way statements alleging that the defendant is the exclusive owner of the processes of manufacture formerly owned or used by John Palmer, or the only manufacturer to whom said processes were imparted by said John Palmer. (3) To restrain the defendant from carrying on its business of manufacturing and selling or dealing in oil-tanned shoe-packs, larrigans, moccasins or other oil-tanned footwear under the name of Palmer-McLellan Shoe-Pack Company, Limited, or under any name which includes the word Palmer or is liable to be confounded with the name of the plaintiff company; or in the alternative a declaration or finding by the court that the use of the word Palmer in the corporate name of the defendant company has led to confusion and mistakes and is liable to cause the defendant company to be mistaken for the plaintiff company, or to induce the belief that the business carried on by the defendant is the same as the business carried on by the plaintiff company or in any way connected therewith.

The cause was tried in July, 1916, and on October 20, following, the Chief Justice delivered judgment and following is the order of the court embodied in the decree:—

> The court, having taken time to consider, doth now order that the defendant company be, and it is, hereby, restrained from using the name "Palmer" as a trademark or part of a trademark upon any of its shoe-packs, moccasins, larrigans, or other oil-tanned footwear, similar to those manufactured by the plaintiff company, and from selling, advertising or in any other

way representing the goods manufactured by or for the defendant company to be "Palmer's" or "Palmer's Shoe-Packs" or "Palmer's make of goods" and from doing any act or thing to induce the belief that oil-tanned footwear manufactured by or for the defendant company are goods manufactured by the plaintiff company, and from publishing or advertising in any way any statements alleging that the defendant company is the exclusive owner of the processes of manufacture formerly owned or used by John Palmer, or the only manufacturers to whom said processes were imparted by said John Palmer.

And it is further ordered that the defendant company do pay to the plaintiff company or its solicitor the costs of this action as taxed by the Registrar, forthwith, on demand.

And the court doth declare and find as a fact that the use of the word "Palmer" in the corporate name of the defendant company has led to confusion and mistakes and has caused parties dealing with the defendant company to believe they were dealing with the plaintiff company.

As a basis for this decree the Chief Justice made several findings of fact as follows:—

(*a*) That John Palmer agreed to sell and did sell and transfer to the plaintiff company the goodwill of the business which for some time prior to 1901 had been carried on by John Palmer in his own name.

(*b*) That the plaintiff company were the only manufacturers of shoe-packs known as Palmer's Shoe-Packs prior to or at the time when the defendant company started manufacturing similar goods; that plaintiff's shoe-packs had been known to the trade for years as Palmer's Shoe-Packs and that John Palmer, W. A. B. McLellan and R. W. McLellan were aware of that fact.

(*c*) That there was no agreement among makers of oil-tanned footwear to standardize the numbers or to use a certain number for a certain brand of goods and no such agreement was in existence when the defendant company was incorporated.

(*d*) That not only did the defendant company by its advertisements attempt to make it appear to purchasers of its goods that they were buying the goods of the plaintiff company that had been known as Palmer's Packs, but in some of its correspondence the defendant company endeavoured to lead persons to believe that it was the manufacturer of the goods that had been known as Palmer's Packs and in the case of Revillon Freres, the latter were so deceived.

(*e*) That the defendant company in advertising and selling its goods as Palmer's Packs and by its trademark which they called the Palm Tree trademark, has endeavoured to induce purchasers to believe that when they purchased goods from the defendant company they were purchasing the goods made by the plaintiff company, and that the defendant company's trademark in itself is calculated to deceive the public and to lead purchasers of defendant company's goods to believe that they are purchasing the goods of the plaintiff company.

(*f*) That the word Palmer was put by the defendant company upon this trademark with a view of deceiving the public and to induce the public to believe that the goods defendant company was manufacturing were the goods that had formerly been known as Palmer's Shoe-Packs.

(*g*) That the name Palmer had been for years associated with the shoe-packs manufactured and sold by plaintiff company, so that when a pur-

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chaser asked for Palmer's Shoe-Packs he expected to get shoe-packs manufactured by plaintiff company, knowing their high reputation.

(*h*) That the use of the corporate name of defendant company has led to confusion and mistakes and has caused parties dealing with defendant company to really believe they were dealing with the plaintiff company.

It has been urged that the decree appealed from should not stand because there has been error on the part of the Chief Justice in the court below, both as to the facts and as to the law applicable thereto. The appellant claims that the recorded findings are against the evidence and against law and evidence and that the Chief Justice has misconceived the facts of the case; that there is no such similarity between the trademarks of the two companies as would make defendant's trademark an encroachment upon those of plaintiff, that there is no evidence of any person being deceived by defendant's trademark and that the name Palmer had not acquired a secondary meaning in the trade.

To my mind, there is one most important outstanding question of fact between the parties and that is: Whether the name "Palmer" had acquired such distinctive meaning in the trade as a description or designation of plaintiff's goods? Plaintiff's complaint against the use of the defendant's trademark rests upon the fact that the word Palmer is struck across it in large letters which, taken with other features, makes it liable to deceive the public if such secondary meaning exists at all,—and it goes without saying that if no such meaning has been acquired, no one could be deceived by it in the purchase of the defendant company's goods. Representatives from such wholesale establishments as Ames-Holden-McCready Co., Ltd., J. M. Humphrey, Ltd., Waterbury & Rising, Ltd., and individual merchants as far separated as Woodstock, Millville, and Memramcook, all testified that the plaintiff's goods are known as Palmer's packs and spoken of as Palmer's goods.

I think the Chief Justice was clearly right in finding that such secondary meaning does exist as alleged, especially in view of evidence given by customers who were misled, when purchasing the defendant company's goods, into thinking that they were receiving the plaintiff company's goods. I do not think it would serve any useful purpose to recite the evidence from which the court below arrived at the conclusion that purchasers had been actually deceived by defendant's use of this word Palmer

in their trademark and in connection with their advertisements. Different witnesses were called by plaintiff upon this point and to my mind their testimony was ample to justify the findings that were made.

While it is not enumerated in the grounds of appeal set out in defendant's factum, it was argued before this court that John Palmer never had transferred the goodwill of his business to the John Palmer Company, Limited, and it was contended that he is under no obligation not to use his name in subsequent business ventures like that of the present defendant company. As a matter of fact, the instrument of transfer does not contain the word "goodwill," but nevertheless I think the learned Chief Justice has correctly found that such goodwill was bought and paid for. It is shewn that the petition to the Lieutenant-Governor-in-Council for incorporation of the John Palmer Company, Limited, signed by John Palmer, recites that the objects for which incorporation was sought were, *inter alia*, to acquire the tanneries and business of the said John Palmer "and the goodwill of said business." The letters patent empowered the purchase of such goodwill, and the books of John Palmer show a credit to the plaintiff company—"For goodwill, $27,236.85" on February 28, 1901, and an entry in plaintiff's books under March 22, 1901, under the head of "Goodwill," shews the same amount paid to John Palmer. It is not essential that the word itself shall be used to pass the goodwill of a business; see *Smith* v. *Hawthorne* (1897), 76 L.T. 716, at p. 717. Having arrived at the conclusion that the goodwill of the business was intended to be sold and was paid for by the purchaser, this court will not hesitate to consider it as the property of the purchaser and decree accordingly.

Now, in the first place, the decree complained of restrains defendant from using the name Palmer as a trademark or any part thereof, and in view of the fact that defendant company's trademark bears the name Palmer in large letters across its face, this order prohibits defendant company from using its present trademark at all. But it will be noticed that the decree does not question defendant's right to use its corporate name, but such use must be in a proper way. Defendant has an unchallengeable right to a proper use of such name, a right bestowed upon it by letters patent. The corporate name of the defendant company

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is "The Palmer-McLellan Shoe-Pack Company, Limited." Having been granted the right to use such name, I take it that the courts would not interfere with such use so long as no injury is done to another party in that connection. It can do business under that title, advertise under that name, but it must not use a certain portion of such name in a way that will confound its product with that of the plaintiff company. Such I take to be the effect of this part of the decree. There can be no doubt that John Palmer passed over to the plaintiff company the right to use all the assets, which he as owner of the business had prior to plaintiff company's incorporation. A name is a distinct asset when it comes to be descriptive of certain goods or to designate them in the market. The evidence of various witnesses has led the Chief Justice to conclude, and I think rightly, that the word "Palmer," in connection with shoe-packs or goods of that nature, has a distinctive meaning in the trade and to the buying public, and therefore it seems to me, notwithstanding the corporate name of the defendant company contains the word Palmer, it is no more open to the company to use this word in a misleading sense than it would be to open to Mr. Palmer himself to engage in a similar business, and to make use of his name in a way which would mislead people into the belief that his goods were the product of the plaintiff company. No doubt if Mr. Palmer had started such business himself in 1912, he would have had the right to do business under his own name and to use his own name in marking and advertising his goods; but he could not so use his name as to deceive people by causing them to believe that his individual goods were the product of plaintiff company's factory. And so it is with the defendant company in the use of its corporate name. No particular limitation should be set to its use, in my opinion, except in accordance with what is expressed immediately above, and if the use which is made of its name—or a part of its name—is calculated to so mislead and deceive, such use, or misuse, should be restrained. Remembering that, after a contest, the Lieutenant-Governor-in-Council allowed defendant company the use of the name, "The Palmer-McLellan Shoe-Pack Company, Limited, we are, I suppose, to take it as a fact that the name of defendant company as a whole is not apt to be confounded with the name borne by the plaintiff company. But the Chief Justice thinks, and under his direction the Chancery Court has decreed, that

the use of a part of defendant's company's corporate name—*viz*: the word "Palmer"—detached from the other words forming such name—is apt to deceive, and in fact has deceived the public as to the manufactured product of the plaintiff and defendant companies, and bearing these two facts in mind, it seems to me, that the decree of the court below, forbidding the detached use of a part of the defendant company's corporate name under the circumstances which the evidence disclosed, and under the findings of fact made by the Chief Justice, was proper and right; and I would suggest, with the utmost deference to the court below, that this part of the decree which forbids the use by defendant company of the word "Palmer" in its trademark and advertisements, be so phrased that it cannot be construed to forbid the use of such word in connection with, or as part of defendant company's corporate name. Defendant company cannot make use of its corporate name without using the word "Palmer" and I think that whenever or wherever it may seem good business for defendant company to write or place its corporate name, the right to do so should not be questioned, and conversely that defendant company's right to use the word Palmer in connection with its goods or advertisements should be confined to a use in connection with or as a part of its said corporate name.

There does not seem to me to be any difference in the cases which were cited by counsel; the same principle or rule of law runs through them all. The case of the *Registrar of Trade Marks* v. *W. & G. DuCros, Ltd.*, [1913] A.C. 624, was an appeal from the decision of the registrar on an application under the Trade Marks Act, 1905, to register two trademarks consisting merely of the letters W. and G. In the one instance joined together with a symbol for the word "and" and in the other instance the same letters in block type.

In this case as in many others it was held that the marks were not registrable because they were not distinctive, which word is defined in the Act as "adapted to distinguish the goods of the applicant for registration from the goods of other persons." The right to have a word registered as a trademark under the above mentioned Act depends upon whether such word is really distinctive or not; if so, it is registered; if not, registration is refused or set aside. In the case of *Teofani & Co. Ltd.* v. *A. Teofani*,

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[1913] 2 Ch. 545, the plaintiffs' Teofani & Co., Ltd., and their predecessors in business, had for many years manufactured and sold cigarettes as "Teofani's Cigarettes," under which description they had become well known to the trade and to the public. In 1909, the plaintiffs caused the name "Teofani" to be registered as their trade mark. In 1911, the defendant Athanasius Teofani commenced to manufacture and sell cigarettes under the description, "A. Teofani's Cigarettes." An injunction was granted restraining the defendant from selling or offering for sale cigarettes as "A. Teofani's Cigarettes," or otherwise marking his goods with the name "Teofani" either with or without other names without clearly distinguishing such cigarettes from those of the plaintiffs and from infringing the trademark.

A single sentence from the concurring judgment of Swinfen Eady, L.J., expresses the law briefly and completely: "The law is that no man may pass off his goods as and for the goods of another; and that proposition of law may be amplified, and be perfectly accurate, if it is put in this way, that a man may not by the use of his own name or otherwise, pass off his goods as and for the goods of another."

The decree here appealed from, it seems to me, conforms to what is said by the Master of the Rolls. The defendant is not restrained from making any of the goods in question, it is not restrained from carrying on such business under its corporate name, but it is enjoined from using the name "Palmer" as its trademark or part of its trademark as well as from doing the other things forbidden by the decree.

In *Re an Application of R. J. Lea*, [1913] 1 Ch. 446, it appeared that the company made application to register the word "Boardman's" as descriptive of a tobacco mixture supplied to one Boardman, a licensed victualler in Manchester, and which mixture had become known and was asked for as Boardman's. Evidence in support of the application shewed that in a limited market among persons who favored the mixture, it was spoken of as Boardman's, and that the word had been used as a trademark to indicate goods of the applicant. The Board of Trade referred the matter to the court, and Joyce, J., refused the application. His decision was unanimously confirmed by an Appeal Court consisting of Farwell, Buckley and Hamilton, L.JJ., on the ground that from the evi-

dence the word "Boardman's" was not adapted to distinguish the goods of the applicant from those of other dealers in tobacco. It was solely a question of fact to be determined by the evidence and it was decided upon that ground.

A different conclusion was reached in *Re Application of Cadbury Brothers, Ltd.*, for registration of the word "Cadbury" as their trademark in respect of certain goods: [1915] 1 Ch. 331. In this case the court was of opinion on the evidence that the word "Cadbury," by long user in connection with the goods in question indicated, and was descriptive of, the goods manufactured solely by the applicant, and was adapted to distinguish such goods from those of any other person, and the registrar was therefore ordered to proceed to register the word "Cadbury" as prayed. In both the "Cadbury" and "Boardman" cases the matter was dealt with as one of fact. It was regarded simply as a question whether the words sought to be registered as trademarks were in fact distinctive within the meaning of the Act.

In the case of *Gramm Motor Truck Co.* v. *Fisher Motor Co.* (1913), 17 D.L.R. 745, 30 O.L.R. 1, the plaintiffs had permission from Mr. Gramm to use his name in marketing the product of their factory wherein they assembled the component parts of the motor trucks which they put together and sold under the trade name "Gramm," their trucks being known as Gramm motor trucks. The defendant company, which started business in the same town with plaintiff company, gave themselves out as entitled to sell Gramm motors, justifying under an arrangement with the Gramm-Bernstein company of the United States, and exhibited Gramm-Bernstein motors for sale.

In an action for an injunction it was held upon the evidence that confusion and interference with the trade of the older (plaintiff) company had arisen from the two rival machines, one known as Gramm, and the other as Gramm-Bernstein, being put upon the market: Also that defendant company had no right by reason of its connection with a man of that name to use the name Gramm as a personal name as against the plaintiff company: Also that defendant company should be restrained from the use of the word Gramm in labelling, advertising or selling their motors; although upon the evidence it was disclosed that the word "Gramm" had not acquired a secondary meaning which would convey the mean-

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ing that a "Gramm" truck would be one of the Gramm type or make, neither was it descriptive of a motor truck generally.

The case of *Kingston, Miller & Co.* v. *Thomas Kingston & Co.*, [1912] 1 Ch. 575, has special application here because of what is said concerning goodwill. The plaintiff company claimed an injunction to restrain the defendant company from using as their registered name, the name of Thomas Kingston & Co., Ltd., or any other name so nearly resembling the registered name of the plaintiff company as to be calculated to mislead or deceive the public into the belief that the defendant company were the same company as the plaintiff, or from issuing or publishing advertisements, circulars or other documents under the name of Thomas Kingston & Co., Ltd., or any other such name, and from carrying on business similar to the plaintiff's business under such name. It appeared that the plaintiff company was incorporated in 1907, and Thomas Kingston had been an employee of said company until the close of the year 1911, when, the company refusing an increase in salary, he left its employ and on January 3, 1912, having completed negotiations with other persons, the defendant company was formed under the name of Thomas Kingston & Co., Ltd., whereupon he entered into an agreement with the last named company, whereby he was engaged to act as its managing director; and immediately the plaintiff brought suit for the remedy before mentioned. Warrington, J., before whom the cause was tried, in delivering judgment asked himself this question, on page 580:—

> Is the use of the name "Kingston" in the name of the defendant company calculated to mislead or deceive the public into the belief that the defendants are the same company as the plaintiffs?

After considering the evidence, the judge came to the conclusion that the use by the defendant company of its name was "calculated to lead to the belief in the minds of many persons who might be minded to employ the plaintiffs that the company carrying on that business of 'Thomas Kingston & Co., Ltd.,' is the company of which the persons in question have heard." The judge further remarked:—

> On the facts, therefore, I come to the conclusion, and I think the conclusion is inevitable, that the use by the defendants of the name "Kingston" is likely to mislead or deceive the public into the belief that the defendants are the same company as the plaintiffs. If that is so, then *primâ facie* the plaintiff company is entitled to succeed.

Thomas Kingston had made no transfer to the plaintiff company of any goodwill which he may have had in the plaintiff company's business.

When it is remembered that John Palmer transferred the goodwill of his business to the plaintiff company, it will be seen how much stronger the present case is than the one from which I have taken the above quotation. In the case under consideration, by Joyce, J., referred to, *Fine Cotton Spinners* v. *Harwood Cash & Co.*, [1907] 2 Ch. 184, the plaintiffs were a company formed for the purpose of amalgamating a number of firms engaged in spinning and doubling yarns, and among these latter was the firm of John Cash & Sons. It was desired to preserve the name and goodwill of this latter firm, consequently a subsidiary company (co-plaintiffs in the action) had been formed under the name of John Cash & Sons, Ltd., to which were assigned the goodwill and trademarks of the business formerly carried on by John Cash & Sons, which latter firm included John Harwood Cash; and there was also a covenant on the part of John Cash & Sons not to engage in business for a period of 25 years. John Harwood Cash with other persons started in business shortly after, under the name of Harwood Cash & Co., Ltd., the objects of which were similar to those of the plaintiff company. By their writ, plaintiffs claimed an injunction to restrain the defendant company from carrying on any business carried on by, or similar to that carried on by, the plaintiffs under the name or style of Harwood Cash & Co., Ltd., or any other name or style so nearly resembling that of the plaintiff company—John Cash & Sons, Ltd., as to be calculated to mislead or deceive the public into the belief that the defendant company was the same as the plaintiff company—John Cash & Sons, Ltd., and to restrain the defendant company from carrying on business under any name of which the word "Cash" formed part, without clearly distinguishing their business and goods from those of the plaintiffs—John Cash & Sons, Limited. The judgment of the court was that the plaintiffs were entitled to the order asked for, and I think the head-note to the case, *supra*, as reported in 76 L.J. Ch. 670, briefly and clearly discloses the effect of the judgment. It says:—

A new company with a title of which a personal name forms part has not the natural right of an individual born with that name, to trade under that name where there is a possibility of confusion with an old company. An

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individual, not transferring a business and goodwill, cannot confer upon a company a title to use his name as against persons liable to be damaged thereby.

It may be argued that a company incorporated by letters patent, as the plaintiff company is, would have larger rights with reference to its corporate name than a company registered under the English Act—rights more nearly approaching those of an individual in the use of his proper name, and there may be force in such contention. But the English Courts do not seem to recognize any difference in principle whether dealing with an individual or with an incorporated company. The *Boardman* and *Teofani* cases, noted above, are instances of individual names. In the case of *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A.C. 83, the defendant company was enjoined "from using the name, style, or title of the North Cheshire and Manchester Brewery Company, Ltd., or any other style or name which includes the plaintiff company's name, or so nearly resembles the same as to be calculated to induce the belief that the business carried on by the defendant company is the same as the business carried on by the plaintiff company, or in any way connected therewith." This form of order was followed in *Fine Cotton Spinners* v. *Harwood Cash & Co.*, above cited. In the *Kingston Miller* case, *supra*, the defendants were restrained from carrying on business under their registered name or any other such name and from issuing advertisements, circulars or other documents under such name, but not from using such name. Now the decree under consideration restrains the defendant company from using the name "Palmer" as a trademark or part thereof upon its goods, similar in make to those of plaintiff company; also from advertising or representing its goods as "Palmer's" or "Palmer's Shoe-Packs," as well as from doing anything to induce people to believe that its oil-tanned footwear are manufactured by plaintiff company.

It seems to me that the cases above referred to, as well as those referred to by the Chief Justice in his reasons for judgment, clearly establish the plaintiff's legal right to the remedy here given and embodied in the first part of the decree, and I also think that the latter part of such decree, which enjoins the defendant company from publishing or advertising or alleging that "the defendant company are the exclusive owners of the processes

of manufacture formerly owned or used by John Palmer, or the only manufacturers to whom said processes were imparted by said John Palmer," is thoroughly justified by a consideration of the facts. The bill of sale absolute executed by John Palmer on August 1, 1901, and which set over to the plaintiff company such property as would properly be passed by a document of that nature, purports to convey to the company, and does convey to it, *inter alia*, all the goods, chattels and personal effects, including machinery, plant, goods manufactured and in course of manufacture, and all other personal property of every kind on the premises or in or about the buildings situate on Westmorland St., upon the property deeded by John Palmer to the plaintiff company by deed bearing even date with such bill of sale; and it also conveyed to the plaintiff company all the leather, hides, "processes of manufacture," and all other property of every kind and description in the tannery buildings. Inasmuch as the conveyance specifically includes the "processes of manufacture" of the goods in question, the right of the plaintiffs to the latter part of the decree seems to me beyond doubt.

The further point was taken by the counsel for appellants that there was such delay in bringing the suit as would amount to laches, and the ground of such contention is thus set out in appellants' factum:—

> The plaintiff and defendant were manufacturing their respective goods and were in competition with each other, and Charles K. Palmer and the manager of the defendant company met together for the purpose and undertook to make a schedule of prices of their products, and of the rates they would pay their employees; and the negotiations for that agreement were without protest of any kind on the part of the plaintiff company as to the right of the defendant company to manufacture the very goods, which the plaintiff company knew they were manufacturing stamped with the trade mark complained of with the addition of the corporate name of the defendant company between the two concentric circles; and the question of laches were raised in connection with this matter as well as the delays on the part of the defendant to prosecute the suit against the defendant company for alleged infringement of its rights.

It seems to me that an objection of this kind to be effective must rest upon one of two grounds—the delay must be for so long a period as to bring into operation the Statute of Limitations; or it must be in the nature of an estoppel. If this were an application for an interlocutory injunction it would be governed by a different principle. In Sebastian on Trade Marks, 5th ed., pp. 223, 224, the author points out that in an application for an

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interlocutory injunction a certain degree of delay might be fatal, and then goes on to say—"Where, however, the case has arrived at the hearing, the degree of delay or acquiescense must be much greater; there must be such an acquiescence as to amount, not only to a positive license, but to an implication of an actual grant before the parties can be forever deprived of their rights. In *Fullwood* v. *Fullwood* (1878), 9 Ch. D. 176, Fry, J., laid down that mere lapse of time, short of the statutory period fixed for the limitation of actions, would not deprive a plaintiff in an action for infringement of a trademark, which is an action for the assertion of a legal right, of his right to the injunction." See Kerr on Injunctions, 5th ed., pp. 381 and 382. *Three Towns Banking Co.* v. *Maddever* (1884), 27 Ch. D. 523.

Nothing that took place between the parties representing the different companies in their meetings for business purposes could be considered in any way to estop the plaintiff in an action of this kind. None of the elements necessary to create an estoppel between parties characterized their dealings in that particular.

As to the declaratory part of the decree appealed from, I agree with the remarks of my brother, White.

In result, therefore, I think the order of the court appealed from should be confirmed, with the addition thereto of a few words to make it clear that such order does not forbid the use of the word "Palmer" by the defendant company in connection with or as part of defendant company's corporate name, and that said order as so amended should read as follows:—

That the defendant company be, and it is hereby, restrained from using the name "Palmer," except as a component part of defendant company's corporate name, as a trademark or part of a trademark upon any of its shoe-packs, moccasins, larrigans, or other oil-tanned footwear similar to those manufactured by the plaintiff company, and, except as aforesaid, from selling, advertising, or in any other way representing the goods manufactured by or for the defendant company to be "Palmer's" or "Palmer's Shoe-Packs" or "Palmer's make of goods," and from doing any act or thing to induce the belief that oil-tanned footwear manufactured by or for the defendant company are goods manufactured by the plaintiff company; and from publishing or advertising in any way, statements alleging that the defendant company are the exclusive owners of the processes of manufacture formerly owned or used by John Palmer, or the only manufacturers to whom said processes were imparted by said John Palmer.

As to that part of the decree appealed from, which refers to the costs of suit in the court below, in my opinion it should not

be disturbed. I think this appeal should be dismissed, without costs to either party.

WHITE, J.:—The Chief Justice in the court below decided that, inasmuch as it appeared that the defendant company, in applying for incorporation, had complied with all the provisions of the Joint Stock Companies' Act, and had presented their petition for incorporation to the Lieutenant-Governor-in-Council, upon the necessary and usual notice, and the plaintiff in the present case had been heard before the Lieutenant-Governor-in-Council in opposition to the incorporation, and upon such hearing the Lieutenant-Governor-in-Council had, notwithstanding such opposition, granted incorporation to the defendant company under their present name, this court has no power to enjoin the defendant company from the use of their corporate name thus acquired. That portion of the judgment of the Chief Justice is not appealed from; so that for the purposes of this motion, the law as there laid down by the Chief Justice must stand. But, when it is once conceded that the defendant company have the right to use their corporate name, and carry on their business thereunder, it follows, to my mind, so clearly that they must have the right to advertise their goods and mark their goods by that name, that I doubt if the Chief Justice intended that the defendants, by the decree in this case, should be enjoined from marking or stamping goods of their manufacture with their corporate name. I agree, however, with the Chief Justice of the King's Bench and with my brother Barry in thinking that that portion of the decree which restrains the defendants from "using the name 'Palmer' as a trademark or part of a trademark upon any of its shoe-packs, moccasins, larrigans or other oil-tanned footwear similar to those manufactured by the plaintiff company," is broad enough in its phraseology to prevent the defendant company from stamping goods of their manufacture, of the character specified, with their corporate name, and I, therefore, think the decree should be amended in that particular; and as between the amendment proposed by my brother Barry and that of the Chief Justice of the King's Bench, I think that of McKeown, C.J., preferable, and, therefore, agree with him that such amendment should be made.

As to the portion of the decree which reads as follows: "And the court doth declare and find as a fact that the use of the word 'Palmer' in the corporate name of the defendant company has

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led to confusion and mistakes, and has caused parties dealing with the defendant company to believe they were dealing with the plaintiff company," it was contended by the defendants, upon argument before us, that inasmuch as the court can issue no process or execution to give effect to that finding, it should not properly form a part of the decree. It is not necessary to decide whether the defendants are right or wrong in this, as the plaintiffs consented that these words should be stricken from the decree. Part of our order, therefore, will be that these words be stricken out.

White, J.

I think there was ample evidence to support the findings of the Chief Justice and, subject to what I have said, I agree with the conclusions reached by him in his judgment.

Barry, J.

BARRY, J.:—The principal question arising for determination on the appeal, and one which, obviously, is of considerable importance to the parties is whether as between these two competing companies engaged in the same line of manufacture, and carrying on their respective businesses side by side in the same city, and in the corporate name of the both of which the word "Palmer" occurs, one has the right to the use of that word in connection with its trade and business to the complete exclusion of the other.

The substantial part of the appeal turns almost entirely upon uncontradicted and undisputed questions of fact. The evidence consists largely of written and printed documents, catalogues, prospectuses, and advertisements in the public press, and correspondence between the parties and their respective customers, in regard to all of which there is and can be no dispute, and in regard to which also a Court of Appeal is in quite as good a position to draw the proper inferences and form an opinion as a court of first instance. It is an appeal in which, from the admitted facts, the court is to re-hear the case, making up its own mind, not disregarding the judgment appealed from, but on the contrary, carefully weighing and considering it, but at the same time not shrinking from over-ruling it if, on full consideration, the court comes to the conclusion that the judgment is wrong. *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *The Glannibanta* (1876), 1 P.D. 283; *Shaw* v. *Robinson*, 40 N.B.R. 473; *St. John River S.S. Co.* v. *Crystal Stream S.S. Co.*, 10 D.L.R. 76, 41 N.B.R. 333.

It would not be strictly accurate to say that the case is entirely

barren of controverted facts. There was and is, for instance, a dispute as to whether the defendants manufactured their first samples from leather of their own tanning; and a dispute as to whether, for the purpose of illustrating their own advertising literature, the defendants appropriated the cuts and illustrations of the plaintiffs;—questions both of which I may say in passing must, I think, be determined against the plaintiffs' contention—but in view of the larger question involved, these comparatively unimportant details may be regarded as insignificant and relegated to the background.

The Chief Justice has not in terms found that the word "Palmer" has acquired a secondary significance or meaning in connection with the particular kind of footwear the plaintiffs were producing; but that that was his opinion is, I think, clearly deducible from many expressions found in his written judgment, and besides, without such a finding, he could not logically have made the order which he has. Thus, we find him saying: "The goods manufactured by the plaintiff company appear to have been of an excellent quality, and to have acquired a high reputation in the trade. They were generally known to traders and others as 'Palmer's Packs'"; and again; "the plaintiff company's shoe-packs had become known to the trade as 'Palmer's Shoe-Packs' for years." And again: "The name 'Palmer' had for years been associated with the shoe-packs manufactured and sold by the plaintiff company, so that when a purchaser asked for 'Palmer's Shoe-Packs' he expected to get the shoe-packs made by the plaintiff company, knowing the high reputation they had in the market."

A strong argument in favour of the contention that the name "Palmer" had acquired some secondary or business signification of a commercial value, other than the signification which would attach to it simply as the name of an individual is to be found in the desire or, perhaps one might be justified in saying, the anxiety which both of the companies appear to have displayed, the one to monopolize, the other to share in the use of the name in connection with their respective businesses. From their long connection with the business of manufacturing and selling the oil-tanned leather footwear of the plaintiffs, no one was in a better position to know the commercial value, if it had any, of the association of the name of Palmer with the description of goods the defendant company

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purposed manufacturing, than the officers of that company themselves. That fact would perhaps go far to explain the celerity with which they proceeded to have their palm-tree trademark registered. For it was registered within four months of the incorporation of the company, and in reality, before any of the defendant's products were manufactured and ready to be offered to the trade. And it will be borne in mind too, that although, from their incorporation down to 1912, the plaintiffs seem to have been content to have gotten along with, and to have done business under the old original moose-head trademark which they had acquired from John Palmer, within two months after the incorporation of the new company, we find them proceeding to have registered a new trademark in which is more prominently featured the name of Palmer. So that it would seem that the contest between the companies for the right to use the name—a name which of itself possesses no magic and can be of a commercial value only because of possessing some secondary meaning—in association with their respective trademarks, became, in a sense, a speed contest, with this great difference however in the merits of the contestants, that while one of them by purchase and long user had acquired a certain right to the use of the name, to the use of the name standing singly and alone, the other had acquired no right whatever.

After a careful perusal of the evidence, I have no difficulty whatever in coming to the conclusion that, to accept the language of Lord Westbury in *Wotherspoon* v. *Currie* (1872), L.R. 5 H.L. 508, 521, long antecedently to the operations of the defendants, the word "Palmer" had acquired a secondary signification or meaning in connection with a particular manufacture—in short it had become the trade denomination of the larrigans and shoe-packs made by the plaintiffs. It was wholly taken out of its ordinary meaning, and in connection with oil-tanned leather footwear had acquired that peculiar signification to which I have referred. The word "Palmer," therefore, as a denomination of larrigans and shoe-packs had become the property of the plaintiffs. It was their right and title in connection with those articles of footwear. In *Reddaway* v. *Banham*, [1896] A.C. 199, the criticism is made that in speaking of a name as "the property of the plaintiffs," Lord Westbury spoke inaccurately. It is not a question of property; outside of the Trade Mark Acts, no man has the exclusive

right to a name; the right is not to a name, but to protection from having another man's goods passed off as his goods.

And it seems that there is in principle no distinction between a case in which the name, of the use of which complaint is made, is the name of the person who is carrying on the business and a case in which it is not. *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (1900), 83 L.T.R. 259, Collins, J., at 271. In *Reddaway* v. *Banham, supra*, the law is thus stated; a trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers (whether immediate or ultimate) into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods.

It is asserted on one side and denied on the other that in 1901, John Palmer sold and transferred to the plaintiffs the goodwill of his business. In the formal conveyance of the business to the plaintiffs we do not find the word "goodwill" in the catalogue of the physical assets and intangible property purported to have been conveyed. But when it is found that in the petition of Palmer and associates to the Lieutenant-Governor-in-Council for incorporation as the plaintiff company, it is stated that the shares in the company subscribed for by Palmer are intended to be paid for by the transfer *inter alia* of the goodwill of his business; and that the company was incorporated for the express purpose amongst others of acquiring that goodwill; and when it is seen that in Palmer's own books the company is credited with having paid to him the sum of $27,000 and upwards for goodwill; and that he received the stock for which he subscribed, part of the consideration for which was to be that very goodwill, it must be admitted that a strong case is made out in support of the judgment in the Chancery Division.

On the other hand, when in the formal conveyance it is found that everything conceivable capable of transference except goodwill is specifically and *eo nomine* transferred to the purchasers, it may well be that in ignoring the rule of construction that *expressio unius est exclusio alterius*, we may be running into the danger of making the parties speak upon the very point upon which they are intentionally silent. In the circumstances of the case, however, the discussion may perhaps be regarded as academic

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rather than practical, because as has been already pointed out the intention of the parties appears to be clear enough, and in the exercise of its equitable jurisdiction the court will look upon that as done, which ought to have been done, and will treat the subject matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been.

Up to this point I find myself in complete agreement with the judgment appealed from. I agree that the name "Palmer" has acquired a secondary significance or meaning and "that the defendants in advertising and selling their goods as 'Palmer's' packs, and by their palm-tree trademark have endeavoured to induce purchasers to believe that when they purchased goods from the defendants they were purchasing goods made by the plaintiff, and that the trademark itself is calculated to deceive the public, and leads purchasers to believe they are purchasing the goods of the plaintiffs." But if, as seems from the scope of the language employed to be the case, the injunction is intended to restrain the defendants from using in their business, in their advertising, in their trademarks, or in marking their manufactures, the corporate name which has been given them by the Lieutenant-Governor-in-Council, and which by law they have the right to use in every legitimate way, then I regret to say I find myself in disagreement with the judgment appealed from.

The sixth ground of appeal is that the plaintiffs' second alleged trademark is not a trademark. It is objected by the plaintiffs that as this ground was not taken in the court below it should not be available to the defendants here. But I find by the record that the question was raised and raised distinctly in the court below; and I may say, also, that the law seems to be well settled, in Ontario at all events, that in a case like the present, on the existing statutes as to trademarks, it is open to the defendants to impeach directly by their defence the validity or efficiency of the plaintiffs' registered trademark: *Provident Chemical Works* v. *Canada Chemical Man. Co.*, 4 O.L.R. 545; *Spilling* v. *O'Kelly*, 8 Can. Ex. 426; *J. Edward Ogden Co. Ltd.* v. *Canadian Expansion Bolt Co. Ltd.*, 22 D.L.R. 813, 33 O.L.R. 589. Under the English practice, any person who is in any way hampered in his trade by the presence of marks used by another may apply to the court for a rectification

of the register, either on the ground that he is the proprietor of the mark, or that such other person is wrongly entered as such proprietor (27 Hals. 1278); and I am aware of no reason why the same course cannot be pursued here.

The objection to the trademark is two-fold. First, it is said that the mere adoption of a word without some design does not constitute a trademark; and secondly, a surname singly and alone cannot be registered as a trademark. Two authorities are cited in support of these propositions, namely; *R. J. Lea, Ltd.*, [1913] 1 Ch. 446, and *Registrar of Trade Marks* v. *W. & G. DuCros, Ltd.*, [1913] A.C. 624, both of which arose under the Trade Marks Act (Imp.) 1905 (5 Edw. VII., c. 15), s. 9 of which requires that a registrable trademark must contain or consist of at least one of a number of what are called essential particulars enumerated in the Act. In *R. J. Lea, Ltd.*, the Court of Appeal, without deciding whether a surname was registrable *per se*, held that on the evidence, the word "Boardman's" was not "adapted to distinguish" the goods of the applicants from those of other dealers in tobacco, and was therefore not registrable as a "distinctive mark" within s. 9 (5) of the Act. In *Registrar of Trade Marks* v. *W. & G. DuCros, Ltd.*, *supra*, the respondents, who were motor-cab proprietors, applied for registration as trademarks for motor vehicles, of two marks used by them for about three years on or in connection with their motor cabs in London. One mark consisted of the letters "W" and "G" (joined by the copulative symbol "&") written in a cursive hand, with a distorted tail to the "G" ending under the "W." The other mark consisted of "W & G" in ordinary block letters. These marks had become in fact distinctive in the London district but not elsewhere. The registrar refused registration, and on appeal, first to Eve, J., then to the Court of Appeal, and finally to the House of Lords, it was held that the marks were not distinctive within the meaning of the word in s. 9, s.-s. 5 of the Act, and were therefore not registrable.

The Imperial Act and the Canadian Act (R.S.C. 1906, c. 71) differ so widely in even their fundamental provisions that they cannot be considered so far *in pari materia* as to make the decisions upon the one binding authorities for the construction of the other. While under the latter Act the minister may refuse to register any trademark, if it is identical with or resembles a trademark already

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registered, if it is calculated to deceive or mislead, if it contains any immorality or scandalous figure, or if it does not contain the essentials necessary to constitute a trademark properly speaking (s. 11). Parliament has not defined as the Imperial Act has done, what are to be considered as "essentials, properly speaking." And moreover, under the Canadian statute, all names which are adopted for use by any person, for the purpose of distinguishing any manufacture, are to be considered as trademarks, and are registrable as such (s. 5). Another and a shorter answer to the objection to the plaintiffs' second trademark, is that the trademark impeached is not simply a surname; it is not one word but four words with the symbolic conjunction &, "Palmer's Shoe-Packs & Larrigans" the first word indicative of the manufacturer and the others descriptive of the manufacture, thus taking it out of the *ratio decidendi* of the authorities cited in support of the objection.

In the judgment appealed from, the court, thinking it was without jurisdiction to grant the first of the alternatives claimed in the third paragraph of the plaintiffs' prayer for relief, refused to do so; that is to say, it refused to grant an injunction restraining the defendants from carrying on their business under their corporate name. The plaintiffs must be taken to have bowed to that decision, for there is no cross-appeal against the court's refusal. But by the injunction which has been granted, the defendants are restrained from using the word "Palmer" as a trademark or part of a trademark upon any of their manufactured articles of footwear similar to those manufactured by the plaintiffs. The effect of the two decisions when construed together seems to me to be this: The defendants are told that they may keep their corporate name but that they must not use it. With every deference I feel bound to say that in my opinion the injunction is far too wide. Also, I gravely question the jurisdiction of the court to make the declaration complained of; but assuming that the court had jurisdiction to make the declaratory order, then under the facts of the case it should never have been made. The several questions involved being closely allied may, conveniently, be discussed together.

It is important to bear in mind that before letters patent of incorporation are granted to any set of applicants, it is incumbent upon them to select as a corporate name, a name which is not

that of any other known company incorporated, or one which is liable to be confounded therewith. (Con. Stat. N.B. 1903, c. 85, s. 4 (a)); their petition for incorporation must be indorsed with the fiat of the Attorney-General to the effect that in his opinion no objection exists to the granting of the incorporation applied for (s. 8). Before the letters patent are issued the applicants must establish to the satisfaction of the provincial secretary that their proposed corporate name is not the name of any other company, incorporated or unincorporated (s. 9 (1)). And for that purpose the provincial secretary is clothed with quasi-judicial functions; he may take and keep of record evidence under oath; he exercises a judicial discretion in the matter (s. 9 (2)), and on his report, or without it, the Lieutenant-Governor-in-Council may, if he thinks fit, give to the applicants a name different from the one which they asked for (s. 10). And in this place, it may be pointed out too, that the Lieutenant-Governor-in-Council is given full power, if for any reason it be deemed expedient to do so, by supplementary letters patent to change the name of any company incorporated under the provisions of the Act (s. 22).

It is in evidence that the plaintiffs opposed before the Lieutenant-Governor-in-Council the granting of incorporation to the defendants by the name which they now bear. The grounds upon which the opposition was based do not appear in the record which has been sent here, but the Chief Justice says that the objection was to the name, and this doubtless is correct, for one cannot conceive of any other objection than one to the name that the plaintiffs could urge against the incorporation of a competing company. So we have it then, that the identical objection which has been raised here was raised before the Lieutenant-Governor-in-Council, and that after full discussion and careful deliberation, upon the advice of the law officers of the Crown and having in his own hands, in case he entertained the slightest doubt in regard to the propriety of giving them the name which they had adopted, because of the likelihood of its being confounded with the name of some other company, full authority to give to the applicants some other name, the Lieutenant-Governor-in-Council refused to do so. The Chief Justice denies the jurisdiction of the court to take away the defendants' corporate name, and denying that, it seems to me to be but a short step to denying the court's jurisdiction to restrain the defendants from using that corporate

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name. But because it has not been raised in the appeal we are not called upon to determine the question whether the court has jurisdiction to afford relief by way of injunction to a party claiming it against a grant by the Lieutenant-Governor-in-Council to another, of a name so nearly resembling his own as to hamper or injure him in his business, notwithstanding he has a right to appeal for the rectification of his grievances to the authority which was the primary cause of them. I am discussing the question whether the names of the two companies are so similar as to lead to confusion and mistake, thus warranting the declaratory order which is complained of, and pointing out that the fact remains and will persist in obtruding itself that the plaintiffs come here with that part of their case already prejudged by a competent tribunal and one clothed with the necessary authority to deal with it. And if it be admitted that the Lieutenant-Governor-in-Council is a tribunal competent to deal with the question there must follow the corollary that the matter is *res judicata*. So that in an indirect way the court is appealed to, to do that which the Lieutenant-Governor-in-Council has refused to do directly. From the remarks of Joyce, J., in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, [1906] 1 Ch. 324, it would seem that the plaintiffs' proper remedy is that provided by s. 22 of the New Brunswick Joint Stock Companies Act.

The plaintiffs do not attempt to disguise the objects which they have in view in seeking the declaratory order, but with commendable frankness tell us that their ultimate object is that, with the order, if obtained, they intend to buttress up a new application which at some future time they purpose presenting to the Lieutenant-Governor-in-Council to have the name of "Palmer" stricken from the corporate name of the defendant company. In that view of the case the question of the court's jurisdiction to make the declaratory order becomes one of considerable importance to the defendants. I am of the opinion that the rule which I shall presently mention was never framed for any such ulterior purpose.

The old rule as to an action for a declaration was that such ar action could not be maintained unless the plaintiff would be entitled to some consequential relief whether he asked for it or not. O. XXXV, r. 5 of the Rules of the New Brunswick Judicature Act

(which is a literal copy of the English rule of the same order and number) introduced a new rule which provides that: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not." The earlier and some of the later decisions under the English rule lean towards a restricted exercise of the jurisdiction conferred by the rule. Thus in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, [1906] 1 Ch. 324, we find Joyce, J., saying, on p. 328, that:—

> To the operation of that rule there must, however, be some limitation. It cannot, I think, compel the court to entertain any and every action for a declaration, and it cannot be that a claim for any declaration whatsoever it may be, is a good ground of action.

And in *Williams* v. *North's Navigation Collieries, Ltd.*, [1904] 2 K.B. 44, Collins, M.R., says that the declaration must be ancillary to the putting in force of some legal right. But the latest authorities do not seem to support that view. In *Guarantee Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536, while Buckley, L.J., seems to have adhered to the earlier decisions, holding that a declaration can only be made under the rule where it is founded on facts which, if true, shew a cause of action, the majority of the Court of Appeal, Pickford and Bankes, L.JJ., held that the order is not confined to the cases where the plaintiff has a cause of action apart from the rule; its effect is to give a general power to make a declaration, whether there is a cause of action or not, at the instance of a party interested in the subject-matter of the declaration; and that the rule applies where a person seeking relief, or in whom a right to relief is alleged to exist, and his application for relief is not to be refused merely because he cannot establish a legal cause of action. The decision in that case was followed in *Re Staples, Owen* v. *Owen*, [1916] 1 Ch. 322.

There are, however, certain principles which the authorities concur in saying should not be lost sight of in exercising jurisdiction under the rule. The power to make declarations as to future rights given by the rule is discretionary, and should be exercised or withheld according to the circumstances of each particular case and should be exercised with great caution. Because of their applicability to the circumstances of this case

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there are three or four authorities which I do not find to have been broken down by subsequent decisions to which I wish briefly to refer. *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, [1906] 1 Ch. 324, is a case in which a declaration of the invalidity of letters patent was claimed, and on account of the nature of the claim, Joyce, J., doubted his jurisdiction to hear it, and declined to exercise his discretion, if he had any, in favor of the plaintiffs, nothwithstanding their ingenuity in devising such a novel form of action, and dismissed the action with costs, stating that in his opinion it was misconceived. The jurisdiction will not as a rule be exercised if the declaration is only asked for in order that it may be used in proceedings in a foreign court. *The Manar*, [1903] P. 95; neither will it be exercised where the legislature has pointed out another mode of procedure before another tribunal; *Grand Junction Waterworks Co.* v. *Hampton Urban District Council*, [1898] 2 Ch. 331; as I think the legislature has done in this case. See also *Baxter* v. *London County Council*, 63 L.T. 767.

It is not suggested that the plaintiffs have any legal right, in the strict sense of the word, to have the word objected to eliminated from the corporate name of the defendant company. It seems to me that if the plaintiffs have any right at all in the matter, it is a right of appeal on consideration of inconvenience to the discretion of the Lieutenant-Governor-in-Council under s. 22 of the N.B. Joint Stock Companies Act for a change in the corporate name of the defendants; and I am persuaded that any relief that can be afforded under the authority of that section is as open to any interested party who is able to shew that by the inadvertent grant of a corporate name to another he has been prejudiced, as it would be to a company seeking for any good reason to have its own corporate name changed.

Passing now for a moment to a consideration of the question of justification, let us see whether, assuming the court to have had jurisdiction, under the facts in evidence, was it justified in making the declaration complained of. The question whether or not two names resemble each other so closely as to be deceptive is one of fact in each case. The general principle to be adopted by the court in deciding such cases is to consider the impression produced by the names as a whole, and to bear in mind that the danger to be guarded against is that the person seeing or hearing

one name will think it to be the same as another which he has seen or heard before, and that the purchaser will not see the two names side by side so as to notice small differences. *Re Farrow's Application* (1890), 63 L.T. 233. Applying the test suggested by Boyd, J., in *J. Edward Ogden Co.* v. *Canadian Expansion Bolt Co.*, 22 D.L.R. 813, 33 O.L.R. 589, at page 592 (he was there discussing trademarks), when the two are not absolutely identical but similar—that is, place the names side by side, and test by inspection of the eye whether one is likely to be mistaken for or confounded with the other. What similarity is there to be found between the two names, "John Palmer Company, Limited," and "Palmer-McLellan Shoe-Pack Company, Limited," the names of these rival companies? No one but the careless or stupid man who always blunders would be likely to confound them. There is confusion neither to the eye nor to the ear. (See *Turton* v. *Turton* (1889), 42 Ch. D. 128.) In the absence of evidence, I would not conclude that any intelligent person with even the slightest rudimentary knowledge of written English, would be likely to be confused or mistaken by the alleged similarity in the names. And in his argument Mr. Gregory admitted as much. Leaving out the words "Company, Limited" in each, for these are words common to all joint stock companies alike, the only similarity in the two corporate names is that they both contain the word "Palmer."

One corporate name is composed of 4 words of 24 letters, the other of 6 words of 36 letters, so that pictorially, that is, looking at the names as mere pictorial representations, without reference to the names, sounds of sequence of the letters which compose them, no one would be likely to be deceived by any similarity in their appearance. Placing side by side the initial letters in the words in the respective names of the companies "J.P.C.L." and "P.M.S.P.C.L.," the difference will, it seems to me, be more strikingly apparent. Tested phonetically, we get the same result. Obviously, in the pronunciation of the two names there is little similarity in the sounds. The sounds of the words "McLellan" and "Shoe-Pack," which are found in one name but not in the other, seem to me to differentiate the one from the other as completely as any words could well do. "A court will not interfere when ordinary attention would enable a purchaser to discriminate. It is not enough that a careless, inattentive or illiterate purchaser

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might be deceived by the resemblance, but the court will inquire whether a person paying ordinary attention would be likely to be deceived." Per Ritchie, Eq. J., in *Johnston* v. *Parr* (1873), Russell's Eq. Dec. (N.S.) 98 at 100; followed by Boyd, C., in *J. Edward Ogden Co.* v. *Canadian Expansion Bolt Co.*, 22 D.L.R. 813, 33 O.L.R. 589, at 595.

I have read carefully and more than once the evidence taken at the hearing. The plaintiffs called and examined ten witnesses, and the evidence of another, the eleventh, was taken upon commission. Of these 11 witnesses, one was the president of the plaintiff company, one was an employee, and a third, Mr. Bailey, was not interrogated upon the point I am about to mention. Eliminating these 3 witnesses, the evidence of the other 8 is, without exception, to the effect that they knew of the two companies as manufacturers, knew the difference between them, and were never confused or confounded by any similarity in the names. The evidence of one of the eight, Mr. Legere, leaves it in doubt whether he gave his order to the defendants on the strength of the personality of John Palmer, whom he says he knew and liked, or on the reputation of the Palmer footwear. He puts it in both ways, and he gave orders to both companies. Another of the eight, Mr. Butler, of the Laurentian Club, did not know of the defendant company until after he had received a letter from them in answer to a letter or telegram, which it appears he had sent addressed to Palmer Bros.; but after that he seems to have had no difficulty in distinguishing between the two, because he gave orders to both.

Of the twelve groups of transactions given by the plaintiffs as specific instances of mistakes attributable as the plaintiffs allege to the use of the word "Palmer" in the defendants' corporate name, and in their trademark, these are cases in which correspondence was addressed simply to John Palmer personally, and of course he got it; two are cases of carelessness on the part of telephone and telegraph operators; two are wholly attributable to the want of ordinary care on the part of customers in addressing correspondence, two are cases where correspondence was addressed to neither of the companies but to "Palmer Shoe Co."; two are cases where purchasers took the word of shop salesmen that the goods purchased were the product of one company although

the name of the other was plainly stamped upon the goods themselves. All these are the "blunders of the people who made the blunders." The remaining instance is a case which, I am free to admit, will not bear a close inspection without some measure of discredit attached to the defendants. I am now referring to the case of Revillon Freres. That case, and the case of Mr. Jardine, who telephoned from Millville to Fredericton, and by a mistake of the operator got into the wrong shop, are cases in which, by methods which are not at all creditable, agents of the defendants sought to influence to their own company business which they must have known was intended for the other people. In this I think they departed from the line of business probity. Mr. Powell himself characterizes these transactions in much harsher terms than I do; he said they were downright dishonest, and we will let them go at that. But he argues, and argues I think with a considerable shew of reason, that the court cannot, as a punishment of the defendants for these dishonest practices on the part of over-zealous agents, take away the defendants' corporate name or any part of it, or deprive them from doing business by and under that name.

The plaintiffs seem to assume that because upon its incorporation in 1901, John Palmer loaned his name to the company, the company has therefore acquired an indefeasible paramount right to the name of Palmer, to the exclusion of all others, even those whose patronymic it is. That, I think, is a great fallacy. It would be equally reasonable to argue that because Mr. Palmer gave to the plaintiffs the right to use his Christian name of John, therefore those possessing that quite common name, and engaging in the manufacture of oil-tanned leather larrigans and shoe-packs must thenceforth keep the name out of sight because forsooth another company had acquired a prior right to the exclusive use of it. Palmer is also quite a common name; there are doubtless in the country to-day hundreds of persons who bear the name of Palmer, all of whom have the indubitable right, if they wish to, to engage in the business of traders and manufacturers and to use in any legitimate way their names in their business. "The court is very reluctant to interfere with a man's right to trade under any name he chooses; and especially with his right to trade under his own name, even though it be the same as that of a better known competitor. Further, the court recognizes that in

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ordinary cases the public is well aware that there may be many traders of the same name and does not consider that mere identity of name necessarily means identity of person." 27 Hals. 1331. In a note to the section of the authority just quoted, it is said that there is no case in which a man has been absolutely prohibited from trading in his own name, and that there are many decisions (which are there assembled) which seem to imply that such an order would never be made. See *Howe Scale Co.* v. *Wycoff* (1905), 198 U.S.R. 118.

The whole stress of conflict centres around the celebrity, which during years has been possessed by John Palmer Company, Limited's shoe-packs and larrigans. But that does not give the plaintiffs such exclusive right, such a monopoly, such a privilege as to prevent any man from making shoe-packs and larrigans and selling them under his own name so long as he takes care to distinguish them from the manufacture of any other person who may have acquired an exclusive right to the use of that name as a trade name. *Burgess* v. *Burgess* (1853), 3 DeG. M. & G. 896, 43 E.R. 351. The right to the exclusive use of a name in connection with a trade or business is familiar to the law, and any person using that name after a relative right of this description has been acquired by another, is considered to have been guilty of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. *DuBoulay* v. *DuBoulay* (1869), L.R. 2 P.C. 430, at 441, 5 Moo. N.S. 31, 16 E.R. 638.

As to the ninth ground of appeal; "No doubt delay may in certain cases furnish a good ground of defence; but, ordinarily, an intending plaintiff may postpone his action as long as he pleases, at the risk of finding himself ultimately barred by some Statute of Limitations, and he may choose his own time for commencing proceedings. He is entitled to wait until he has collected the necessary evidence, or has made such inquiries as he thinks fit, or has obtained the requisite funds, or what not." Per Joyce, J., *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, [1906] 1 Ch. 324, at 330. It was only in January or February, 1916, that the plaintiffs discovered that the defendants were selling their manufacture under the palm-tree trademark and by the single name "Palmer." This, they say, they regarded

as the last straw, and accordingly, to stop the practice, they brought suit on the 10th of the following March. It cannot be pretended that there was such delay or acquiescence as to deprive the plaintiffs of their rights.

In regard to the tenth and eleventh grounds, I may say that in my opinion there is no estoppel; and while I think the letter of Revillon Freres was improperly received in evidence against the defendants' objection, I do not think that any substantial wrong or miscarriage was thereby occasioned (O. XXXIX, r. 6) and besides there were a number of letters of a similar kind and for a similar object admitted in evidence without any objection from the defendants as if they were courting the introduction of evidence of that character.

Twelfth ground. The defendants deny any intention to copy or imitate the plaintiffs' trademark or trade name and argue that no person has been deceived. But if the plaintiffs can shew any actual use of the name to the exclusive right of the use of which they are entitled by reason of its having acquired in connection with their manufacture, a secondary significance or meaning, they are required to go no further. *Provident Chemical Works* v. *Canada Chemical Co.*, 4 O.L.R. 545, at 552. And if the defendants from the time of their incorporation knew of the plaintiffs' claim to the name "Palmer" as a trade name—and it is difficult to believe that they did not—and knowing this, by their own use of the name challenge the plaintiffs' right to it, they must be considered therefore, without further proof, as intending the natural consequences of their own acts, and as such natural consequence is to deceive, they will be restrained from continuing to use such name. *Singer Manufacturing Co.* v. *Loog* (1880), 18 Ch. D. 395, at 417.

It follows that in my opinion this appeal must be allowed in part. In cases like the present, where unregistered trade names have been imitated, the usual form of injunction is to prohibit the use of the word "without clearly distinguishing" the defendants' goods from the plaintiffs. *Montgomery* v. *Thompson*, [1891] A.C. 217, at 221; *Reddaway* v. *Banham*, [1896] A.C. 199, at 222. To effectuate the opinion I have formed upon the case, I would strike out ss. (a) and (b) of the decree as it stands and insert in lieu thereof the following: "using the name of 'Palmer'

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as descriptive of or in connection with oil-tanned leather footwear manufactured by them, or oil-tanned leather footwear (not being of the plaintiffs' manufacture) sold or offered for sale by them without clearly distinguishing such footwear from the like description of footwear of the plaintiffs." Secs. (c) and (d) of the restraining order to stand, for no one has a right to represent his goods as the goods of somebody else, and if there are any secret processes of manufacture, the invention of the late John Palmer—a matter which has not been made clear by the evidence—which have become the property of the plaintiffs, it is not only a wrong to them but a fraud upon the public as well for the defendants to represent themselves as being the exclusive owners of such secret processes. I doubt the jurisdiction of the court to make the declaratory finding (e); but if it has jurisdiction, then under the facts of the case as they appear to me, with every deference to those who upon the same evidence have or may come to a different conclusion, I am of the opinion that the declaratory order should not have been made; therefore, I would expunge it from the decree. And since on the appeal neither party can be said to have been wholly successful, following the rule usual in such cases, I would allow no costs to either on the appeal.

Judgment varied.

Annotation.

ANNOTATION.

Distinction between trademark and trade name and rights arising therefrom.

BY RUSSEL S. SMART, B.A., M.E., OF THE OTTAWA BAR.

Sections 5 and 11 of the Trade-Mark and Design Act (R.S.C. 1906. c. 71) read:—

5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling for the purpose of distinguishing any manufacture, product or article of any description, manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same shall, for the purposes of this Act, be considered and known as trade-marks. R.S., c. 63, s. 3.

11. The Minister may refuse to register any trade-mark:—

(a) If he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark;

(b) If the trade-mark proposed for registration is identical with or resembles a trade-mark already registered;

(c) If it appears that the trade-mark is calculated to deceive or mislead the public;

(d) If the trade-mark contains any immorality or scandalous figure;

(e) If the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking. 54-55 V., c. 35, s. 1. **Annotation.**

REFER TO ENGLISH LAW FOR DEFINITION OF TRADE-MARK.—The classification of sec. 5 does not constitute a definition of trade-marks. For this purpose, reference must be had to English Law (*Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A.C. 78).

It is necessary, however, to use the English decisions with care, especially those since 1875, which are generally limited to interpretation of the definition of registrable trade-marks found in the Trade-Marks Registration Act of 1875 and subsequent Acts.

Lord Cranworth in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H.L.C. 523, 11 E.R. 1435, 35 L.J., Ch. 61, gives the following definition:—

"A trade-mark, properly so-called, may be described as a particular mark or symbol, used by a person for the purpose of denoting that the article to which it is affixed is sold or manufactured by him or by his authority or that he carries on business at a particular place."

Clifford, J., in *McLean* v. *Fleming*, 69 U.S. 245, 254, said: "A trade-mark may consist of a name, symbol, letter, form or device, if adapted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity."

ENGLISH ACT OF 1905.—Sec. 9 of the present English Act, that of 1905, reads in part:—

9. A registrable trade-mark must contain or consist of at least one of the following essential particulars:—

(1) The name of a company, individual or firm represented in a special or particular manner;

(2) The signature of the applicant for registration or some predecessor in business;

(3) An invented word or invented words;

(4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification, a geographical name or a surname;

(5) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the description in the above paragraphs 1, 2, 3, and 4 shall not, except by order of the Board of Trade, or the Court, be deemed a distinctive mark.

DISTINCTIONS BETWEEN ENGLISH AND CANADIAN ACTS.—It is clear that the above definition imposes limitations not in the Canadian statute. In the Supreme Court in *New York Herald* v. *Ottawa Citizen* (1908), 41 Can. S.C.R. 229, affirming 12 Can. Ex. 229, Idington, J., said: "Our statutes and the English Acts are so different that, except for the fundamental purpose of determining whether any device used, may in its manner of use, be or not be a subject of such property as exists in law in trade-mark, the English cases are not very helpful."

Distinctions between the Canadian and English statutes have been pointed out in *Smith* v. *Fair*, 14 O.R. 729; *Provident Chemical Works* v. *Canadian Chemical Co.*, 4 O.L.R., at p. 549; *Fruitatives* v. *La Compagnie Pharmaceutique de La Croix Rouge* (1912), 8 D.L.R. 917, 14 Can. Ex. 30.

The more important distinctions are:—

Annotation.

(1) The Canadian Act makes all marks, names, labels, brands, packages, or other business devices "which contain the essentials necessary to constitute a trade-mark" registrable. The English Registration Acts define what trade-marks are registrable. Most of the English decisions are concerned with the interpretation of the definition of the Act and not with the broad question of what constitutes the essentials of a trade-mark. Unregistered trade-marks only come into Court in England in "passing off" and "unfair competition" actions where other facts than the character of the trade-mark influence the decision.

(2) The Canadian Act not merely makes the registration *primâ facie* evidence of ownership and right to use but states (sec. 13), that after registration the proprietor "shall have the exclusive right to use the trade-mark to designate articles manufactured or sold by him."

(3) The Canadian statute provides no statutory classification. It provides a general division, however, between "general" and "specific" trade-marks. The former endure perpetually.

(4) The provisions of the Canadian statute with respect to assignments do not require the assignment to be only made in connection with the good-will as under the English enactments.

The Province of Quebec derives considerable of its common law from France, and it is necessary to give consideration to this point as affecting cases within that province.

Cross, J., in *Lambert Pharmacal Co.* v. *Palmer & Sons, Ltd.*, 2 D.L.R. 358, has pointed out that Canadian trade-mark law is a development from both French and English law.

"With reference to the authorities cited to us from the law of France, it may be opportune, that, speaking for myself, a few observations be added: The law of France upon the subject of trade-marks and designs is a creation of modern legislation which was not extended to this country. As the law of France stood when it prevailed in this part of Canada, it was possible to say of it, in the words of the treatise in Dalloz, Rep.:—

Industrie et Commerce No. 252: "Mais jusqu' à cette époque c'est-a-dire la réorganisation du régime industriel les noms et les marques de fabrique réstèrent, malgré leur importance, sans protection et en quelque sorte a la merci des usurpateurs."

That would indicate a statement of our law much like the English common law, under which it could be said: "A man cannot give to his own wares a name which has been adopted by a rival manufacturer, so as to make his wares pass as being manufactured by the other. But there is nothing to prevent him giving his own house the same name as his neighbour's house, though the result may be to cause inconvenience and loss to the latter": Mayne, Damages, 8th ed., p. 9, citing *Johnston* v. *Orr Ewing*, 7 App. Cas. 219; *Day* v. *Brownrigg*, 10 Ch. D. 294; *Keeble* v. *Hickeringill*, 11 East 574n., 103 E.R. 1127.

And I take it that in England to this day, a trader who is put in peril of ruin by a supplanter in the way indicated can publish his feeble protest of "no connection with the establishment of the name next door." When it is realized that this peculiarity of English common law or case law lies at the very foundation of trade-mark or trade-name law, another reason can be seen why we should hesitate to be guided by decisions given in England otherwise than as mere illustrations of the statutory construction. Civil

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law responsibility for wrongful interference with the plaintiff's trade is to be determined by our law and not by English law, except in so far as it depends upon statutory construction. The same peculiarity of English law above referred to would seem to constitute the ground of decision in the *Lea & McEwan Applications* case (or perhaps one should say of the statutory rule there applied: L.J. Weekly, 1912, p. 142 and 28 T.L.R. 258), where marks in use for half a century were refused registration, a case which under our law would be decided in the opposite sense. But why, it may be asked, call attention to such a peculiarity, if the old French law as introduced in Canada is the same? The reason is that our law has developed and broadened and a defendant who has caused damage to a plaintiff by introducing confusion into his trade subjects himself to responsibility in damages just as he would by commission of any other tort (art. 1053, C.C.). It is upon that footing that the decision in *La Nationale* v. *La Societe Nationale*, cited to us from 3 Couhin, p. 493, and the citations from Pouillet and from Fuzier-Herman, Rep. "Concurrence Déloyale," No. 459, and Sirey, 91-1-165, in so far as not affected by statutory legislation are seen to be reasonable."

When it becomes necessary to consider "the essentials necessary to constitute a trade-mark," as called for in sec. 11 of the Canadian Act, many of the English cases are valuable.

TRADE NAMES.—Actions to restrain imitations of trade names used as such, and not as trade-marks on goods, differ from trade-mark cases proper. A trader has much the same right in respect of his tradename as he has to his trade-mark, or to his get-up and other distinctive badges. The representation made is, usually, that a certain firm or undertaking is a certain other firm or undertaking with a view to the one firm obtaining the custom of the other. The principle upon which the Court acts in protecting a trade name was stated by James, L.J., in *Levy* v. *Walker* (1879), 10 Ch. D., p. 447:

"It should never be forgotten that in those cases the sole right to restrain anybody from using any name he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark, that is to say a man has a right to say: 'You must not use a name—whether fictitious or real—you must not use a description, whether true or not, which is to represent or calculated to represent, to the world that your business is my business, and so by a fraudulent misstatement deprive me of the profits of the business which otherwise come to me.' An individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain anyone else from injuring his business by using that name."

NO RIGHT TO NAME APART FROM BUSINESS.—There can be no absolute right in a trade name apart from a trade or business. The right to the exclusive use of a name in connection with a trade or business is recognized, and an invasion of that right by another is good ground for an action for an injunction. But the name must have been actually adopted and used by the plaintiff. *Du Boulay* v. *Du Boulay* (1869), L.R. 2 P.C. 441; *Beazley* v. *Soares* (1882), 22 Ch. D. 660; and Canadian cases: *Robinson* v. *Bogle*, 18 O.R. 387; *Love* v. *Latimer*, 32 O.R. 231; *Carey* v. *Goss*, 11 O.R. 619.

TRADE NAME AS APPLIED TO GOODS.—Another kind of a trade name is that which is applied to the goods themselves, instances of which are to be found in the Canadian cases of *Pabst* v. *Ekers*, 20 Que. S.C. 20; *Boston Rubber Shoe Co.* v. *Boston Rubber Co.*, 7 Can. Ex. 9; and *Thompson* v. *McKinnon*,

Annotation. 21 L.C.J. 355. Dealing with this class, Lord Blackburn, in *Singer Mfg. Co.* v. *Loog* (1882), 8 App. Cas., said:

"There is another way in which goods not the plaintiff's may be sold as and for the plaintiff's. A name may be so appropriated by user as to come to mean the goods of the plaintiff, though it is not, and never was, impressed on the goods . . . so as to be a trade-mark properly so-called. Where it is established that such a trade name bears that meaning, I think the use of that name or one so nearly resembling it as to be likely to deceive, may be the means of passing off those goods as and for the plaintiff's. . . . And I think it is settled by a series of cases that both trade-marks and trade names are in a certain sense property, and the right to use them passes with the goodwill of the business to the successors of the firm which originally established them, even though the name of that firm be changed so that they are no longer strictly correct." *Robin* v. *Hart*, 23 N.S. 316; *Reddaway* v. *Banham*, [1896] A.C. 199.

In *Pabst* v. *Ekers*, above referred to, it was held, by the Superior Court for Quebec, reversing the decision of Davidson, J., that protection would be granted against a competitor using the same or some similar name only upon proof either of fraud or deception as regards such use and of prejudice resulting therefrom. It may be doubted in view of the authorities cited below whether this is good law. In the court below, Davidson, J. granted an injunction on the ground that a rival has no right to use a similar name in such a way as is calculated to mislead purchasers into the belief that his goods are another's. This appears to us to be the correct view of the law. Fraud need not be proved. *Cf. Reddaway* v. *Banham* (1896), A.C. 199; *Powell* v. *Birmingham, etc., Co.*, [1896] 2 Ch. 54, [1897] A.C. 710. The Superior Court's decision could, however, be supported on another ground, that the plaintiffs had no right to the trade name in question as it was a name *publici juris* when adopted by them.

DECEPTION MUST BE PROBABLE.—Though fraud need not be shewn, it is however, necessary that deception of the public is probable before relief will be granted. *Goodfellow* v. *Prince* (1887), 35 Ch. D. 9; *California Fig Syrup Co.* v. *Taylor* (1897), 14 R.P.C. 564. Moreover, where the goods are clearly so alike as to be calculated to deceive "no evidence is required to prove the intention to deceive. . . . The sound rule is that a man must be taken to have intended the reasonable and natural consequences of his acts and no more is wanted. If, on the other hand, a mere comparison of the goods, having regard to the surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence was really intended to deceive." *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 893, per Kekewich, J.; *cf. Watson* v. *Westlake*, 12 O.R. 449.

NAME OF COMPANY.—As to cases where the name imitated is that of a company, it is laid down that very clear evidence of probability of deception will be required. *London Assurance Co.* v. *London and Westminster Assurance Co.* (1863), 32 L.J. Ch. 664; *Lee* v. *Haley* (1869), L.R. 5 Ch. 155; *Colonial Life Assurance Co.* v. *Home & Colonial Assurance Co.* (1864), 33 Beav. 548. In British Columbia it has been decided that the name "British Columbia Permanent Loan & Savings Company" is not so similar to "The Canada Permanent Loan and Savings Company" as to be calculated to deceive the public. *Canada Permanent* v. *B.C. Permanent* (1898), 6 B.C.R. 377.

The various Companies Acts in Canada contain various regulations re-

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garding the use of similar names. In Ontario, the Companies Act, R.S.O. 1914, ch. 178, sec. 37, provides that the proposed name shall not be identical with that of any known company, or so nearly resembling the same as to deceive, and similar provisions are to be found in the Acts of the Dominion, and other provinces. Sec. 39 of the Ontario Act provides for changing the name of any company incorporated under the Act if it is made to appear that such name is the same as, or so similar to any existing company, partnership, or any name under which any existing business is being carried on so as to deceive. A similar power exists in Quebec, art. 6015, *et. seq.*

CANADIAN CASES ON TRADE NAMES.—In Canada, there are several decisions on this point. In *Canada Publishing Co.* v. *Gage*, 6 O.R. 68, 11 A.R. 402, 11 Can. S.C.R. 306, an injunction was granted restraining the defendants from using the name Beatty's New and Improved Headline Copy Book, which was considered to be an imitation of Beatty's Headline Copy Book calculated to deceive the public.

In *Rose* v. *McLean*, 24 A.R. 240, the name "The Canadian Bookseller and Stationer" was condemned as an infringement of "The Canadian Bookseller and Library Journal," commonly known as "The Canadian Bookseller," and the plaintiff was granted an injunction restraining the defendants from using the word "Canada" or "Canadian" conjointly with the word "Bookseller," as a title to their journal.

In the *Montreal Lithographing Co.* v. *Sabiston*, 3 Rev. de Jur. 403, affirmed, (1889) A.C. 610, the plaintiffs were refused an injunction restraining the defendant from carrying on business under the name Sabiston Lithographing and Publishing Company. They were the transferees of the assets and good will of the dissolved Sabiston Lithographic and Publishing Company and claimed that the name adopted by the defendants was a colourable imitation of their trade-name, and calculated to prejudice the rights of the plaintiffs. The Court of Queen's Bench for Quebec held that the appellants (plaintiffs) did not derive by purchase from the dissolved company any right to use its corporate name (a right which could only be granted by the Crown) or to continue its business. They were incorporated and registered, and had since done business under a quite different name and did not allege any intention of using, and had no right to use the old company's name as their trade or firm name. But the respondent, their Lordships held, had no right to represent himself as the successor in business to the dissolved company. This was as far as they would go.

SURNAME AS TRADE NAMES.—The use of a surname as a trade-mark is objectionable because "No person can acquire the right to use his surname as a trade-mark or trade name, to the exclusion of others bearing the same surname." Matteson, J., in *Harson* v. *Halkyard*, 22 R.I. 102.

Where a surname has enjoyed extended and exclusive use, for a long period of time, a secondary meaning may be acquired by it, the benefit of which will be supported by Courts of Equity. Lord Parker, in *Registrar* v. *Du Cros, Ltd.*, 83 L.J. Ch. 1, said:—

"Independent of any trade-mark legislation, whenever a person uses upon or in connection with his goods some mark which has become generally known to the trade or to the public as his mark and thus operates to distinguish his goods from the goods of other persons, he is entitled in equity to an injunction against the user of the same or any colourable imitation of the same which is in any manner calculated to deceive the trade or the public. Equity has

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never imposed any limitation on the kind of word entitled to this protection, but in every case it has to be proved that the mark has by user become in fact distinctive of the plaintiff's goods."

In some instances, as where a secondary meaning has been acquired by a surname, the use of it, even by one of the same name would deceive and would be restrained by Court of Equity. *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Holloway* v. *Holloway*, 13 Beav. 209; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Christie* v. *Christie*, L.R. 8 Ch. 422.

The mere fact that confusion is likely to result is not sufficient. "If all that a man does is to carry on the same business (as another trader), and to state how he is carrying it on, that statement being the simple truth, and he does nothing more with regard to the respective names he is doing no wrong. He is doing what he has an absolute right by the law of England to do and you cannot restrain a man from doing that which he has an absolute right by the law of England to do." (*Per* Lord Esher, M.R., in *Turton & Sons, Ltd.* v. *Turton*, 42 Ch. D. 128.) In the same case, Cotton, L.J., said:—

"The court cannot stop a man from carrying on his own business in his own name, although it may be the name of a better-known manufacturer, when he does nothing at all in any way to try and represent that he is that better known and successful manufacturer."

[See *Re Horlick's Malted Milk* (1917), 35 D.L.R. 516, and annotations thereto at p. 519.]

ACQUIESCENCE IN USE OF NAME BY ANOTHER.—Where, however, a person has allowed another to use his name, and acquire a reputation under it, he will not afterwards be allowed to himself use his name so as to deceive, nor to empower others to use it so as to produce that result. *Birmingham Vinegar Brewing Co., Ltd.* v. *Liverpool Vinegar Co., Ltd.*, 4 T.L.R. 613.

RIGHT OF VENDOR OF BUSINESS TO USE NAME.—The vendor of a business and goodwill, when there is no convention to the contrary, may establish a similar business in the neighborhood and may deal with his former customers, although he may be enjoined from soliciting business from them. *Leggott* v. *Barrett* (1880), L.R. 15 Ch. 306; *Cruttwell* v. *Lye* (1810), 17 Ves. 346, 34 E.R. 129; *Labouchere* v. *Dawson* (1872), L.R. 13 Eq. 322. In *Thompson* v. *McKinnon*, 21 L.C.J. 355, a biscuit manufacturer was held to have conveyed with the sale of the business and goodwill, the exclusive right to use the name "McKinnon's" as well as the device of a boar's head grasping in its jaws a bone, and he was restrained from subsequently making use of the name and device. The Court of Review in this case referred with approval to the rule laid down by the foregoing English cases.

LOAN OF NAME FOR PURPOSES OF DECEPTION.—It is not permissible for a man to lend his name to a third person and induce that third person to start in business in opposition to someone else who is using that name and has an established business under it. *Rendle* v. *Rendle & Co.*, 63 L.T.N.S. 94; *Brinsmead* v. *Brinsmead*, 12 T.L.R. 631; *Mappin & Webb* v. *Leapman*, 22 R.P.C. 398.

The use of a partnership name gotten up for the purpose of fraud will not be permitted. *Croft* v. *Day*, 2 Beav. 84; *Dunlop Pneumatic Tyre Co., Ltd.* v. *Dunlop Lubricant Co.*, 16 R.P.C. 12.

In *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 R.P.C. 45, the defendant took a brother of the plaintiff into his service under an agreement by which the defendant was to have the right to use the brother's name.

Annotation.

The defendant then opened a business close to the plaintiffs under the name "The Melachrino Egyptian Cigarette Co," and used the name "Melachrino" in various ways calculated to deceive. An injunction was granted.

RIGHTS TO NAME ON DISSOLUTION OF PARTNERSHIP.—Upon dissolution of a partnership, if the whole business and goodwill is sold the trade name goes with them. (*Banks* v. *Gibson*, 33 Beav. 566.) If the partnership assets are merely divided without stipulation as to the partnership name then each partner is free to use the name. *Clark* v. *Leach*, 22 Beav. 141; *Condy* v. *Mitchell*, 37 L.T.N.S. 268, 766; *Levy* v. *Walker*, 10 Ch. D. 436.

EMPLOYER AND EMPLOYEE.—A person who has been a member or employee of a firm, and later sets up in business for himself may derive what benefit he may from a fair statement of the fact of his former employment as by the use of the phrase "late of" followed by the name of his former employer or firm. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; *Clark* v. *Leach*, 32 Beav. 14; *Cundy* v. *Lerwill*, 99 L.T.N.S. 273. Such statement must, however, not be made in such a way as to induce the belief that the former employee is selling the goods of his former employer. *Worcester Royal Porcelain Co., Ltd.* v. *Locke & Co.*, 19 R.P.C. 479, 490; *Jefferson, Dodd & Co.* v. *Dodd's Drug Stores*, 25 R.P.C. 16.

NAME OF ESTABLISHMENT.—The name of an establishment or place of business if sufficiently distinctive may be protected, *e.g.*, "The Carriage Bazaar," *Boulnois* v. *Peake*, 13 Ch. D. 513; "The Bodega," *Bodega Co., Ltd.* v. *Owens*, 7 R.P.C. 31.

In *Walker* v. *Alley*, 13 Gr. 366, it was found that the name and sign of "The Golden Lion" was so connected with the plaintiff's dry goods business that it could not be taken by another trader. The Chancellor in his judgment said:—

"Where it is clear to the court that the defendant himself intended an advantage by the use of a particular sign or mark in use by another, and believes he has obtained it, or, in other words, that the defendant himself thought the use of it was calculated to advertise him at the expense of the plaintiff, and this was his object in using it, and where such has been the effect of the user, I think the court should say to him: 'Remove that sign; its use by you may, as you intend, damage the plaintiff. It cannot be necessary or valuable to you for any other purpose, you have your choice of many signs which, as a mere attraction or to give your store a marked designation must answer a fair business purpose equally well.'"

TRADE LIBEL.—Sometimes the misuse of a man's name may amount to a libel, or disparaging statements may be made sufficiently damaging to sustain a suit for libel. The law in such cases is far from clear, and must be considered in connection with the general law of libel. As illustrative cases, see *Fleming* v. *Newton*, 1 H.L.C. 376; *Gee* v. *Pritchard*, 2 Swanst. 413; *Martin* v. *Wright*, 6 Sim. 297; *Clark* v. *Freeman*, 11 Beav. 112; *Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582; *Halsey* v. *Brotherhood*, 15 Ch. D. 514; *Colley* v. *Hart*, 6 R.P.C. 17; *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, 52 W.R. 254; *Lee* v. *Gibbings*, 67 L.T.N.S. 263.

ALTA.

S. C.

McMILLAN v. PIERCE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. October 18, 1917.

BILLS OF SALE (§ II A—5)—AS TO GROWING CROPS—SECURITY—BONA FIDE PURCHASER—NOTICE.

A bill of sale of growing crops is not within the registration requirements of the Alberta Bills of Sale Ordinance, nor within sec. 15 thereof, if not intended as a security, and is therefore not void as against a subsequent purchaser, even though the consideration was not truly expressed; the status of a *bonâ fide* purchaser is not affected by notice which has come to him after he has incurred liability in the transaction.

Statement.

APPEAL from the judgment of Simmons, J., sustaining the rights of a purchaser of crops as against a subsequent purchaser. Affirmed.

A. S. Watt, for plaintiff, appellant.

W. J. Loggie, for defendant, respondent.

The judgment of the court was delivered by

Walsh, J.

WALSH, J.:—The plaintiff on December 11, 1916, bought from the defendant Pierce a quantity of oats then in bins on the farm of one White and paid him on account of the purchase price $450. Pierce had in fact on September 14, 1916, given a bill of sale to the defendant Swap of two-thirds of all the oats grown upon certain land described in the bill of sale, which oats in fact were then growing on that land but were afterwards cut, harvested and threshed by Swap and put in bins on the White farm, and it was these oats which Pierce afterwards sold to the plaintiff. The principal question for decision is which of these two men thus defrauded by Pierce, the plaintiff or the defendant Swap, is entitled to this money. Simmons, J., who tried the case, held that the consideration was not truly expressed in Swap's bill of sale and that it therefore would have been void as against the plaintiff's subsequent purchase of these same oats under s. 11 of the Bills of Sale Ordinance, if the plaintiff was a purchaser in good faith for valuable consideration, but he found that the plaintiff was not a purchaser in good faith because of notice which he had of the prior sale to Swap and with certain directions as to a reference and the payment of costs he gave judgment for the defendant.

In my opinion, the judge was quite right in holding that the consideration was not truly expressed in the defendant's bill of sale. His own evidence appears to make it perfectly clear that it was not. I think, however, that he was wrong in holding that the notice which the plaintiff had of this sale prevented him from

acquiring the status of a purchaser in good faith. He did not learn anything of it until after he had bound himself to Pierce to buy these oats and had issued his cheque for $450 in part payment for them. He might have stopped payment of this cheque, as it had not been cashed when he got the notice which he did of Swap's prior purchase, but that would not have relieved him, for his cheque was to his knowledge then in the hands of a *bonâ fide* holder for value. Even if notice of this prior sale could in any event have taken from the plaintiff the character of a purchaser in good faith, which I very much doubt, I am satisfied that notice of it to him in these circumstances could not have that effect. If, therefore, the defendant's judgment can only be sustained upon the ground taken by the judge I think he could not hold it.

There is, however, in my opinion, another ground open to him upon which he can do so, and that is, that inasmuch as the transaction between him and Pierce was a sale of growing crops it is not within the Bills of Sale Ordinance at all and his bill of sale is therefore not made void by reason of the fact that it does not truly state the consideration for it.

Our Ordinance is modelled after the Ontario Bills of Sale and Chattel Mortgage Act. Sec. 9 of the Ordinance, which is the section with which we are now concerned, is in substance though not in exact phraseology identical with the corresponding section of the Ontario Act. In the only reported cases which there are upon the subject the Ontario courts have held that that Act does not apply to goods and chattels which are incapable of an immediate delivery and actual and continued change of possession. In *Hamilton* v. *Harrison*, 46 U.C.Q.B. 127, the full court held, Armour, J., dissenting, that a mortgage of growing crops was for this reason not within the Act. This judgment appears, however, to rest almost entirely upon the judgment in *Brantom* v. *Griffits*, 1 C.P.D. 349, 2 C.P.D. 212, and for that reason does not entirely satisfy me, for the Imperial Statute upon which that case was decided deals only with personal chattels which are by it defined to be "goods, furniture, fixtures and other articles capable of complete transfer by delivery," which to my mind makes so broad a distinction between it and the Ontario Act as to make *Brantom* v. *Griffits*, practically valueless as an authority under the latter. *Hamilton* v *Harrison*, however, no matter upon what reasoning founded, is an authoritative opinion of an Ontario Court upon the Ontario statute

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which has never since been questioned. In *Gunn* v. *Burgess*, 5 O.R. 685, Boyd, C., says, at p. 687:—

> The mischief intended to be remedied by this Act is to prevent a secret transfer of movable property which can be at once removed, and the apparent possession of which is suffered to remain in a person who has parted with the ownership,

and at p. 688:—

> The intrinsic evidence afforded by the Ontario Act manifests that it was intended to apply to personal chattels susceptible of specific ascertainment, and of accurate description, capable therefore of being actually and manually transferred and possessed *in specie*.

Burton, J., expressed a somewhat similar opinion of the object of the Act in *McMaster* v. *Garland*, 8 A.R. (Ont.) 1 at 12. Wilson, C.J., in delivering the judgment of the Court of Appeal in *Grass* v. *Austin*, 7 A.R. (Ont.) 511, says, at 513:—

> Growing crops are not lands within the Statute of Frauds but goods and chattels. It is true however that the mortgage or sale of them need not be registered under the Chattel Mortgage Act because the possession of them cannot, while growing, be changed without changing the possession of the land also upon which they are growing, and that cannot in most cases be done.

The same view of the Act was taken by the Common Pleas Division in *Steinhoff* v. *McRae*, 13 O.R. 546. In *Clifford* v. *Logan*, 9 Man. L.R. 423, Taylor, C.J., reached the same conclusion under the Manitoba Act, though Killam, J., who also wrote a judgment, refrained from expressing an opinion upon the point, and Bain, J., concurred, though there is nothing in the report to indicate whether he agreed or disagreed on this point.

The opening words of s. 9 certainly make possible this construction of the Ordinance. We cannot apply here the principle upon which this court acted in *Ward* v. *Serrell*, 3 A.L.R. 138, and *B. & R. Co.* v. *McLeod*, 18 D.L.R. 245, 7 A.L.R. 349, and other cases, namely, that the interpretation of the Ordinance should be that given to the Ontario Act from which it is copied by the courts of that province before it was adopted by our legislature, because the Ordinance was passed on June 5, 1881, 20 days before the earliest of the above cited Ontario cases was decided. I think, however, then, when courts in other jurisdictions have so construed statutes in *pari materia* with it by an unbroken series of decisions extending considerably over a quarter of a century, we cannot go far wrong in following them. See *Ward* v. *Serrell*, *supra*, at p. 140.

Stuart, J., in *Jacobson* v. *International Harvester Co.*, 11 A.L.R. 122, 24 D.L.R. 632, expressed the opinion that s. 9 clearly contem-

plates only a case where it is possible that the sale can be accompanied by an immediate delivery and followed by an actual and continued change of possession and that the Ordinance would not apply to the agreement which he was considering (which was one for the sale of a future crop), if it had been made after the crop had begun to grow. This judgment was affirmed by the Appellate Division "on the grounds expressed by the judge," *ib.*, p. 125, 28 D.L.R. 582.

It was suggested on the argument that the defendant's bill of sale was taken only as security and that it is therefore invalid under s. 15 of the Ordinance, which invalidates an instrument which is intended to operate and have effect as a security in so far as it assumes to bind any growing crop. The judge seems to have been of that opinion though he did not give effect to it. His opinion, however, was based upon certain questions and answers put in from the defendant's examination and upon what took place between Pierce and Swap some months later. My view after reading all of the evidence is that that is not the proper conclusion. This deal undoubtedly originated in Swap's anxiety over a note of Pierce for about $300 upon which he had become liable as surety. He evidently feared that he would have to pay it and so he set himself to work to protect himself against it. The arrangement was that he was to pay this note and the amount of it was figured as part of the consideration that Swap was to pay for the grain. Swap was to harvest, thresh and market the grain and if there was enough left out of the crop after payment of the expenses in addition to the amount of the note he was to pay Pierce $200 and to keep for himself anything in excess of that. This arrangement was an out-and-out sale of the crop upon these terms under which Swap became, as between him and Pierce, the principal debtor in respect of the note and became the absolute owner of the crop. A subsequent arrangement was made some months afterwards, when the crop had been cut and threshed and partly marketed, under which Swap agreed to surrender his bill of sale upon getting the amount of the note, and the expenses he had been put to but I do not think that it in any way detracted from the character of the original transaction.

I would dismiss the plaintiff's appeal with costs, taxable under column 2.

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The defendant Swap appealed from the disposition of the costs made by the judge but I do not think we can say that he exercised his discretion with reference to them upon any wrong principle, and so I would dismiss his appeal also, but as substantially no costs have been occasioned by it, I would do so without costs.

Appeal dismissed.

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Re CITY OF HAMILTON AND UNITED GAS AND FUEL Co. OF HAMILTON Ltd.

Ontario Supreme Court, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. May 21, 1917.

CONTRACTS (§ II D—157)—TO SUPPLY GAS—RATES—MINIMUM CHARGE.

A gas company, bound under the terms of a municipal franchise to supply gas at a specified rate, subject to its general rules and regulations not inconsistent therewith, cannot validly obligate the consumers to pay for a minimum quantity whether the gas be used or not as a condition precedent to their being supplied.

Statement.

Appeal by the company (by leave) from an order of the Ontario Railway and Municipal Board of the 22nd March, 1917.

The application to the Board was made by the city corporation, under sec. 21 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, for an order forbidding the company to require applicants for gas in the city of Hamilton, as a condition precedent to their being supplied, to execute a contract binding them to pay a minimum charge, and declaring that the company was not entitled to make any charge against its customers, except for gas supplied and at the rates set forth in a certain by-law and directing the company to supply gas at the charges set forth in that by-law to all inhabitants along the mains and pipes of the company.

The company was, by letters patent of the Province of Ontario, dated the 18th November, 1903, incorporated under the name of "The Ontario Pipe Line Company Limited," with power, amongst other things, to drill and bore for natural gas, and to construct and operate works for the production, sale, and distribution of natural gas for the purpose of light, heat, and power. The name of the company was subsequently changed to that of "The United Gas and Fuel Company of Hamilton Limited."

Under by-law No. 400 of the city council, passed on the 26th September, 1904 (interpreted by by-law No. 443 passed on the 13th March, 1905), certain rights were granted to the company to enable it to furnish gas to the inhabitants of the city of Hamilton; the company binding itself in return to supply gas in terms

of the by-law. The material clauses of by-law No. 400 (which was adopted by the company by an agreement dated the 24th October, 1904) were as follows:—

"5. The company shall render its accounts monthly or quarterly at its option, and shall not charge the Corporation of the City of Hamilton or consumers of gas therein for natural gas more than fifty cents per thousand cubic feet for the first five years from the date hereof, and for ten years thereafter not more than forty-five cents per thousand cubic feet, and thenceforth not more than forty-two and a half cents per thousand cubic feet, subject always to a discount of five cents per thousand cubic feet on all bills paid within fourteen days after presentation thereof; and meters shall be furnished by the company, free of charge, to all consumers of its gas, and no charge shall be made for any supply-pipe from the main to the margin of the street."

"16. The company shall commence not later than the 1st day of May, 1905, to lay mains and pipes within the said city of Hamilton, and shall, within six months thereafter, have laid at least ten miles of mains in the streets, public alleys, and public grounds of the city of Hamilton, and shall, from and after the expiration of such six months, supply gas, at the prices hereinbefore mentioned, to the city corporation and to all inhabitants along such mains desiring to be supplied, upon such applicants tendering to the company a contract to pay the rates aforesaid, all such contracts to be subject to the company's general rules and regulations not inconsistent herewith, and the company to have the right to cease such supply during any time when the rates chargeable under this by-law shall be in arrear. If any such applicant shall not be the owner of the premises for which the supply of gas is desired, the company may require the applicant to furnish adequate security for the payment of the rates chargeable for the gas to be supplied to him, such security to be by guarantee-bond or cash-deposit, and the sufficiency of the security to be determined by the Assessment Commissioner, if objected to by the company."

"17. Whenever said company shall have received *bonâ fide* applications for the supply of gas to the extent of 200,000 cubic feet per month, to be furnished within a radius of a quarter of a mile from any point in any part of the city where it has laid down

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a line of pipes, and the applicants shall have tendered such company contracts for the use of gas aggregating said amount for at least one year, accompanied by security from each applicant approved by the Assessment Commissioner of the city, which contract shall conform to said company's general rules and regulations not inconsistent herewith, then and in such case the city council may order and direct that said company, within three months thereafter, shall extend its line of pipes and furnish gas to such applicants in the manner and on the conditions hereinbefore provided, so far as the capacity of its plant and its facilities for increasing the same will permit."

The grounds of opposition to the application were in effect two:—

(1) That the Board has no jurisdiction to entertain the application.

(2) That a contract providing for a minimum charge for natural gas was in accordance with the rules and regulations of the company regarding the same, and was legal and binding on the contracting parties.

It was not suggested by the city corporation that the company made any charge unauthorised by the by-law except in case the consumer's account fall below 80 cents in any month; but objection was taken to the action of the company in requiring applicants for gas to sign a contract binding them to pay a minimum sum in the event of that contingency.

The practice of the company was to require each applicant for gas service to sign a contract, the material provisions of which were as follows:—

"To the United Gas and Fuel Company of Hamilton Limited:—

"Subject to the rules and regulations of the United Gas and Fuel Company of Hamilton Limited, at present in force or which may be hereafter adopted by the company, and which I agree shall form part of this contract, I hereby make application for gas by meter at.....
Hamilton, Ont., occupied as....., and I agree:—

'First, to pay for gas supplied at the kerb or property line of the above premises at the end of the company's monthly period for the district in which the premises are situated, at the rates

published by the company, subject to the published discount if paid within fourteen days after date of rendering bill. I agree to pay a minimum rate of 80 cents per month, should the consumption in any one month amount to less than that sum; and that all bills shall become due and payable forthwith in case of discontinuance of the use of gas. All bills to be paid at the general offices of the company during its regular hours of business. In default of payment of any bill when due, I hereby covenant and agree with the company that, in consideration of the premises, notwithstanding anything contained in the Execution Act or any amendment thereof, or any other statute of the Province of Ontario, none of my goods and chattels shall be exempt from levy or seizure under any writ or execution issued out of any Court against me in respect of any claim hereunder, and I hereby expressly waive, for myself and my heirs, all and every benefit that could accrue to me by virtue thereof but for this covenant.

"Second, to pay for all gas delivered to the kerb or property line of the premises above named until I notify the company in writing of my intention to move from the said premises, to discontinue the use of gas, or to terminate in any manner my liability under this contract."

The Board held that it had jurisdiction, and made an order directing the company to carry out its agreement with the city corporation as contained in the by-law, and forbidding the company to require from each applicant for gas a contract binding such applicant, in breach of the terms of the by-law, to pay a minimum monthly or quarterly charge.

The company's appeal was from that order.

Christopher C. Robinson, for the appellant.

F. R. Waddell, K.C., for the respondent.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The single question which we are asked to consider on this appeal is: whether the appellants, in contracting with persons entitled to be supplied by them with gas under the provisions of the agreement in question, violate their contract contained in that agreement, in exacting from such persons an obligation to take, or to pay for it if they do not take it, a fixed quantity of gas monthly, or in other fixed periods.

It has been, elsewhere, contended that the Ontario Railway and Municipal Board, from the ruling of which the appeal is made,

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had not power to deal with that question; and that, if there had been such a breach of the agreement, and if the Board had such power, the relief awarded is improper or excessive; but neither point is raised here now.

The rights of the parties depend upon the meaning of the words: " . . . and shall . . . supply gas, at the prices hereinbefore mentioned, to the city corporation and to all inhabitants along such mains desiring to be supplied, upon such applicants tendering to the company a contract to pay the rates aforesaid, all such contracts to be subject to the company's general rules and regulations not inconsistent herewith, and the company to have the right to cease such supply during any time when the rates chargeable under this by-law shall be in arrear," contained in paragraph 16 of the respondents' by-law, passed in conformity with the terms of the agreement between the parties.

The 5th paragraph of the by-law sets out the contract as to rates, referred to in paragraph 16, in these words: " . . . shall not charge the Corporation of the City of Hamilton or consumers of gas therein for natural gas more than fifty cents per thousand cubic feet for the first five years from the date hereof, and for ten years thereafter not more than forty-five cents per thousand cubic feet, and thenceforth not more than forty-two and a half cents per thousand cubic feet." No other part of the agreement throws much, if any, light upon the single question which we are now asked to answer.

The plain meaning of the agreement, in this respect, seems to me to be: that such inhabitants of Hamilton as are entitled to the benefit of the agreement cannot be charged more for the gas supplied to them than the price provided for in the agreement in question, nor be compelled to take more than they choose to use.

If the appellants supply less than a thousand feet, and yet exact the full price of a thousand feet, obviously they exact more than the agreement provides for, for the gas they have supplied.

So, too, if they supply none, and yet exact the price of a thousand feet.

It seems very plain to me, too plain indeed for serious contention to the contrary, that if one be compelled to pay for gas not supplied, as well as the full rate agreed upon for all that is supplied, he pays more than the parties to the agreement in

question intended that he should pay, and for more than their words, contained in it, permit him to be charged; and that such a charge would consequently be "inconsistent" with the agreement, and so not permissible under any "general rules and regulations" of the appellants.

Whatever may be the effect of the contract, the parties are bound by it. Neither inconvenience nor hardship could rescind or change it. But I feel bound to add that there does not seem to me to be any great inconvenience, or any real hardship, in the interpretation which we put upon the agreement. The appellants are not bound to supply any but those persons, mentioned in paragraph 16, who take a real supply of gas; they cannot be compelled to put in pipes and other connections and meters for those who do not intend to take such a supply, nor are they likely to be asked to do so.

It is not necessary that we should express any opinion as to what, if any, relief the respondents would be entitled to in case of contracts, made quite voluntarily by "customers," not in accord with the provisions of the agreement.

The appeal is dismissed. *Appeal dismissed.*

Re DOMINION TRUSTS Co. and ALLEN.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. June 5, 1917.

COMPANIES (§ V F—261)—LIABILITY OF SHAREHOLDERS—CONTRIBUTORIES—NEW COMPANY—ESTOPPEL.

Upon the organization of a new company, as where a provincial company is incorporated into a Dominion company, the shareholders of the old company do not become shareholders of the new company and liable as contributories, even when receiving dividends and participating in the business of the latter, unless shares in the new company are in fact allotted to them.

Statement.

APPEAL by liquidator from an order of Murphy, J., removing names from the list of contributories. Affirmed.

Martin, K.C., for appellant.

Savage, MacInnes, Macdonald, Gibson, Ross, and Ellis, for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A. (dissenting):—The names of the respondents were placed on a list of contributories to the Dominion Trust Co. On appeal to a judge they were removed therefrom, and we are now asked to restore them. The respondents were shareholders in a provincial company known as the Dominion Trust Company, Limited. The Dominion parliament, on the

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petition of that company, incorporated the Dominion Trust Co., the company in liquidation. The companies differ in name only in respect of the word "limited."

The authorized capital of both was the same. The new company, as it is called, was formed for no other purpose than to take over the business and assets of the old company so that it might conduct that business in a larger field in the interest of the shareholders.

In pursuance of the purposes aforesaid, extraordinary general meetings of the old company, held on January 17, 1913, and February 25, 1913, approved and confirmed an agreement which is made a schedule to the Act of the provincial legislature, 1913, c. 89, which ratifies and confirms said agreement.

Mr. Martin, counsel for the liquidator-appellant, argued that the effect of the Act was to make the shareholders in the old company shareholders in the new *nolens volens*. In my opinion, this contention must fail. It would fail even apart from the fact that the new company was incorporated by Dominion parliament and not by the provincial legislature.

If then the respondent is to be held to be a shareholder in, or contributory to the new company, it must be because of some act of his from which it may be inferred that he elected to become such, or which estops him from now denying membership.

The said agreement gives a shareholder in the old company the right to share for share in the new company. The new company agreed to allot such shares not to the old company but to the shareholders in the old company. On my construction of the agreement the right to such an allotment is not as respondents contend postponed until the old shares have been fully paid-up. The issue of new certificates only is so postponed. This seems clear from the language of the Act: "A member holding a share of the old company not fully paid shall receive a share of the new company paid up to the like amount."

There are some loose and inapt expressions in the agreement as to the new company's holding the shares in trust for distribution among the old shareholders, but I think this was intended to refer to the share certificates and not to the allotment of the shares.

From the coming into effect of the agreement the interests of the shareholders of the old company *qua* shareholders are expressed

to be limited to rights to the new shares. The powers of such shareholders to conduct the business of the old company are gone, but on signifying his acceptance of the arrangement made and evidenced by said agreement, the shareholder in the old company becomes entitled to stand in the new company where he stood in the old one. I do not think a formal application for shares in the new company, and a formal allotment by the new company, was necessarily a prerequisite to such a change. Recognition by both of the new relationship may estop either party from denying it. The authorities on this point are very numerous, but before referring to some of them I would turn to the statutes relating to membership in and contribution to the company in liquidation. The Dominion Companies Act defines "shareholder" as "every subscriber to or holder of stock in the company." Stock may be allotted in such manner as the directors by by-law or *otherwise* may prescribe. The company is required to keep books in which the names of all persons who are or have been shareholders shall be entered—such books to be open to inspection by shareholders and creditors.

By the Winding-Up Act every shareholder *or member* is made liable to contribute to the extent unpaid on his shares.

We were referred to no by-law or other regulation of the company relating to the allotment of shares.

It will be seen from the above provisions of the statutes that no very hard and fast formalities are prescribed in respect of membership. Some of the English cases turn upon rather strict terms of the deed of settlement or articles of association relating to allotment or transfer of shares; but even in such cases the courts have not strictly enforced compliance therewith, and have held the company or shareholder, as the case might be, estopped by conduct, from setting up non-compliance with the statutory or other regulations of the company.

It is said in Lindley on Companies, 6th ed., p. 1049, that:—

> Indeed, it is now clearly settled, as a general rule, that where a person has acted, and been treated as a shareholder, he will be a contributory, notwithstanding the non-observance of those formalities which, according to the strict letter of the company's deed or articles of association, ought to be complied with before a person is entitled to share profits, or enjoy the other rights or privileges of a shareholder.

In *Cheltenham R. Co.* v. *Daniel* (1841), 2 Q.B. 281 (114 E.R. 110), Lord Denman, C.J., said, at p. 292:—

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I think the point is conclusively settled by *Sheffield & Manchester Ry. Co.* v. *Woodcock*, 7 M. & W. 574. That case shews that all difficulties which may arise from not adopting the machinery of the Act are got over by the conduct of the parties who claim to be placed in the situation of proprietors, and are so placed accordingly.

I would refer also to *Challis's* case (1870), 6 Ch. App. 266, *Hindley's* case, [1896] 2 Ch. 121; *Bargate* v. *Shortridge*, 5 H.L. Cas. 297; and *Murray* v. *Bush*, L.R. 6 H.L. 37.

None of the respondents made formal application for new shares and the board of the new company made no formal allotments of shares to them. On the contrary, the board passed a resolution purporting to allot to the old company all the shares to which the members thereof were entitled under the agreement, apparently without authority or request of the old company or its shareholders, and contrary to the terms of the agreement. That resolution appears not to have been acted upon. The old company was not in fact registered as holder of the shares. On the contrary, the new company from the beginning treated the members of the old company as the holders. This is abundantly plain when it is seen that they were notified of the meetings of the new company, and such as attended were admitted thereto as shareholders. The new company adopted informally as its own the old share register and the serial numbering of the old shares.

In these circumstances, I would restore to the list of contributories, the name of each respondent who can properly be said to have assumed the character of member of the new company. Certain of them may be divided into classes. In the first class I should place the secretary and the four directors who are respondents, namely, Messrs. Bain, Drew, Keenlysides, Ramsay and Reid. These were active participants in the affairs of both companies and with full knowledge of the agreement and all that led up to it, and followed it; they accepted membership and office in the new company, and they cannot, I think, escape the consequences of such membership by setting up the absence of a formal contract constituting them such members.

In the second class I would place those who were present in person or by proxy at the extraordinary general meeting of the old company held on January 7, 1913, which authorized the said agreement; or at the confirmatory meeting of said company held on February 25, 1913, and who in either case were afterwards present in person or by proxy at one or both of the meetings of

the new company held on May 15, 1913, and February 24, 1914. These respondents knew, or must be taken to have known, through their agents, the contents of the said agreement. Such persons cannot plead ignorance of what was done at meetings at which they or their agents were present.

Furthermore, in the absence of proof to the contrary these respondents must be taken to have been under no misapprehension as to the character of the meetings of May, 1913, and February, 1914, that is to say, that they were meetings of the new company. *Primâ facie* evidence of this are their proxy papers and their presence there.

Now, while a large number of the respondents whom I would place in this class have denied that they were present at any of the four meetings, they do not deny that they were represented by proxy. I have carefully considered their testimony and find it falls short of rebutting the presumption of election involved in the fact that they took part in these meetings in the character of members. Not one of them has said: "I signed the document authorizing another to represent me at meetings of the new company without noticing that the word 'Limited' was not in the name and under the mistaken belief that it was for a meeting of the old company."

I do not attach too much importance to the receipt of dividends by these respondents since, while the cheques therefor were the cheques of the new company, the receipts signed by respondents purported to be receipts acknowledging payment from the old company. I have this observation to make, however, that with knowledge of the fact that the old company could earn no more dividends they accepted moneys which they knew could only have been earned by the new company.

I lay the most stress upon the fact that these respondents had knowledge of the agreement aforesaid and with such knowledge exercised the rights of membership in the new company by attending at the meetings, personally or by proxy, and have not rebutted the presumption which arises therefrom.

The following respondents fall within this second class: C. B. Baker, James Balfour, A. W. Briegal, A. H. Burke, Thomas Burnard, Mrs. Burke, G. L. Gamble, M. H. R. Gamble, D. B. Grant, M. R. Gray, D. M. Hackney, George H. Hopkins, J. W.

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Jones, A. T. Brooks, C. T. McHattie, W. H. McInnes, L. N. McKechnie, D. D. McLeod, Robert McPherson, F. A. Pauline, M. Ross, and S. Tallman.

The third class of respondents are those who attended in person or by proxy one or both of the meetings of the new company, but not the said meetings of the old company, and have given no evidence in these proceedings and hence as to them the presumption of acceptance of membership in the new company based upon such attendance at meetings has not been rebutted. These are, C. B. Garland, George Hay, J. Kingham, H. E. Lillie, C. Martin Estate, J. C. Mathers and Miss Reid, and I would include with them James Muir, K.C., and D. A. Smith, who in my opinion have not successfully by their affidavits rebutted the presumption arising from the appointment of proxies.

In the fourth class there are those in the same situation as the above except that they have given evidence denying knowledge of the change of status of the old company, thereby inferentially denying that they consciously gave proxies for meetings of the new company, and while in the case of some of these the evidence is not quite satisfactory, yet I think they are entitled to the benefit of the doubt, and hence their names should not be replaced on the list. It is not safe to apply the doctrine of estoppel where the inference of knowledge of the essential facts cannot be clearly drawn.

In the fifth class are those who attended no meetings of the new company, but did attend in person or by proxy one or both of the said meetings of the old company. They may be taken to have had knowledge of the agreement and of their rights under it but as they have done nothing amounting to an election to claim those rights, I do not think they have become members of the new company and their names should not be replaced on the list. The receipt of dividends by them in manner above mentioned does not necessarily point to the recognition by them of membership in the new company.

In the sixth, and last class, are those who attended none of said meetings of either company either in person or by proxy, but who received dividends paid by cheque of the new company but acknowledged on a form of receipt of the old company, as did all of the respondents.

I have already referred to this question, and am satisfied that the receipt of the dividends in the circumstances cannot be held to have been an election on the part of these respondents to become members of the company and therefore their names should not be replaced on the list.

I should say a word or two about the evidence given by three of the respondents of the second class. Mr. McInnes knew the nature of the proposed change of status of the old company. He did not object, but, on the contrary, appears to have approved of it. He thought the change was to have been made without creating a new company. He understood the substance but not the form. He does not say he was under any misapprehension when he attended a meeting of the new company as to his being a member of it, or that the dividends he received were not paid by the company which was under the Dominion Act of Incorporation.

R. McPherson while present at the meeting of January 7, and while fully appreciating the change about to be made, said he understood that he could only become a member of the new company when he had paid up his old shares. But he does not explain his presence in the character of member at meetings of the new company.

Mr. Bridges asserts that he was induced to take shares in the old company by the misrepresentations of an agent of that company. That might have been ground for setting aside the contract as between the company and himself, but it cannot be relied on in proceedings of this nature after winding-up proceedings have intervened: *Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325; and *Directors, etc. of Central R. Co. of Venezuela* v. *Kisch*, *Ib.* 99.

As to the first, second and third classes, I would allow the appeal.

GALLIHER, J.A.:—I agree with the trial judge that c. 89 of the Statutes of B.C. 1913 has not the effect of causing shareholders in the old company to become *ipso facto* shareholders in the new. *Re Bank of Hindustan*, 34 L.J. Ch. 609, is directly in point.

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It is then sought to bind them by estoppel.

One feature that impresses me at the outset is that none of the respondents ever made application for shares in the new company, none were allotted to them, and they were never entered in the books of the new company as shareholders.

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The books of the old company in which they were entered as shareholders were transferred to and became the property of the new company, but as books, and not with the effect of in any way changing their status as shareholders.

Under the agreement certain shares were set apart by the new company and to the extent that they were shareholders in the old company they had the option to take shares in the new company share for share.

Now how was that option exercised (if at all).

No application was made to the new company—no shares were allotted by the new company, and the respondents nowhere appear in the books of the new company as shareholders therein.

We find no resolution of the new company adopting the share register of the old company in which the respondents' names appear as their share register.

In fact, they kept a share register of their own in which was entered the names of shareholders in the new company, some who had never been members of the old company and some who had and whose shares had been paid in full, and it was only when shareholders in the old company had paid in full for their shares and had delivered up their share certificates that they were entered as shareholders in the new company, in other words, they had exercised the option given to them under the agreement.

It is admitted that all of the respondents accepted dividends from the new company.

It is also admitted that calls were made upon the respondents in respect of their shares in the old company and payments made in respect of them.

I have discussed these features with the Chief Justice and other members of the court, and agree that under the circumstances disclosed in the evidence neither of these acts is sufficient to fix them as shareholders in the new company.

It remains then to consider the fact that some of the respondents acted as directors in the new company while others attended shareholders' meetings either in person or by proxy.

In the view I take, it becomes unnecessary to distinguish as between these.

I have read all the cases to which we have been referred, and others, and I find no case where there had not been either an

application for shares, an allotment of shares, a transfer of shares, or an entry as a shareholder in the books of the company, not one element of which is present in the case before us.

It is sought here to make the respondents liable as contributories because the new company in turning to the share register of the old company and finding there entered the names of these respondents (who had a right to become shareholders if they chose) send out notices of meetings at which they attend either in person or by proxy and take part therein.

I may have misunderstood the effect of the cases, but as I understand them there is no principle laid down which goes so far as that.

Had anyone searched the registers of the new company they would not have found the respondents entered as shareholders thereof; had returns of shareholders been made to the proper department, their names would not have appeared. Moreover, can it be said the attendance at meetings was an election to take, in the case of directors, more shares than was necessary to qualify them as such, and in the case of shareholders simply more than one share?

It seems to me it is too indefinite a basis on which to proceed, and that no proper foundation has been established.

I would dismiss the appeal.

McPHILLIPS, J.A.:—This is an appeal from the order of Murphy, J., setting aside the certificate of the Deputy District Registrar at Vancouver, settling the list of contributories of the Dominion Trust Company—the persons named thereon being members of the Dominion Trust Company, Limited, incorporated in the Province of British Columbia and vested with further powers by Act of the Legislature of British Columbia being ch. 59 of the Statutes of 1908. McPhillips, J.A

The Dominion Trust Co. was incorporated by Private Act of the Parliament of Canada being ch. 89 of the Statutes of Canada 1912, which in s. 1 thereof, reads as follows:—

1. William H. P. Chubb, merchant; William D. Brydone-Jack, physician; Francis R. Stewart, merchant; William R. Arnold, managing director; John R. Gray, gentleman; James Stark, merchant; Ellis W. Keenlyside, insurance agent; William Henderson, wholesale druggist; Herbert W. Riggs, physician; and James Ramsay, manufacturer, all of the City of Vancouver, in the Province of British Columbia; Thomas R. Pearson, manager, and George E. Drew, physician, both of the City of New Westminster in the said province; David

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W. Bole, wholesale druggist; John Pitblado, banker, and Peter Lyall, the elder, contractor, all of the City of Montreal, in the Province of Quebec; and Charles W. Twelves, financier, of the City of Antwerp, Belgium, being the directors of "Dominion Trust Company, Limited," mentioned in the preamble, together with such persons as become shareholders in the company hereby incorporated, are incorporated under the name of "Dominion Trust Company," hereinafter called the company.

It will be noted that the above quoted section in part reads as follows, after reciting the individual names of the directors of the Dominion Trust Company, Limited, mentioned in the preamble, "*together with such persons as become shareholders in the company hereby incorporated* are incorporated under the name of Dominion Trust Company," that is, by statute, the individuals named are shareholders, together with such persons as become thereafter shareholders in the company thereby incorporated, viz., the Dominion Trust Company. It is at once borne in upon one's mind, that the statute falls short of declaring that the shareholders in the Dominion Trust Company, Limited, are shareholders in the Dominion Trust Company—this is an important matter for later consideration. Then in s. 14 of the Statutes of Canada (c. 89, 1912) it is provided as follows:—

14. The company may acquire the stock and the whole or any part of the business, rights and property of Dominion Trust Company, Limited (mentioned in the preamble) and of the Dominion of Canada Trusts Company, incorporated by c. 84 of the statutes of 1895, conditional upon the assumption by the company of such duties, obligations and liabilities of the said companies with respect to the business, rights and property so acquired as are not performed or discharged by the said companies.

Following upon this legislation obtained from the Parliament of Canada, the Dominion Trust Company, Limited, and the Dominion Trust Company, entered into an agreement under date January 8, 1913, which reads in one of the recitals as contained in the preamble to the said agreement as follows:—

And whereas the old company (Dominion Trust Company, Limited) has agreed to convey and assign to the new company (Dominion Trust Company) the whole of its business, rights and property on the terms hereinafter contained and the new company has agreed to purchase the same upon said terms—

it is to be noted—and this also is an important matter for later consideration—that there is no pretence even that in conformity with s. 14 above set forth (c. 89 Statutes of Canada, 1912) that the agreement provides for the acquirement of the stock, *i.e.*, the issued shares of the old company.

The agreement of January 8, 1913, was made a schedule to

the Dominion Trust Company Act 1913, being c. 89 of the Statutes of 1913, of British Columbia, the sections therein referring thereto and which need consideration are 1, 2, 3, 5, 24, and 26.

It will be also noted that nothing appears in the above sections to indicate that the Legislature of British Columbia in any way enacted that the shareholders in the old company should *ipso facto* be shareholders in the new company.

Then turning to the agreement of January 8, 1913, which is statutorily approved, ratified and confirmed (s. 1, c. 89, B.C. 1913), we find the terms of sale.

It will be observed that the new company agreed to allot to the members of the old company $2,500,000 of stock, $1,122,100 being fully paid up, $1,162,900 credited with $756,125 paid up thereon, and $94,100 credited with $77,436.98 paid up thereon, and $120,900 credited with $44,338.02 paid up thereon, and $8,488.54 due for premiums and to hold the same in trust for distribution among the members of the old company as provided, *i.e.*, a member of the old company holding a fully paid share of the old company would receive a fully paid share of the new company; and a member holding a share of the old company not fully paid would receive a share of the new company paid up to the like amount as the share in the old company stood on the books of the old company; and if on the share of the old company there should be owing any amount for premium, the share of the new company should be subject to the payment of the like amount for premium. It will be observed that neither the statute, nor the agreement ratified by the statute, automatically accomplished anything in the way of the transfer of or the delivery up of the old shares for the new. It was incumbent upon the shareholder in the old company to move in the matter—it being provided in the agreement that the new company

should deliver to each shareholder of the old company *in exchange for and upon* the delivery of a certificate with endorsed transfer thereof duly executed on share warrant for fully paid shares in the capital stock of the old company a certificate representing an equivalent number of fully paid shares of the capital stock of the new company. (It will also be noted that) no certificate for shares in the capital stock of the new company not fully paid or in respect of which there is any sum due for premium shall be issued until all sums due on said shares whether for premium or otherwise shall have been fully paid.

It is therefore apparent that there would have to be the proper allotment of the shares to the members of the old company and

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the holding of the same in trust, and besides that the active and conscious act of the shareholder in the old company by way of the delivery up of the old share for the new share, and the issue and acceptance thereof, before the change would be accomplished from that of being a shareholder in the old company to that of being a shareholder in the new company.

It is to be further remarked that it was provided, that even if this procedure was gone through with, where moneys were due in respect of shares, they would not issue until fully paid, whether the moneys were due for premium or otherwise.

It is plain that the shareholders in the old company have been by the provincial legislation relegated to but one position (the whole of the business of the old company has been transferred together with the rights and property thereof to the new company), and that one position is very precisely and tersely stated in the agreement (approved, ratified and confirmed by statute) to be as follows:—

> From and after this agreement coming into effect as hereinafter provided (and it did come into effect, the Act c. 89, Stats of B.C. (1912), being assented to on the 1st of March, 1913), the rights of the shareholders in the old company *qua* such shareholders shall consist only of and be limited to the right of each such shareholder to a certain number of shares in the capital stock of the new company in the manner hereinbefore set forth. All of the shares of the old company *transferred and delivered by the shareholders of the old company under the provisions hereof* shall be held by the new company either in its own name or in the names of its nominees to the intent that the whole of the stock of the old company shall be held by or on behalf of the new company.

It is, therefore, patent, that the new company has not, in pursuance of s. 14 (c. 89 Stat. of Canada 1912), acquired the stock by virtue of the provincial legislation, or by reason of the provisions of the agreement statutorily approved, ratified and confirmed (s. 1, c. 89, Stat. of B.C. 1913), to acquire the stock it is necessary that the shareholders in the old company should deliver up and transfer their shares to the new company and accept shares in the new company, and only by this method is it possible for the new company to be possessed of these shares; *a fortiori*, it can only be in this way that the shareholders from being shareholders in the old company become shareholders in the new company, and within the purview of s. 1 of the Act of incorporation of the new company (c. 89, Stat. of Canada 1912), and within the terminology thereof, "together with such persons as become shareholders in the com-

pany"—*i.e.*, in that way only could it be said that the new company had acquired the shares of the old company, and in that way only could it be said that the shareholders in the old company had become shareholders in the new company, and members of the new company, capable of being placed upon the list of contributories of the new company. The trial judge (Murphy, J.) in his judgment referred to the decision of Romilly, M.R., in *Re Bank of Hindustan* (1864), 34 L.J. Ch. 609 at 613, 11 Jur. N.S. 661, and that case seems to me to be very much in point, the Master of the Rolls there considering the Companies Act 1862, ss. 161 and 35.

The language of Romilly, M.R., is exceedingly apposite to the points requiring determination upon this appeal. See *Re London Bombay and Mediterranean Bank* (*Drew's* Case) (1867), 36 L.J. Ch. 785; and *Re Empire Assur. Co.; Bagshaw and Wigglesworth's* case (1867), 36 L.J. Ch. 663, L.R. 4, Eq. 341.

Then we have it stated in par. 1015 of vol. 5 of Halsbury's Laws of England at p. 591.

In *Zuccani* v. *Nacupai Gold Mining Co.* (1889), 61 L.T. 176, Lord Esher, M.R., at p. 178, said (and in reading this language, No. 1 company may be read, as the old company, and No. 2 company as the new company, when applying the reasoning to the facts of the present case):—

> Assume Mozeley then to be a shareholder in the No. 1 company, does it make him a shareholder in the No. 2 company or give him a right to be treated (if it were Mozeley himself) as a shareholder now in the No. 2 company? The No. 1 company was got rid of but it is said that it was reconstituted in the No. 2 company. I cannot agree that either in law or in equity the No. 2 company is the same thing as the No. 1 company. Assuming that Mozeley is to be treated as a shareholder in the No. 1 company what were his rights as against the No. 2 company? His rights were that he might have insisted upon being admitted as a shareholder therein.

In the present case as we have seen no allotment was made of the shares in the new company in pursuance of the agreement of January 8, 1913, so that matters were not even put in train to bring about a change of status of the shareholders, *i.e.*, from the old company to the new company. Further, the persons appearing upon the list of contributories would not appear to have applied, much less insisted upon recognition as shareholders in the new company, and there is no evidence of any transfer of shares in the old company to the new company. It is true there is some evidence quite unsatisfactory though and I can only assume not sufficient

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in the opinion of the trial judge; that there were dealings upon the part of the persons placed upon the list of contributories with the new company such as the attendance at meetings in person or by proxy and the acceptance of dividends, and as to the acceptance of dividends, it is to be observed that there was really nothing upon the dividend warrant cheques to shew that any change had taken place from the old company to the new company. The cheques for dividends were the same, the word "Limited" absent after the name of the company was the whole change, not a noticeable change. Further, the business of the old company and the new company is in such inextricable confusion that it cannot be held that there is anything amounting to estoppel. And as to the proxies, these were really too stale and could not be looked upon as being authority in any sense to attend at meetings of the new company—in any case were not proxies from shareholders in the new company as those giving them were not shareholders in the new company.

The mere fact that a director of the old company became a director in the new company, and that shareholders in the old company attended meetings of the new company, does not *ipso facto* establish that, in so doing, the share interest held in the old company was agreed to be transferred into the new company and that this conduct can be said to be referable only to a changed position and that there is estoppel by reason thereof. In Palmer's Company Law (10th ed., 1916) at p. 182, we find this language:—

> The general law requires no share qualification for a director, and table A, art. 70, only requires a nominal qualification—the holding of at least one share in the company.

The Companies (Consolidation) Act 1908 (Imperial) does not of course govern in the present case nor the Companies Act (R.S.B.C. 1911, c. 39) but it is useful to turn to these statutes at times, and to the decisions thereon, in examining into matters calling for consideration in respect to companies incorporated under private Acts—as in drafting the special Acts no doubt the draughtsmen as a rule follow the general legislation obtaining as to the qualification of directors etc.; and we find upon turning to c. 89, 2 Geo. V. (1912, Canada), the private Act of the new company that the qualification of the directors is fixed. See s. 6—a director must hold 20 shares, and upon ceasing to hold 20 shares "he shall *ipso facto* cease to be a director." Therefore, any director of the

old company, or any shareholder of the old company becoming a director in the new company, was required to hold 20 shares in the new company; but the fact that he became a director would not import that, whatever holdings he had in the old company were transferred to the new company and that he was thereby qualified, especially when, as pointed out, the conditions precedent to even effecting the change were never complied with and the new company had never placed any of the parties upon a share register of the new company. I entirely reject the contention that the share register of the old company can be looked upon as a share register of the new company. There is an entire absence of that evidence which can in any way be relied upon as creating an estoppel. Whatever may have been done cannot be said to have operated in bringing about a transfer from the position of shareholders in the old company to shareholders in the new company; this could only be accomplished by compliance with the statutory provisions and the conscious exercise of them by the shareholders in the old company, evidencing a change of position. It might well be that shareholders in the old company became in some way shareholders in the new company not referable at all to the fact that they were shareholders in the old company. We also find at p. 183 in Palmer's Company Law, that the mere acting as a director does not import any agreement to take the shares (qualification shares) *from the company* (*Brown's Case* (1873), 9 Ch. App. 102).

It will be noticed that ss. 24 and 26 respectively, of the Provincial Act (c. 89, B.C. 1913) provide for the preservation of all liabilities of the old company and the requirement to pay the same, and the winding-up of the old company; and there is no evidence that all these liabilities have been discharged nor that any winding-up has taken place. It would seem to be reasonably necessary that this should be established before any transfer of shares should be capable of being made; however, as to this, apparently there is no inhibition in the statute. A question may arise in the future in connection with the shares held in the old company in a winding-up, or possibly apart therefrom, as to the liability of the shareholders in the old company to pay up in respect of shares not fully paid, and whether all moneys due in respect of shares not fully paid-up are the moneys of the new company by reason of the sale from the old company to the new company, or

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whether they must be applied in discharge of the general liabilities of the old company (Palmer's Company Precedents, Part 1, 1912, at p. 1439. "What the section (referring to s. 161 Companies Act 1862) contemplates was the sale of the company's 'property'", and it has been laid down in several cases that, in a winding-up, the uncalled capital is part of the property. *Webb* v. *Whiffin* (1872), L.R. 5 H.L. 711, 735; *Birch* v. *Cropper* (1889)), 14 App. Cas. 525, 545. It is a statutory debt due to the company.

Reverting to the question of estoppel (as to receipt of dividends see *Coté* v. *Stadacona* (1881), 6 Can. S.C.R. 193, where it was held that the defendent was not estopped from shewing that never in fact the holder of shares) there was no such conduct as would impose liability in respect of shares in the new company as determined in *Campbell's* case (1873), 9 Ch. App. 1, 15, and there was no proper allotment or acceptance (*Spitzel* v. *Chinese Corporation*, 80 L.T. 347; *Pentelow's* case (1869), 4 Ch. App. 178; *Nasmith* v. *Manning*, 5 Can. S.C.R. 417); *Peek's* case (1869), 4 Ch. App. 532).

Then the facts shew that the persons upon the list of contributories never became shareholders in the new company, the statute fails to make them such and they were not subscribers for shares nor were they parties to any enforceable contract to take shares (*East Gloucestershire R.W.* v. *Bartholomew* (1867), L.R. 3 Exch. 15; *Re Macdonald Sons & Co.*, [1894] 1 Ch. 89).

Upon the whole case, although I am unable to say that it is a case which is without difficulties, I feel impelled upon the facts and the law to say that the judge arrived at the right conclusion; certainly it is not a case in which I can say that he has come to a wrong conclusion. I, therefore, am of the opinion that the order appealed from should be affirmed and the appeal dismissed.

Martin, J.A.

MARTIN, J.A.:—I agree in dismissing appeal.

Appeal dismissed.

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CASEY v. McHUGH.

New Brunswick Supreme Court, Appeal Side, White, Grimmer and Chandler, JJ. September 21, 1917.

WILLS (§ III G—125)—PRECATORY WORDS—TRUST—ABSOLUTE ESTATE.

A will expressing a "desire" by the testator, that the residuary legatee, who is given the property forever, "shall exercise and carry out the request and directions which I may give him respecting the same by a document under my hand and seal," does not thereby impress the residue with a trust, and, in the event of failure to give direction, the next of

kin do not take, but gives the donee an absolute estate subject to any trust which may be declared as provided.

[See *Perry* v. *Perry*, (Man.), 37 D.L.R. 89.]

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APPEAL from the judgment of Sir E. McLeod, C.J., in Chancery, in an action brought by James McHugh, executor of the will of James T. Hurley, for a ruling and interpretation of the will. Reversed.

Statement.

M. G. Teed, K.C., for all defendants except appellant; Dr. *R. F. Quigley*, for defendants McGuire and Goggin, and *J. McM. Trueman*, for defendants Goggin, with him. *C. S. Hanington*, for plaintiff, respondent.

WHITE, J.:—The clause of the will which is directly in dispute reads as follows:—

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11. I give, devise and bequeath all the rest, residue and remainder of all my real estate, lands and tenements, goods, chattels, moneys, property, insurance and effects of every nature, kind, quality and description whatever, wheresoever situate and howsoever described unto The Right Rev. Timothy Casey, Roman Catholic Bishop of Saint John, to have and to hold the same unto The Right Rev. Timothy Casey, forever, and I desire that the said The Right Rev. Timothy Casey shall exercise and carry out the requests and directions which I may give him respecting the same by a document under my hand and seal.

While I have come to the conclusion that the appeal in this case should be allowed, I do not hold the view, expressed by my brother Chandler, that by the words, "I desire that," etc., the testator intended to leave it discretionary with the devisee named to carry out, or not, any directions which the testator might subsequently give him by an instrument under his hand and seal. If the testator had intended that the "requests and directions" which he contemplated thus giving his devisee should be deemed to be merely an expression of desire on his part, having in law no binding force, I find it difficult to understand why he should have provided, as he did, that such desire must be expressed in and by an instrument under his hand and seal, as specified in the will. The words of the clause in question are, "I desire that the said Right Reverend Timothy Casey *shall exercise and carry out the requests and directions*." The word "shall," as there used, has, I think, imperative force. As to the word "directions," it will be observed that in every instance throughout the will where the testator wishes to impose a duty upon his executors he uses the words, "I direct."

Moreover, if we look at the clause of the will wherein the testa-

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tor directs the sum of $150 to be paid to the Roman Catholic Bishop of Saint John for the purpose of having masses said for his soul, we find he there uses these words, "and I would prefer that the said amount be distributed by him among the Redemptionist Fathers and clergymen of poor parishes, but *this is a matter I leave entirely in his discretion.*" The fact that the testator, when using words so little liable to be held mandatory or imperative as, "I prefer," etc., took care to expressly state, "but this is a matter I leave entirely in his discretion," renders it quite evident that when he wished to express a preference or desire, without thereby imposing a trust, he not only knew how to do so in such a way as to leave no room for doubt, but, seemingly, was alive to the importance of making his meaning clear beyond question. Therefore, I think the testator's intention was not to leave it optional with, but to make it imperative upon Bishop Casey, as devisee of his residuary estate, to carry out such requests and directions respecting the same as the testator might subsequently give him by an instrument under his hand and seal.

Having reached this conclusion, the next question which presents itself is, did the testator intend that Bishop Casey should take the property devised to him to hold merely as a trustee, or, did he intend that he should take the same beneficially, subject however to such trusts as the testator might afterwards create or declare by such instrument as aforesaid under his hand and seal.

This distinction between property given *upon* trust and gifts given *subject to* trusts is a well recognized one: *Clarke* v. *Hilton* (1866), L.R. 2 Eq. 810; *Fenton* v. *Hawkins* (1861), 9 W.R. 300, 4 L.T. 737; *Hancock* v. *Watson*, [1902] A.C. 14. In *Hancock* v. *Watson*, Lord Davey says, at p. 22:—

> For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be. Of course, as Lord Cottenham pointed out in *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551, if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event.

Construing the words of gift which are here in question with

the aid of the other provisions contained in the will as a whole, I am led to conclude that the intention of the testator was that Bishop Casey should take the property devised to him beneficially, subject only to such trusts as the testator might later attach to or impose upon it by document under his hand and seal, as specified in the will.

In the first place, the gift is expressly made "unto the Right Reverend Timothy Casey, Roman Catholic Bishop of Saint John *to have and to hold the same unto the Right Reverend Timothy Casey forever.*" These words of limitation of the gift which I have italicized are not in themselves, of course, absolutely decisive of the question; because, had they been followed by the words, "upon trust," or other words clearly indicating an intention that the property was to be held by the devisee as a trustee only, they would not have been repugnant, or have sufficed to defeat the real intention of the testator thus expressed by such other words, or provisions, of the will. But, at the same time, they are to be looked at as affording some indication as to what the real intention of the testator was. In *Hancock* v. *Watson*, to which I have already referred, Lord Davey, says: "The testator uses the words 'I give' and speaks of the shares subsequently as 'allotted' to her. . . . In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts she takes for life only."

A further indication that the testator intended Bishop Casey to take the property devised to him beneficially, subject only to such trusts as the testator might, by instrument, under his hand and seal declare as aforesaid, is to be found, I think, in the way in which the testator disposed of his estate apart from the residue in question. Reading the specific bequests which he makes to his next of kin, it is difficult to resist the conclusion that in every such bequest, he gave to the devisee named all that he intended such devisee should receive out of his estate. He does not seem to have been aware that he could not "by his will prospectively create for himself power to dispose of his property by an instrument not duly executed as a will," to adopt the language used by Sir James Parker, V.C., in *Johnson* v. *Ball*, 5 De. G. & Sm. 85, 64 E.R. 1029, and that, therefore, any trust which he might attempt by means

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of such an instrument, to create and impose upon the property devised to Bishop Casey must fail. Hence, it is reasonable to suppose, that in making his will, he may not have taken into consideration any question as to how his property would go upon the failure of such trusts should he so declare them. But it is likewise at least equally reasonable to assume that, when making his will, he would have had in mind the possibility that he might never finally decide to create such trusts as he contemplated, or, that having decided to create them, he might, owing to the uncertainty of life, fail to execute the document requisite by the terms of his will to carry out such intention. The words he uses are, "the requests and directions which I *may* give him"—not which I shall give him, or which I intend to give him. Then, in the event that no such trusts should be declared, did he intend the property to revert to his estate and go to his next of kin as in case of intestacy? I would think that highly improbable. If such were his intention, I find it difficult to conceive why he should have given this property in question to Bishop Casey at all, since he had appointed executors to his will and entrusted them to carry out his testamentary intentions in regard to all the rest of his estate.

Taking the whole will together, I think what the testator intended and had in mind, was to give to Bishop Casey all of his residuary estate to hold the same beneficially, subject to such trusts as he might see fit subsequently to declare in the manner specified in the will. In making this disposition he quite recognized that he might never declare any such trust, or that the trusts he might so declare would not exhaust the whole of his residuary estate, and intended in either case that Bishop Casey should take and have as his own beneficially all residue of the gift thus finally undisposed of.

As to the claim that the next of kin are entitled to the proceeds of the insurance policy which the testator some 2 years before his death (and therefore upwards of 6 years subsequently to the making of his will) assigned, by endorsement on the policy, to "my testamentary executor the Reverend Tim Casey," if I am right in the conclusion I have reached that Bishop Casey is entitled beneficially to the undisposed residue of the estate devised to him, there can be no doubt that he would also be entitled to the proceeds of the policy.

But, it is contended that the testator, by designating Bishop Casey in such assignment as, "my testamentary executor," furnishes evidence that by his will he intended Bishop Casey to take and hold the property devised to him upon trust only. Even if we were at liberty, in determining what was the intention of the testator declared by his will, to look at and take into consideration these words, they would not I think afford us any assistance. For, whether the testator intended Bishop Casey to take the gift to him simply as trustee, or to take beneficially subject to such trusts as the testator might subsequently declare, he would have been quite as liable to make the mistake of designating the Bishop as his teatamentary executor in the one case as in the other. But I think it very clear that we are not at liberty to resort to these words in construing the will. To permit the provisions of a will to be interpreted and controlled by expressions or statements made use of by the testator subsequently to its execution, would be to ignore, and, indeed, to very largely subvert and destroy, those safeguards which the Statute of Wills has thrown about the testamentary disposition of property, by requiring that the testator's will shall be made and attested in the mode prescribed by that Act.

For the reasons stated I think the appeal should be allowed.

Chandler, J.

CHANDLER, J.:—The respondent asked the decision of the court below as to whether the Right Reverend Timothy Casey took the property mentioned in the clause of the will quoted, absolutely or as trustee.

It appears that the testator left a policy of insurance on his life for the sum of $576, made payable as follows:—"to my testamentary executor the Reverend Tim Casey." The plaintiff in the court below asked the opinion of the court as to whether Reverend Casey took the proceeds of the policy absolutely or held it as part of the residuary estate.

The Chief Justice of New Brunswick, before whom the hearing in the action took place, decided that the words—"and I desire that the said Right Reverend Timothy Casey shall exercise and carry out the requests and directions which I may give him respecting the same by a document under my hand and seal" shewed that when the testator made the bequest to him he intended to give him certain directions with regard to the disposal of that property and intended that until he gave those directions he should

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simply hold it as a trustee, and that as no directions were ever given by the testator, the Right Reverend Timothy Casey would be a trustee for the next of kin of the testator. The Chief Justice also decided that the money arising from the policy of insurance on the life of the testator was held by the appellant in the same way and manner as he held the residuary estate—namely, as a trustee for the next of kin. From this decision the Reverend Casey appeals, the appeal having been argued at the June sitting of the Appeal Court, 1917.

In Godefroi on Trusts, 4th ed., at p. 112, the author says: "There are really no such things as precatory trusts at the present day. If the precatory words are imperative the trust is an express trust. If they are not imperative there is no trust at all. Whether precatory words create a trust is really a matter of intention. You must take the will and see what it means, and if you come to the conclusion that no trust was intended you say so, although previous judges have said the contrary on wills more or less similar. The court will be simply guided by the intention of the testator apparent in the will and not by any particular words. Words such as 'in full confidence' may or may not create a trust, but whether they do or not must be determined by the context. In years gone by words were construed as creating a trust which would not now be followed." The course of the court is rather to discourage the implication of a trust where merely precatory words are used. At p. 113 the same author says, "An absolute gift followed by words which merely amount to an expression as to the motive of the testator; or a desire that the gift shall be applied in a particular way, will not cut down the gift." Citing *Re Connolly*, [1910] 1 Ch. 219.

The following quotations from *Re Adams and Kensington Vestry* (1884), 27 Ch.D. 394, throw some light upon the doctrine of the courts at the present time respecting so called precatory trusts. Baggallay, L.J., at p. 408, says, "There being a different view adopted by Courts of Equity in more recent years from what was adopted some years ago as regards what were called precatory trusts, it has long been decided that these views are not to be extended." Cotton, L.J., at p. 410, says, "I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust."

Lindley, L.J., at p. 411, "I quite agree that some cases have gone very far and have imposed upon words a meaning beyond what they bear if looked at alone, apart from the authorities. I am glad to see that James, L.J., had the courage to stem the tide, and I find, in the last case I know of before the Privy Council, they have taken the same view . . . I am very glad to see that the current is changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator." See also *Lambe* v. *Eames* (1871), L.R. 6 Ch. App. 597.

If the gift is to a person subject to the performance of certain trusts, the donee *primâ facie* takes beneficially subject to those trusts, and this construction is assisted, if the donee is a person whom the testator may be expected to provide for and he is not an executor or trustee. Theobald on Wills, 7th ed., p. 487.

Where property is given to a man subject to certain defined trusts, there remains no right in anyone but the donee when those trusts are exhausted. Where, however, an estate is given to a man in the character of a trustee, without anything to indicate that a beneficial interest is intended, then there is a resulting trust. Stuart, V.C., in *Clarke* v. *Hilton* (1866), L.R. 2 Eq. 810, at 815.

A gift followed by such expressions as "in full confidence," or in "full trust and confidence," or "well knowing," or the expression of a desire, or request, or wish that the legatee will dispose of the property in accordance with the testator's wishes, or even in a certain specified manner, will not now impose a trust on the donee. Theobald, p. 489.

The question to be decided in this case is—what was the intention of the testator as expressed in clause 11 of the will quoted above?

In the first place, upon reading the will, it appears to me that the testator never intended that his residuary estate should go to his brothers and sisters. In clause 10 of the will he gives to his sister Elizabeth "any moneys that may be due to me from her at my death," and he directs his executors to give her a release in full for all such amounts. He also gives to his brother John and to his sister Ellen McGuire the sum of $1 each, and then follows this by a gift of the residue of his estate to the appellant, as quoted. It also appears that in clause 2 of the will he gives to the Roman Catholic Bishop of Saint John a sum of money for a particular and specified purpose, using apt language for the creation of a trust in this particular instance. We also find in clause 8 of the will a gift to the Roman Catholic Bishop of Saint John to be used in keeping in order the testator's grave.

Then comes clause 11 in which the words to be construed are

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found. By this clause the entire residuary estate is given to the appellant for ever, and then follow the words in which the testator expresses his desire that the residuary devisee will exercise and carry out the requests and directions which he may give him by a document, etc. Are these words anything more than the expression by the testator of the possibility of his wishing in the future to give some particular directions to the residuary devisee with respect to the residuary estate or some part of it, and when the testator used these words did he intend that the whole residuary estate should be held by the residuary devisee in trust with the possibility of the whole residuary estate going to his brothers and sisters and nephews and nieces, for want of any specific directions in the future? It would have been more satisfactory if some information had been furnished at the hearing in this case, as to the situation in life of the testator, his relations with the appellant and other matters respecting his property, which might have thrown some light upon the questions to be decided, but in the absence of any information of this kind, we are compelled to decide the case simply upon the words of the will. After giving this matter the best consideration of which I am capable, I find it impossible to come to the conclusion that the testator ever intended to impress with a trust the residuary estate which he gives to appellant. I think that he intended that the residuary estate should go to the appellant for his own use, subject to the possibility of his asking at some future time to make some particular disposition of the estate or of some part of it. The case of *Fenton* v. *Hawkins* (1861), 4 L.T. 737, 9 W.R. 300, is very similar to the case in hand. In the case cited the testator devised and bequeathed his residuary real and personal estate to his trustees as tenants in common "subject however to such disposition, limitation or appointment thereof as he might by any deed or writing duly executed thereafter direct, limit or appoint." The testator made no such disposition and it was held that the persons named took the residuary real and personal estate equally between them. Wood, V.C., in giving judgment in this case said, "There was a specific devise and bequest to the three executors as tenants in common subject to any disposition which the testator should subsequently make. He may have intended to make such a disposition, and one adverse to the interest of the three legatees,

but he never did, or he might have carefully avoided making any such disposition, thinking he had given it already to those he intended to benefit by such subsequent disposition. The gift being to them as tenants in common, precluded the presumption that they were mere trustees. They, therefore, were entitled beneficially in the absence of any subsequent disposition. The testator had not expressed any clear determination that he would make any such; had he been more explicit upon that head, it might have made a difference—in fact, there was no trust declared adverse to the beneficial interest in the fund." See 4 L.T. 737. In the judgment in this case, as reported in 9 W.R. 300, the following words appear —"This clause appeared to indicate an undecided state of mind whether he would make a subsequent disposition. He did not say he intended to make such a disposition, but merely that he might make it and the three persons would take liable thereto." The words last quoted seem to me to be very applicable to this particular case. James Hurley does not say in his will that he intends to make any subsequent disposition as to his residuary estate, but uses the words "which I may give him respecting the same by a document, etc." As in the case of *Fenton* v. *Hawkins*, the appellant takes the residuary estate for his own benefit but liable to any subsequent disposition made by the testator.

In addition to the cases already mentioned the following cases may be referred to with advantage in the discussion of the case in hand:

Irvine v. *Sullivan* (1869), L.R. 8 Eq. 673; cited by the appellant in his factum in this case. In the case last cited the testator gave certain property to D.I. "absolutely trusting she would carry out his wishes with regard to the same with which she was fully acquainted." It was held that D. I. took the property beneficially, but subject in part to the wishes which the testator had expressed to her, and as to which she had bound herself. James, V-C., in this case says that "supposing he (the donee) was a trustee *simpliciter*, it would have been the simplest thing in the world to have confided that same trust to the executors whom she appointed trustees." Now in the will of James Hurley, while he did not appoint his executors Farrell and McHugh trustees under his will, he does give certain directions in his will (see clauses 1 to 5) by which his executors are bound and he could very well have made

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them trustees of his residuary estate, had he intended to impress it with a trust for any particular purpose or object.

Bank of Montreal v. *Bower*, 18 O. R. 226, was also cited by counsel for the appellant on the argument. In this case Boyd, C., discusses some of the cases already referred to, but says:—"It would be an otiose undertaking to go through all the cases, for they are numerous and cannot be reconciled." He adds that since *Lambe* v. *Eames*, already cited, there has been a new departure in favor of confining language supposed to create a trust for the children within much narrower limits than in some of the earlier cases.

Re Hamilton, [1895] 2 Ch. 370, 64 L.J. Ch. 799. In this case Lindley, L.J., quotes with approval the words of Cotton, L.J., in his judgment in *Re Adams and the Kensington Vestry*, 27 Ch.D. 394, already referred to.

As to the money accruing from the policy of insurance upon the life of the testator, which was by the policy made payable to "my testamentary executor the Reverend Tim Casey," I find myself unable to agree with the view of the Chief Justice of New Brunswick in the judgment appealed from. The Chief Justice says that the words quoted mean that the appellant should hold the money arising from the policy in the same way as he held the residuary estate. As in my view the appellant does not take the residuary estate as a trustee, but for his own use, it follows that I must hold that he takes the money accruing from this policy for his own use and in the same way as he takes the residuary estate. In my opinion the will and the policy should be dealt with separately, and I do not think that even if by the will, the appellant took the residuary estate as a trustee, it must necessarily follow that he takes the insurance moneys in the same character. It seems to me that the words used in the policy and quoted above are merely descriptive of the person to take the money and do not mean taken alone, that he is to hold the insurance moneys as a trustee, and I do not think that I should look at the will in order to arrive at a construction of the words used in the policy.

I regret that I am unable to agree with the judgment of the Chief Justice of New Brunswick, but I am of the opinion that the appeal should be allowed.

Grimmer, J.

GRIMMER, J., agreed. *Appeal allowed.*

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Alberta Supreme Court, Hyndman, J. October 18, 1917.

1. CHATTEL MORTGAGE (§ II A—7)—TRUE EXPRESSION OF CONSIDERATION.
The consideration in a chattel mortgage is truly expressed, notwithstanding a portion of it was not actually paid over but formed part of a debt for which the mortgage was given.

2. CHATTEL MORTGAGE (§ III — 38) — RENEWAL—EXTENSION OF TIME.
An order extending the time for renewal of the mortgage, made subject to the rights of third parties, is effective as against those whose rights have not accrued at the time the order was made.

3. CHATTEL MORTGAGE (§ II B—10)—SUFFICIENCY OF DESCRIPTION.
In a chattel mortgage of a hotel business and the effects therein, the description is sufficient for all reasonable purposes if it fully describes the premises upon which the effects are situated.

4. CHATTEL MORTGAGE (§ II A—7)—SUFFICIENCY OF AFFIDAVIT—CLERICAL DEFECTS—EFFECT OF POSSESSION.
The affidavit of *bonâ fides* made by the manager of a company need not state knowledge of the circumstances connected with the mortgage, as required by sec. 22 of the Bills of Sale Ordinance (C.O. 1898, c. 43, as amended in 1915, c. 2, s. 11); nor is a clerical error as to the name of the mortgagee fatal to its validity. Besides, possession by the mortgagee, even in the form of seizure without removal, has the effect of curing any defect in the mortgage, and will prevail over a subsequent seizure of the chattels by a municipality for arrears in taxes.

Statement.

ACTION for illegal seizure of chattels claimed under a chattel mortgage.

A. M. Sinclair, and *D. L. Redman*, for plaintiff: *James Muir*, K.C., and *G. F. Auxier*, for defendant.

Hyndman, J.

HYNDMAN, J.:—The plaintiff company is the trustee for the debenture holders of the Calgary Brewing and Malting Co., Ltd., under and by virtue of a deed of trust made between the parties, dated October 1, 1912. On April 15, 1913, one Carl Stettler, of the town of Castor, hotel-keeper, executed a mortgage covering the goods and chattels in the National Hotel, Castor, hereinafter described, in favour of the plaintiff for the sum of $15,500, which was duly registered in the Red Deer Registration District, on April 24, 1913, and was fyled in the Stettler District on May 6, 1915, Stettler being, in the year 1913, included in the Red Deer District. The property mortgaged was described in the instrument as follows:

All and singular the leasehold interests, live stock, vehicles, furniture, furnishings, bedding, household linen, office fittings, stoves, furnaces, heating apparatus, kitchen utensils, cutlery, dishes, provisions, bars, bar fittings, beer pumps, mirrors, stock-in-trade including spirituous, vinous and malt liquors and other beverages, tobacco, cigars and cigarettes, leasehold interests, license to sell intoxicating liquors and all other goods, chattels and personal effects whatsoever owned by and in possession of the mortgagor and used by him in connection with his business as a hotel-keeper licensed to sell intoxica-

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ting liquors, and being in, on, around and about, or in connection with the premises situate on the following described land, that is to say: lots 8 and 9 and 10, block 6, according to a map or plan of part of the Town of Castor of record in the Land Titles Office for the North Alberta Land Registration District as Plan 8387 T. Castor, the hotel in question being situate on said lots.

On October 11, 1916, the plaintiff company issued a warrant to the sheriff of the Judicial District of Stettler authorizing him to distrain on the goods and chattels secured by the said mortgage under the power contained therein, the mortgage then being in arrears for principal and interest, and in pursuance thereof the sheriff, through his bailiff, one Jeffries, on October 18, 1916, seized all the goods and chattels in the hotel. According to the evidence, the bailiff started to make out his schedule about 8.30 a.m. and finished about 12 o'clock noon. On the same day a distress warrant was issued to the sheriff from the clerk of the defendant town against the same goods and chattels for arrears of taxes owing by Stettler against the lands upon which the hotel is situated *and other lands*. According to the evidence of Jeffries this second seizure was made about 4 o'clock in the afternoon, and he continued in possession for both parties. Stettler himself left the hotel three or four days after the seizure and thereafter the hotel was managed by an agent of the Royal Trust Co. About 1 month after the seizure the goods were sold by an auctioneer on behalf of the town under the second seizure, sale being made "en bloc."

At the time of the seizure by the defendant the plaintiff tendered to the town the sum of $921.70, being the full amount of the taxes owing against the lots upon which the hotel is situate, which tender was refused, the town insisting on payment in full of their claim in respect of all taxes owing by Stettler, notwithstanding the said chattel mortgage and the first seizure.

The amount of the indebtedness under the chattel mortgage, according to the evidence of McMillan, treasurer of the brewing company, was $20,020.72 as at March 24, 1917.

The action has been partly tried by Scott, J. (*Royal Trust Co.* v. *Town of Castor*, [1917] 1 W.W.R., 1529), who held that if the chattel mortgage referred to was at the time valid and subsisting as against the defendant, the defendant was not entitled to seize and sell the goods covered by it for the purpose of satisfying taxes due by Stettler *in respect of other lands* than those upon

which the said goods were situated at the time of the seizure, and the question of the validity of the chattel mortgage remained for decision.

The principal objections raised by the defendants are as follows: (1) That the consideration for the mortgage was not truly expressed therein, (2) That the mortgage has not been duly renewed, (3) That it does not contain a sufficient description of the chattels, (4) That the affidavit of *bona fides* in the mortgage and in certain renewals thereof do not state that the mortgagor was justly and truly indebted to the "mortgagee in question."

Objection 1. The facts are that the said Stettler and one R. L. Shaw borrowed from the Calgary Brewing and Malting Co. Ltd., about the year 1909, the sum of $12,000. It was all repaid with the exception of $3,500, and in the year in which the mortgage was given Shaw disposed of his interests to Stettler. Stettler then made an arrangement with the Calgary Brewing and Malting Co., Ltd., to borrow a further sum of $12,000 and assume the liability for the $3,500, which sums together amount to $15,000, and in consequence the mortgage in question was arranged. The $12,000 was actually paid in two cheques of $9,000 and $3,000, not all direct to Stettler but to parties to whom he owed money or at his direction, and I find as a fact that so far as $12,000 is concerned it was actually paid over in cash. Part of the objection was that the balance, viz., $3,500, was not in fact paid over, but I fail to see the necessity for Stettler paying this amount only to receive it back again immediately. Instead of this formal exchange, a simple cross entry was made. Plaintiff was, in fact, the trustee for the debenture holders, and although the moneys may not have actually been handled by the trust company, still the methods employed as between themselves and the brewing company as a matter of internal management, in my opinion, should have no bearing on the case so far as outside parties are concerned. I am satisfied the money was in fact secured for the benefit of the debenture holders and management of the funds by the trust company is something which they would have to answer for to their *cestui que trust*. I, therefore, hold that the mortgage does in fact express the true consideration.

As to objection 2. It seems to me that the order of Mahaffy, J., made on May 23, 1916, extending the time for renewal until

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June 23, 1916, which renewal was fyled on May 25, was sufficient to cure all defects which may have existed in this respect up to that time. The order was made subject to the rights of third parties accrued by reason of the said omission to register the said renewal within the time required by law. At the date of the order there were no rights accrued as against these goods in favour of the town, and therefore the order should be considered effective as against the defendant.

Objection 3. In *Quirk* v. *Thompson*, 1 Terr. L.R. 159, which was affirmed in the Supreme Court of Canada, 18 Can. S.C.R. 695, it was held that the following description in a chattel mortgage was sufficient.

> All and singular the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of the said mortgagor on the north half of section six (6) township nineteen (19) range twenty-eight (28), west of the fourth meridian.

I fail to see any distinction between that case and the present one, the lands upon which the property is situated being fully described. In my opinion the description of the goods and chattels therefore ought to be considered as sufficient for all reasonable purposes.

As to Objection 4. The form used was one printed for the "Ranchmen's Trust Co., Ltd.," which had formerly been the trustee for the brewing company debenture holders. The words "Ranchmen's Trust Company, Limited," throughout the document, were stricken out, and "Royal Trust Company" inserted in lieu thereof, except in the affidavit of *bona fides*, which in part reads as follows:

> (1) I am the manager of the Royal Trust Company, the mortgagee, an incorporated company; (2) That Carl Stettler the mortgagor in the foregoing chattel mortgage named, is justly and truly indebted to the *Ranchmen's Trust Company Limited*, etc., etc.

In my opinion, this is a mere clerical error, and could not possibly mislead anybody, and should not be held fatal to the validity of the mortgage, and there appears to me to be ample authority for so holding. (*Goldrick* v. *Ryan*, 17 A.R. (Ont.) 253.)

There was a further objection, namely, that the affidavit of *bona fides* is insufficient because it is not stated by the agent "that he is aware of all the circumstances connected therewith or was authorized to make the mortgage." If the mortgage had

been to an individual and the affidavit were made by an agent, undoubtedly it would have been necessary to first file a power of attorney authorizing him to act, and the affidavit should state the agent's knowledge, but here the affidavit is made by one Sydney Kidd as "manager" and though not stating whether he is the general, local or branch manager, the evidence is clear that he is the manager for Alberta. It is, therefore, unnecessary for him to state his knowledge of the circumstances by reason of sec. 22, Bills of Sale Ordinance, C.O. 1898, c. 43, as amended 1915, Stat. c. 2., sec.11, which enacts as follows:

> Sec. 22. For the purpose of making the affidavit of *bona fides* required by secs. 6, 8, and 9 of this Ordinance and the affidavit required by sec. 17 of this Ordinance, the expressions "mortgagee," "bargainee," or "assignee" shall, in addition to their primary meaning, mean and include the general, local or branch manager of any mortgagee, bargainee, or assignee, being an incorporated company.

If, however, I am wrong in any of the above conclusions it seems to me that the act of taking possession exercised by the plaintiff prior to any seizure made by the town under the circumstances here ought to be considered as having the effect of curing any defect there may have been in the mortgage. It is true that the goods and chattels were not removed from the building, but I cannot see how that should be expected, at least up to the time of the alleged seizure by the town. The building was a fairly large one, filled with the usual furnishings of a country hotel, and it would have been impossible or at least unreasonable and unbusinesslike to move the goods at once. The seizure, too, was not opposed by Stettler, but, on the contrary, assented to if not expressly authorized by him, and the plaintiff was really in possession with his consent. It is true Stettler did not leave the premises for three or four days. Mr. Muir, counsel for the town, contended that as there was no actual or visible change of possession, therefore the claim of possession should not be available to the plaintiff. I am of the opinion, however, after a consideration of all the facts that possession exercised here was effective. I cannot see how the plaintiffs could be expected to do much more than they did. The plaintiff having permission from the owner, the taking of possession was not in any way wrongful or illegal, granting that the mortgage was defective.

It is laid down in Barron and O'Brien, 2nd ed., p. 83:

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When a mortgage from some cause is invalid as against creditors, purchasers, etc., ... if the mortgage be good and valid between the immediate parties, then there is nothing to prevent the mortgagee making good his title to the goods mortgaged by taking possession, but this, of course, is required to be done before the rights or liens of others attach on the property mortgaged.

In the case at bar, although the town had a claim against the mortgagor for taxes on the lands in question and other lands, yet, in my opinion, they had no rights as against these specific goods until actual levy was made, and which in this case was clearly not until after the plaintiff through the sheriff's bailiff had already taken possession. They were, of course, creditors of Stettler's, but it seems to me they had no greater rights than any ordinary creditor would have until they actually levied under legal process against these particular goods, and until that act or proceeding took place, I do not think they should be considered as being one of the class of creditors referred to in the Bills of Sale Ordinance. It was not until the actual issue of the warrant that they had any specific right against the goods, and as possession was taken by the plaintiff prior to that it would seem to me that any right which defendant might have had ought to be considered as subject to the plaintiff's mortgage; consequently they were in my opinion too late to avail themselves of any defects in the mortgage in question.

Again, in Barron and O'Brien, 2nd ed., p. 84, I find the following:

Though the mortgage may be good *inter partes* yet possession taken by the mortgagee, even though to cure defects such as have been mentioned, may be against the consent of the mortgagor, and the further question then arises, does possession so taken have the same saving effect? As against the mortgagor, the mortgagee assumes to do that which he is unauthorized to do, and in the doing of it constitutes himself as wrong-doer.

There appears to be some doubt as to the legal effect of a mortgagee taking possession when his act is not acquiesced in by the mortgagor, nor authorized by the mortgage.

If, as against the mortgagor, the right exists, or if the mortgagor becomes privy to the act, then unquestionably all defects in the mortgage are cured, and the mortgagee's title becomes paramount, but if what the mortgagee does is absolutely illegal, it then becomes necessary to consider the degree or kind of possession taken by the mortgagee.

As stated above, in this case there is no question about the legality of the plaintiff's act in taking possession as they had ample authority from Stettler for so doing.

A further point was raised on the argument by Mr. Muir, that this was not the act of the Royal Trust Co. at all but merely that of the Calgary Brewing and Malting Co., Ltd., inasmuch

as the manager of the Royal Trust Co. took no part in the matter. McMillan, the treasurer of the brewing company, explained this by saying that although the money in fact belonged to the Royal Trust Co., by arrangement, not put in any formal way, or even in writing, it was the usual thing for the brewing company to look after collections and matters of this character and pay the principal over to the Royal Trust Co., retaining the interest themselves, in other words, the brewing company and their trustee had adjustments from time to time of the money received from sources such as this. It seems to me that this is a logical and reasonable explanation of the matter, and I am unable to see what possible effect it can have on the rights of other parties. If the trust company is willing to leave the care of such matters to the brewing company it seems to me that it is their own concern and on their own responsibility.

On the whole, therefore, I have come to the conclusion that the mortgage is valid and, in any event, possession has cured any possible defects there may be in it, and plaintiff is entitled to judgment.

There will therefore be a reference to the clerk of the court or the master to ascertain the amount of damages suffered by the plaintiff by reason of the acts of the defendant, and there will be judgment accordingly in favor of the plaintiff with costs.

Judgment for plaintiff.

FOSTER v. TOWNSHIP OF ST. JOSEPH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. May 8, 1917.

1. TAXES (§ I F—75)—EXEMPTION—"BUILDINGS ON MINERAL LAND."
Buildings used in connection with the working of a deposit of trap-rock are not "buildings on mineral land" within the exemption provisions of the Ontario Assessment Act (R.S.O. 1914, ch. 195, sec. 40 (4)).

2. TAXES (§ III D—135)—REMEDY FOR ILLEGAL ASSESSMENT—APPEAL—INJUNCTION.
Injunction is not the proper remedy for an illegal assessment where there is a statutory right of appeal to the Court of Revision.

Statement.

APPEAL by plaintiff from the judgment of Latchford, J., 39 O.L.R. 114, dismissing a motion by the plaintiff to continue an interim injunction restraining the defendants from proceeding with the sale of certain chattels of the plaintiff, seized for non-payment of taxes levied under an assessment of buildings of the plaintiff, used in connection with their working of a deposit of

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trap-rock in the township of St. Joseph, the plaintiff contending that his buildings were exempt from assessment by virtue of subsec. (4) of sec. 40 of the Assessment Act, R.S.O. 1914, ch. 195. Affirmed.

R. C. H. Cassels, for the appellant.

W. E. Raney, K.C., for the defendants, respondents.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Mr. Cassels has said all that could be said in favour of this appeal, has thrown a good deal of light upon the subject of it, and has discussed the whole matter in a manner that was interesting and instructive. But he has failed to convince me that the trial Judge was wrong in regard to either of the points that are raised in this appeal, and which were discussed and considered in the Court below.

It seems to me, as it seemed to the trial Judge, that cases of this character were intended by the Legislature to be dealt with in the Courts of Revision only; that the Legislature has striven long to produce that effect; and I agree with my brother Riddell in the observation made by him, that it has been generally supposed that at last it has succeeded. If not, it is not because it has not tried often enough and with sufficient determination.

This is not a case in which, even if Mr. Cassels were right in his contention, there was no power to tax. As has been pointed out during the argument, there was a right to tax to some extent. For myself, I have no hesitation in saying that, if there had been really no power to tax because of the provisions of sec. 40 of the Assessment Act,* yet, these lands being in the municipality, the proper place for obtaining relief from assessment for the purpose of taxing them was the Court of Revision in the first instance, and that all the questions involved in this action ought there, and not here, to have been so dealt with: see *Hislop* v. *City of Stratford* (1917), 38 O.L.R. 470, 34 D.L.R. 31. But, as I have said, that is not so; and, therefore, speaking for the Court, it is enough to say that, in the facts of this case, it was one for the Court of Revision.

As has been pointed out, the buildings assessed do not come

*Section 40 (4) of the Assessment Act, R.S.O. 1914, ch. 195, provides that "the buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant . . . shall not be assessable."

within the exemption relied upon; indeed Mr. Cassels has admitted that there was a right and a duty to tax part of the land—that a part of it is plainly not exempt.

In my judgment, therefore, there was a right of appeal against the assessment in question to the Court of Revision; and that right was the only one open to the appellant here to remedy any wrong he may have sustained—if he sustained any—in being assessed as he was assessed. And this is enough to dispose of this appeal in favour of the respondents.

But, as the trial Judge has dealt with the case upon its merits, and as it has been discussed here so fully in that respect, it may be better to say that we all agree with the trial Judge in his conclusion in this respect also.

It is quite plain from sec. 40 of the Assessment Act that the minerals which are exempt are not all of those things which form part of the mineral kingdom in the general subdivision of all things into animal, vegetable, and mineral matter. It is quite plain from the words of the Act that it is the more valuable minerals which are exempt; not, as in this case, the mere rock, but minerals in and to be won out of the rock, if any there were in it. It will be observed that buildings and machinery used mainly for obtaining or storing minerals, and concentrators and sampling plant, are, with the minerals in, on, or under the land, not assessable—words inapplicable to the rock in question, used in road-making and road-repair only, as gravel and sand may be. The rock in question is not, and contains no, mineral of the character exempt under the legislation in question.

If that be not so—if Mr. Cassels be right in his contention—what would there be of land that could be taxed? What would be left that is not mineral in character, in the broadest meaning of the word *mineral*?

I am quite of the opinion that the learned Judge who tried this case was right upon both points; and, therefore, I am in favour of dismissing the appeal. *Appeal dismissed.*

CANADIAN WESTERN FOUNDRY & SUPPLY Co. v. HOOVER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck and Walsh, JJ. October 18, 1917.

CONTRACTS (§ IV C—350)—"SATISFACTORY COMPLETION" —SUBSTANTIAL PERFORMANCE.

The substantial performance of work under a contract is a "satisfactory completion" thereof, though minor details have not been supplied, and the contractor is entitled to the contract price less the cost of supplying the minor omissions.

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Walsh, J.

APPEAL by defendant from the judgment of Morrison, J., in an action for the contract price for work performed. Varied.

C. V. Bennett, for appellant; *G. B. O'Connor*, K.C., for respondent.

The judgment of the Court was delivered by:—

WALSH, J.—The plaintiff sued to recover $295.53, being the balance due under a contract between it and the defendant for the supplying and installation of an electric light plant in the defendant's house and barn. The written contract contains the following expressions; "guaranteed satisfactory. Terms cash on satisfactory completion." The defendant resists the plaintiff's attempt to make him pay this money upon the ground that there has not been a "satisfactory completion" of the contract by the plaintiff. His Honor, Morrison, J., who tried the case, held against this contention, but made an allowance to the defendant to cover the costs of some minor omissions and defects which he thought the plaintiff should supply and remove. From this judgment the defendant appeals.

In my opinion the judge reached the proper conclusion upon the main issue, that is the satisfactory completion of the contract. The defendant's expert put the plant under a three hours' test, and he afterwards made a test of the wiring. He summarised the result by saying "the plant seemed to work fairly satisfactorily." His criticisms of the system were confined to comparatively small matters of detail, some of which were upon mere questions of taste. The plaintiff's expert, while saying that there were a few things which he would have insisted upon having done, considered, upon the whole, that the contract was satisfactorily completed. The conduct of the defendant, however, lends the strongest possible support to the plaintiff's contention. The work was finished early in April, 1916. The defendant on July 7 following sent the plaintiff a cheque for $350 on account. There is not in his covering letter even the semblance of a complaint about the plant or its installation. On the contrary, he explains the comparative smallness of the cheque by saying that "it seems to be about the limit of my bank account," but he promised that he would send more shortly. He had then had three months' use of the plant, in the course of which he must have noticed many of the things of which he now complains, even indeed if they were

not observable and observed by him as the work of installation proceeded, as I think some of them at least must have been. This letter constitutes the only written evidence of anything that occurred between the parties after the making of the contract, and there was but little if any attempt made to show that before the writing of it verbal complaints were made by the defendant, and any such attempt was to my mind quite unsuccessful. There has been, I think, a substantial performance by the plaintiff of its contract so as to entitle it to payment of the balance of the contract price, less so much as upon the evidence should properly be deducted to cover the cost of supplying such minor omissions and curing such minor defects as are thereby established.

Dakin v. *Lee*, [1916] 1 K.B. 566, is a very recent judgment of the Court of Appeal in England on the subject of the rights and liabilities of the parties under a building contract which has been substantially, though not absolutely, performed. Lord Cozens-Hardy, M.R., says, at p. 579:

> To say that a builder cannot recover from a building owner merely because some item of work has been done negligently or inefficiently or improperly, is a proposition which I should not listen to unless compelled by a decision of the House of Lords. . . . I regard the present case as one of negligence and bad workmanship, and not as a case where there has been an omission of any one of the items in the specifications. The builders thought, apparently, or so they have sworn, that they had done all that was intended to be done in reference to the contract; and I suppose the defects are due to carelessness on the part of some of the workmen or of the foreman; but the existence of these defects does not amount to a refusal by them to perform part of the contract; it simply shows negligence in the way in which they have done the work. . . . It seems to me that the result is that the builders are entitled to recover the contract price, less so much as it is found ought to be allowed in respect to the items which the official referee has found to be defective.

And Pickford, L.J., says, at p. 580:

> I cannot accept the proposition that if a man agrees to do a certain amount of work for a lump sum every breach which he makes of that contract by doing his work badly, or by omitting some small portion of it, is an abandonment of his contract, or is only a performance of part of his contract, so that he cannot be paid his lump sum. It seems to me that there would be a performance of the contract, although some part of it was done badly, and that seems to me to be the position here.

This is practically in accord with the view which my brother Beck took in *Watts* v. *McLeay*, 19 W.L.R. 916, at 920, which was decided before *Dakin* v. *Lee*. I think that the words, "guaranteed satisfactory. Terms cash on satisfactory completion of job,"

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do not mean that it was to be left to the mere whim of the defendant to say whether or not the work was satisfactory, but that it is a question of fact upon the evidence whether or not there has been a satisfactory performance of it by the plaintiff.

The judge allowed $20 as a sum which ought to cover those omissions and defects. With respect I think he erred on the side of moderation in making this allowance. The plaintiff's expert put the cost of material which he thought should be supplied at $2 in addition to which there would be the labour of putting it on. The witness' opinion was that it would involve an hour's work, amounting to $1, but there is the suggestion that the workman would have to come from Stettler, some miles distant, in which case, of course, the cost of the labour would greatly exceed that sum. The defendant's expert was of the opinion that it "could not be done under $45 or $50, and it is not quite clear to me that he included in this estimate the cost of the labour. The judge slightly misconceived the evidence of this witness, for he says that his conclusion was that to put the plant into proper condition "would cost at the outside $40." He struck what he called "a balance between the two extremes," and fixed $20 as the proper sum to deduct. I do not think it was a case for the splitting of the difference. Each of these men was not speaking of the same things when giving his estimate, so it is not a case of two men differing in their opinions as to the value of certain agreed work and materials. The defendant's witness saw a good many more things requiring attention than did the plaintiff's witness, and this accounts for his larger estimate. I think the allowance should have been made by a determination as to which of the things thus spoken of should be done to complete the work. The defendant's witness had a much better opportunity to speak accurately of them than the plaintiff's witness had, for he made a much more thorough examination of the wiring and the details of the installation than the other man did. The judge has not discredited either witness, and so we are free to act upon our own view of their evidence. I would increase the allowance to $45, being the minimum of the estimate of the defendant's witness and reduce the plaintiff's judgment to $219.45. With this exception I would dismiss the appeal.

There was a dispute at the trial over some extras for which

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the plaintiff made claim and succeeded. The allowance of these extras was appealed against but that ground of appeal was abandoned on the argument. As each party has succeeded in part, I will allow no costs of the appeal to either party. The measure of the defendant's success is considerably less than that of the plaintiff, but his costs of the appeal are proportionately higher, for he has had all the expense of preparing the appeal book so that this disposition of the costs is not inequitable.

Judgment varied.

CAMPBELL v. HEDLEY.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Lennox, J. Ferguson, J.A. and Rose, J. May 17, 1917.

ANIMALS (§ IA—6)—FERÆ NATURÆ—ESCAPED FOX—PROPERTY RIGHTS.

A fox escaped from the premises of his breeder, and at large for a week without the owner knowing of the escape, is an animal *ferae naturae*, and belongs to the persons who reduce it to their possession.

[Game and Fisheries Act, R.S.O. 1914, ch. 262, and sec. 345 of Crim. Code, considered.]

Statement.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Middlesex, dismissing without costs an action brought in that Court.

The following statement of the facts is taken from the judgment of LENNOX, J.:—

This action is brought to recover the value of what is called a "patch" fox, shot and killed by the defendant Hedley, assisted by the defendant McIntosh. The plaintiff is a breeder of foxes and propagates them for profit. This fox was born on the plaintiff's ranch, and reared in a state of captivity. It was the progeny of captive foxes purchased from other breeders, and these again had been reared from captive stock; thus the fox in question was one of a third generation of captives. They were kept by being penned in to prevent their escape; at all events this one was kept in a pen, as otherwise it would escape and leave the plaintiff's premises, and it did escape on this occasion and was at large for several days, and possibly for a week, before the plaintiff was aware of it. It was shot upon the property of a third person. The plaintiff claimed the value of the fox as a living animal—its value for breeding purposes—and alternatively the value of the pelt. The action was tried by the Senior Judge of the County Court of the County of

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Statement.

Middlesex with a jury. The jury found that the fox the defendants killed was one that had escaped from the plaintiff's ranch or kennels, and that when they killed it they had no reason to believe that it was a fox which had escaped from the kennel or ranch of any fox-breeder. The learned Judge of the County Court directed judgment to be entered dismissing the action without costs.

J. M. McEvoy, for the appellant.

W. R. Meredith, for the defendants, respondents.

Lennox, J.

LENNOX, J. (after stating the facts as above):—Mr. McEvoy relied upon the judgment in *Re Long Point Co.* v. *Anderson*, 19 O.R. 487, 18 A.R. 401. That is an interesting case, but the decision ultimately, and mainly throughout, turned upon the question of the jurisdiction of an inferior Court and the right to prohibit it, and does not very closely touch the questions arising upon this appeal.

The question to be decided upon this appeal is, whether the plaintiff enjoyed an absolute, or only a qualified or possessory, title in the fox in question; and this by considering and determining whether this fox should be regarded as of the domestic or tamed class of animals, or of the class known as animals *feræ naturæ*. The former are the subject of absolute property, and the owner retains his right of property if they stray away, and may retake them if he can find them, living or dead: Halsbury's Laws of England, vol. 1, p. 365, para. 797. It is not so as to the latter; he has no absolute property; there is a recognised qualified property in these; the reclaimer or land-owner has a defeasible title, *per industriam*, or *ratione soli*, or for other causes; and the plaintiff here up to the time of escape had both these foundations of title, and could until then, by obtaining complete physical control, have become the absolute owner of the fox: Halsbury, vol. 1, pp. 365-6, para. 798; for instance, by killing it (p. 367, para. 802). But his qualified property in the fox by expenditure of time and money and housing on his own land, and the incipient power of enlarging this into absolute ownership, both came to an end when it escaped and was reduced into actual possession by the defendants without his intervention or knowledge. The qualifications of this broad general principle are well-defined, and rest upon considerations which do not arise upon this appeal, such as immediate pursuit, the *animus revertendi*, etc.

There was nothing like immediate pursuit, and could not be, for the plaintiff was not aware that the animal had escaped from his pen; it was not killed upon his property, in which case he would be entitled to the dead animal: *Sutton* v. *Moody* (1697), 1 Ld. Raym. 250; Lord Westbury, L.C., in *Blades* v. *Higgs*, 11 H.L.C. at p. 631; it was not started or driven from his enclosure or ranch by a wrongdoer: *Churchward* v. *Studdy* (1811), 14 East 249; *Earl of Lonsdale* v. *Rigg* (1856), 11 Ex. 654, affirmed in *Rigg* v. *Earl of Lonsdale*, 1 H. & N. 923; or prevented from returning to a place it regarded as a home and was regularly in the habit of returning to—it is not pretended that there was an *animus revertendi*, that it regarded its pen as other than a prison, or that it would voluntarily return to captivity or human control. The plaintiff's own evidence makes this quite clear; it was struggling for freedom, it was pursuing the instincts of its class, and had reverted to the common stock at the time it was destroyed.

Lord Halsbury, in his Laws of England, vol. 1, p. 365, para. 796, says:—

"The common law follows the civil law in classifying animals in two divisions, as follows:—

"(1) Domestic or tame (*domitæ*, or *mansuetæ*, *naturæ*). This class includes cattle, horses, sheep, goats, pigs, poultry, cats, dogs, and all other animals which by habit or training live in association with man.

"(2) Wild (*feræ naturæ*), and not classed as domestic or tame. This class includes not only lions, tigers, eagles, and other animals of an undoubtedly savage nature, but also deer, foxes, hares, rabbits, game of all kinds, rooks, pigeons, wild fowl and the like, and all fishes, reptiles and insects."

In Kent's Commentaries on American Law, Blackstone series, vol. 2, p. 348, it is said: "Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. . . . If an animal belongs to the class of tame animals, . . . he is then clearly a subject of absolute property; but if he belongs to the class of animals which are wild by nature, and owe all their temporary docility to the discipline of man, such as deer, fish, and several kind of fowl, then the animal is a subject

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of qualified property, and which continues so long only as the tameness and dominion remain." And he sums up by saying (p. 349): "The common law has wisely avoided all perplexing questions and refinements . . . and has adopted the test laid down by Puffendorf, by referring the question, whether the animal be wild or tame, to our knowledge of his habits, derived from fact and experience."

Blackstone says (vol. 2, p. 391): "A qualified property may subsist in animals *feræ naturæ per industriam hominis:* by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty." And, referring to theories and arguments that all animals were originally or instinctively wild, he says (pp. 391, 392): "Our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitæ naturæ:* and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*, which is only to be known by their usual custom of returning."

And again, after referring to immediate pursuit and the quasi-possession that this implies, Blackstone says (pp. 392, 393): "But if they stray without my knowledge, and do not return in the usual manner" (and *â fortiori* if there is no habit of return), "it is then lawful for any stranger to take them. . . . In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible; a property that may be destroyed if they resume their ancient wildness and are found at large."

In *Ulery* v. *Jones* (1876), 81 Ill. 403, in the Supreme Court, the defendant was held liable for killing his neighbour's buffalo when it came upon his land. I refrain from commenting upon the decision. What is said about liability of a person who brings something of

a dangerous character upon his premises, if it escapes and causes injury, is dependent upon another principle.

I find in Corpus Juris, vol. 3, p. 16, a classification of animals, for which the authority of 2 Blackstone's Commentaries, pp. 389 and 391, and 4 Bacon's Abridgement, p. 431, is cited, which appears to be so well borne out by decisions in Britain, and is so clear, comprehensive, and exhaustive, that I am tempted to quote it, namely:—

"Domestic animals include those which are tame by nature, or from time immemorial have been accustomed to the association of man, or by his industry have been subjected to his will, and have no disposition to escape his dominion.

"Wild animals comprehend those wild by nature, which, because of habit, mode of life, or natural instinct, are incapable of being completely domesticated, and require the exercise of art, force, or skill to keep them in subjection."

If these definitions are substantially accurate, and I think they are, there is no room for doubt as to the class to which the fox in question should be assigned.

And, with this point established, I have not been able to find any authority in our own Courts or in the Courts of Great Britain that will support a finding in favour of the plaintiff. In *Earl of Lonsdale* v. *Rigg*, 11 Ex. 654, *Rigg* v. *Earl of Lonsdale*, 1 H. & N. 923, Lord Lonsdale was ultimately declared entitled to recover for the grouse in question, because the birds were shot upon his grounds, and the alleged wrongdoers were only entitled to pasturage thereon. Here the fox was not shot upon the plaintiff's property. *Blades* v. *Higgs*, 12 C.B.N.S. 50, 13 C.B.N.S. 844, 11 H.L.C. 621, was decided upon the same principle, and does not help the plaintiff. See also Possession in the Common Law, Pollock & Wright, 1888, Part III., pp. 231-2; Williams on Personal Property, 17th ed., p. 154; Ingham's Law of Animals (Am.), pp. 10 and 11; *Falkand Islands Co.* v. *The Queen* (1864), 2 Moore P.C. (N.S.) 266, 10 Jur. (N.S.) 807, 11 L.T.R. 9, where a lot of cattle had been put upon an island and many of them escaped and had adopted a wild life, and were held not to be included in the grant of the lands from the Crown; *Aberdeen Arctic Co.* v. *Sutter* (1862), 4 Macq. H.L. 355, where property in a whale was adjudged to the final captor, although previously it had been partly captured, and in a sense reduced into possession, by another

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In Cyc., to which we were referred, it is said in the text, vol. 2, p. 309, that: "Where one has property *ratione soli* or *ratione privilegii* game taken by virtue of such right become his absolute property; but, generally, in animals *feræ naturæ* none can have absolute property, for if it be *per industriam*, it is defeasible by the animals resuming their ancient wildness and going at large; if *ratione impotentiæ*, by their attaining strength and departing from his land; if *propter privilegium*, by their ceasing to remain within his liberty; and if *ratione soli*, by their quitting or being hunted off his land."

Manning v. *Mitcherson* (1882), 69 Ga. 447, 47 Am. Rep. 764—the escape of a canary bird—does not directly touch the question we have to decide in this action, and I am not at all sure that our Courts would be prepared to adopt either the decision or dicta in that case; although it has much in abstract justice to commend it. I need not, and do not, however, express any final opinion as to the law as there applied.

In *Mullett* v. *Bradley* (1898), 24 Misc. (N.Y.) 695, a captive sea-lion escaped from New York city, travelled seventy miles, was at large for two weeks, but had not regained its place of origin on the California coast, when it was captured by a stranger in a place where, it was said, it could not continue to exist, and the Court decided against the person from whom it escaped. This case is directly in point, and coincides with the law relating to animals *feræ naturæ* as recognised in our Courts.

The liability of a person who has upon his property, in his possession, or under his control, an animal of the *feræ naturæ* class, which escapes and does damage, does not necessarily involve any question of conflicting proprietary rights. The elephant case, *Filburn* v. *People's Palace and Aquarium Co.* (1890), 25 Q.B.D. 258, is an illustration of this. The head-note is: "Held, that the defendants were liable, as the animal" (which caused personal injuries to the plaintiff) "did not belong to a class which, according to the experience of mankind, is not dangerous to man, and therefore the owner kept such an animal at his own risk, and his liability for damage done by it was not affected by his ignorance of its dangerous character;" in other words, the plaintiff was not bound to prove actual knowledge of a vicious tendency, as in the case of domestic animals such as dogs, horses, bulls, etc. The

judgment in this case and the dicta, as to liability, of Mr. Justice Beese in the Illinois buffalo case above quoted, are both amply supported by the oft-quoted case of *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265, *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, which is applicable to a great variety of conditions, and declares in effect that a person who brings upon his land or harbours anything that would not naturally be there, and in itself dangerous, must safely keep it or be liable for injuries resulting from its getting beyond his control; and there is nothing in conflict with the decision of *Fletcher* v. *Rylands* or the *Filburn* case in *Connor* v. "*The Princess Theatre*" (1912), 27 O.L.R. 466, 10 D.L.R. 143; for the decision turns upon the fact, specifically found, that the monkey causing the injury was not kept by or in the possession, or on the premises, of the defendants. The cases there referred to by the late Chancellor Boyd may, however, well be referred to in considering liability for injuries caused by animals—which, although of a wild nature, are not yet generally vicious—in connection with the broad general doctrine declared in the *Fletcher* case.

It was not urged by the appellants that it does, but it appears right to consider whether the Ontario Game and Fisheries Act, R.S.O. 1914, ch. 262, affects the position of the parties as to the right to the fox in question. If I should find that the shooting constituted an infraction of the statute, I should not find it difficult to conclude that the defendants could not in this way deprive the plaintiff of any right of property he possessed until that time. The defendants' violation of the statute would not create in them a right of property. Chapter 262 is said to be "An Act respecting the Game, Furbearing Animals and Fisheries of Ontario." By sec. 2: "This Act and the Regulations shall apply to all game hunting, shooting, fish, fisheries, fishing and all rights and matters relating thereto." There are Regulations authorised to be made by the Lieutenant-Governor in Council (sec. 4): (*a*) and (*b*) relating to records and archives and affecting fish companies and dealers, which could not affect any question in this action; and (*c*) "containing such further and other provisions as may be deemed necessary or desirable for the administration and enforcement of this Act and of the Regulations." There are also other Regulations, (*a*) to (*i*) inclusive, grouped under the Game Regu-

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lations, which may be made in the same way, authorised by sec. 8; and, by sec. 3, clause (*e*), "'Game' shall mean and include all animals and birds protected by this Act or by the Regulations and the heads, skins and every part of such animals and birds."

Section 10 defines the open seasons for the various animals and birds protected by the Act, and sub-sec. (3) thereof makes special provision for an extended open season to be enjoyed by a person who breeds or imports deer upon his own land and by his licensee.

Section 22 provides: "(1) Where a person has put or bred any kind of game upon his own land for the purpose of breeding and preserving the same no person knowing it to be such *game* shall hunt, shoot, kill or destroy it without the consent in writing of the owner of the land. (2) This section shall not prevent any person from shooting, hunting, taking or killing upon his own land, or upon any land over which he has a right to shoot or hunt, any game which he does not know or has not reason to believe had been so put or bred by some other person upon his own land."

If the Act applies, sub-sec. (2) of sec. 22 would not be available for the defendants, as, although the jury found that "they had not reason to believe," etc., yet the animal was not destroyed upon the land of either of the defendants, and it was not shewn that they had a right to hunt or shoot upon the land where it was destroyed. But the right thus specifically preserved by sec. 22 (1) is to the person who collects or breeds "game"—as defined by sec. 3 (*e*) —and I cannot find anything in the Act, or the Regulations set out therein, stating or indicating that foxes are to be regarded as game, or to be protected under the Act.

Nor were we invited to consider the provisions of the Criminal Code, concerning animals capable of being stolen. Of course no statute of the Dominion Parliament could determine the civil rights of the parties to this action, for the double reason that they are not intended to determine questions of this kind, and "property and civil rights" are by the British North America Act exclusively assigned to the jurisdiction of the Legislatures of the Provinces.

But sec. 345 of the Code is founded upon the English statute, and this statute is the result of a report, recommendations, and

draft bill submitted by a Royal Commission charged with the duty, amongst other things, I apprehend, of taking into account a wide range of new conditions concerning the ownership and custody of animals; eliminating some rather subtle distinctions of the common law between civil or proprietary rights on the one hand and the limits of criminal responsibility for intentional disregard of them on the other; and, under the sanction of penal consequences, to secure to the owners of some domestic animals, and to the qualified owners of reclaimed animals *feræ naturæ*, generally a better defined recognition and greater certainty of enjoyment of the fruits of their expenditure or industry than had theretofore been accorded to them in the administration of the common law in criminal Courts. It is idle to talk of a dog or cat as a domestic animal and the *absolute* property of A., if B. is at liberty to filch them with impunity, because, forsooth, A. or others would not regard these animals as desirable for food.

The Royal Commission said: "As to animals, one rule of the existing law is founded on the principle that to steal animals used for food or labour is a crime worthy of death, but to steal animals kept for pleasure or curiosity is only a civil wrong. The principle has long since been abandoned; sheep stealing is no longer a capital offence; and dog stealing is a statutory offence. But the distinction (above referred to) still gives form to the law and occasionally produces results of a very undesirable kind. . . . It seems to us that the rule is quite unreasonable, and that *all* animals which are the subject of property should also be the subject of larceny."

A consideration of the provisions of the Criminal Code, although not necessarily decisive, is therefore clearly relevant.

By sec. 345, sub-sec. 3: "All other living creatures wild by nature shall, if kept in a state of confinement, be capable of being stolen *so long as they remain in confinement or are being actually pursued after escaping therefrom, but no longer.*"

By sub-sec. 4: "A wild living creature shall be deemed to be in a state of confinement so long as it is in a den, cage or small inclosure, stye or tank, or is otherwise so situated that it cannot escape and that its owner can take possession of it at pleasure."

Although these provisions do not *per se* determine the civil

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or proprietary rights of the parties to this action, it would, I think, be difficult to find a better guide to the proper interpretation of what constitutes that state of confinement or control which created a qualified property in this fox in the plaintiff, than is to be found in sub-sec. 4, or on the other hand a clearer statement of the limitations of his proprietary rights, how long they continued, and how they were lost, or a better epitome of the effect of the decisions than is set forth in sub-sec. 3; or, putting it another way, paraphrasing and applying sub-sec. 3, the fox was the plaintiff's "so long as it remained in confinement or was being actually pursued after escaping therefrom, but no longer."

See also sec. 350, shewing how very carefully Parliament has considered the question as to the quasi-proprietary rights over caged animals, and an effort to bring the criminal law into harmony with modern conditions.

This action raises most interesting points of law, and I have been tempted to pursue it further than is necessary for the immediate purpose of disposing of the issues presented by the appeal, but not further, I trust, than is proper, having regard to the general question of the position of persons engaged in a comparatively new industry of a commercial character, and which the Legislature may consider entitled to statutory protection.

I am of opinion that the judgment of the learned Judge of the County Court was right; and, if I may say so with respect, that he exercised a wise discretion in disposing of the costs as he did.

The appeal should be dismissed with costs.

Rose, J. ROSE, J., agreed with LENNOX, J.

Meredith, C.J.C.P. MEREDITH, C.J.C.P., and FERGUSON, J.A., agreed that the
Ferguson, J.A. appeal should be dismissed. *Appeal dismissed.*

QUE.
C. R.

DUQUETTE v. C. P. R. Co.

Quebec Court of Review, Fortin, Greenshields and Lamothe, JJ. May 30, 1917.

CARRIERS (§ III D—404)—NOTICE OF ARRIVAL—DELIVERY OF NOTICE—DEMURRAGE.

An advice note mailed to a consignee, but not received by him, is not notice within the meaning of a bill of lading subjecting the goods to demurrage charges if not removed after "written notice has been sent or given;" the burden of proving that the notice reached the consignee is upon the sender.

Statement. APPEAL by plaintiff from a judgment dismissing his action to recover goods from a carrier held for demurrage charges. Reversed.

G. A. Marsan, for plaintiff.

Meredith and Holden, for defendant.

The judgment in review was delivered by:—

GREENSHIELDS, J.:—On October 29, 1913, a carload of brick was shipped by the St. Lawrence Brick Co. from Laprairie to Mile End, consigned to the order of the plaintiff. The brick arrived at Mile End on November 5. On that date, one of the defendant's employees made out what is called an "Advice Note," which is a memorandum advising the consignee of the arrival of his goods. The employee testifies that he mailed the advice note to the private address of the plaintiff on Park Ave. The plaintiff never received this notice. If it was sent through the post office, it is clear from the proof that it never reached the plaintiff.

The plaintiff learned on November 17, it would appear, after some enquires, that the carload of brick was at Mile End; he immediately went to take delivery, and the defendant refused delivery without the payment by the plaintiff of the sum of $25 for demurrage. The plaintiff refused to pay and took out the present action, accompanied by a seizure in revendication.

The defendant pleaded to the demand of the plaintiff, its willingness to deliver the goods upon the payment of $25 demurrage charges, and added, that it had a lien and right of retention on the goods until this amount was paid; and prayed for the dismissal of the plaintiff's action.

The defendant then constituted itself cross-plaintiff and made a demand for the $25, for the same reason as contained in its plea, to which cross-demand the cross-defendant admits his refusal to pay the $25; pleads that he never received the notice and that he incurred no liability for demurrage until he had received notice of the arrival of the goods, which notice he never received.

Subsequently, the goods were delivered to the plaintiff subject to the rights of the parties.

The trial judge held:—

Considering that it is established that the company defendant was obliged, either to send or to give notice to consignees on the arrival of goods at its station;

Considering that in the present case it was proved conclusively that notice was sent by mail to the plaintiff by letter on or about November 5, 1913, which was duly posted;

Considering that the usual and proper notice was sent to the plaintiff;

Doth dismiss the plaintiff's action, with costs.

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By the said judgment the cross-demand was maintained and the cross-defendant was condemned to pay the sum of $25 and costs.

The plaintiff, cross-defendant, inscribes.

The learned counsel for the railway company in his written submission states the question at issue as follows:—

"The sole question to be determined, then, is whether the case falls within the provision of sec. 6 of the shipping bill, viz: whether a written notice was sent or given by the defendant on the arrival of the goods."

Sec. 6 of the bill of lading, which the contract under which the goods were carried, reads as follows:—

Goods not removed by the party entitled to receive them within 48 hours (exclusive of legal holidays), or in the case of bonded goods, within 72 hours (exclusive of legal holidays), after written notice has been sent or given, may be kept in car, station or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only, or may at the option of the carrier (after written notice of the carrier's intention to do so has been sent or given) be removed to and stored in a public or licensed warehouse at the cost of the owner and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

This section was approved by the Railway Commission, and is the law of the parties.

It would seem perfectly clear from this section, that whatever liability a consignee may incur by reason of his failure to remove the goods, that liability attaches only after a written notice has been sent or given by the carrier.

I should say that the sending or giving of that notice is a condition precedent to the right of the carrier to do the things or exact the penalties provided for in s. 6 of its contract.

If it be a correct statement, that the carrier's right to exact demurrage—as is sought in this case—depends upon the sending or giving of a notice, then it would seem beyond doubt that the burden of establishing that the notice was sent or given rests upon the carrier.

It will be at once observed that the section is silent as to how the notice should be sent or given. It creates the obligation, pure and simple, of sending or giving the notice.

The carrier in this case chose his own way of sending or giving this notice. Its employee was told to mail a notice to the consignee's address: the employee did that. The notice never reach-

ed the consignee. Certainly notice was not given; it was sent from the office of the carrier to the mail box of the Post Office; what happened to it afterwards the record does not disclose. If through some fault of the postal authorities it was lost or mislaid, the consignee should not be held responsible, because the carrier chose that agency for the purpose of sending the notice; just as if the employee of the carrier was directed to carry the notice and deliver it to the consignee, and never did so, then surely the carrier would be at fault and not the consignee.

Under s. 6 as it now reads, I should say that the obligation of the carrier, in order that it may enforce its contract, is to prove that the notice reached the defendant, or reached his domicile or place of business.

The defendant in this case has not discharged that obligation.

The counsel for the defendant has referred the court to certain jurisprudence in France, and that jurisprudence is based upon the "Arret Ministériel" of May 27, 1878, which the counsel submits lays down practically the same rule as the bill of lading in this case. I think it lays down an entirely different rule. It reads "(Translation) On the arrival the companies may, at their choice, advise the consignees, either by post, by express or by telegram."

If the defendant's bill of lading contained a similar provision, I should not hesitate to maintain its pretensions, and it is not surprising, under this "Arret" to find the statement of the French writers as follows:—

> It is the uniform jurisprudence, that the right to storage runs or commences by the sole fact of the sending of the advice note; it is not upon the carrier to establish that this advice note reached its destination.

There the law says that the notice may be given by post. There is no such a thing in the clause under consideration.

Bouvier's Law Dictionary, vol. 3, p. 2369, it is essential that the person who has to give notice, be prepared to prove affirmatively, that such notice was given. Chitty Pr., vol. 1, p. 496; Parsons, vol. 1, p. 516, and 200 Fed. Rep. 224.

I, therefore, am of opinion that the giving of the notice was a condition precedent to the right of the defendant to claim demurrage from the plaintiff.

I am of opinion that the entire burden of proving, not the mailing of the notice through the Post Office, but the giving of the notice, rests upon the defendant company.

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I am of opinion that the company defendant must prove that notice reached the place under the control of the consignee or his employees or servants. The company defendant has not done this.

I should reverse the judgment, maintaining the plaintiff's action for costs, and dismissing the incidental demand, with costs.

Judgment reversed.

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McMANNAMIN v. R. CHESTNUT & SONS.

New Brunswick Supreme Court, King's Bench Division, Crocket, J. April 7, 1917.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT.

An injury sustained by a plumber employed in one department of a business while helping himself to material in another department thereof, instead of applying for it to the clerk in charge, as required by the shop rules, is not one "arising out of and in the course of employment," nor caused "while in the discharge of his duty," within the meaning of the New Brunswick Workmen's Compensation Act.

Statement.

APPLICATION for compensation under the Workmen's Compensation Act.

T. Feeney, for plaintiff; *R. B. Hanson*, for defendants.

Crocket, J.

CROCKET, J.:—The applicant is a plumber, and for 7 or 8 months prior to December 14 last, had been employed as such in the plumbing department of the business carried on by the defendant firm at Fredericton. On December 14, he was engaged installing a sink and closet in a dwelling on Shore St. At noon he was in need of some oakum and other materials for this work, and on his way from his home after dinner he went to the defendants' plumbing shop, which is situated in rear of its hardware store, on the third floor, and from there downstairs to the shipping room of the wholesale department to get the oakum. The clerk, who was in charge of the shipping room, was writing at a desk when the applicant entered. The latter told him he wanted to get some oakum, or asked him where he kept the oakum. The clerk pointed up to the shelf on which the oakum was kept and continued writing at the desk, and the applicant, taking this as a request to get it himself, went towards the shelf and ascended a movable stair or ladder leading to it. He got the oakum from the shelf and as he turned about to descend the steps the ladder slipped and dropped from underneath him. He fell to the floor about 7 feet on his back and was injured. One of his ribs was broken and

he was totally incapacitated for work for a period of at least 4 weeks, and it is for this injury that compensation is sought.

By the Act of Assembly, 6 Geo. V., c. 36, s. 3 of the Workmen's Compensation for Injuries Act, 4 Geo. V., c. 34, was repealed and the following substituted therefor:—

> Where in any employment to which this Act applies, personal injury by accident, arising out of and in the course of the employment, is caused to a workman while in the discharge of his duty, his employer shall be liable to provide and pay compensation in the manner and to the extent provided under the terms of this Act.

The liability of the defendants in this case depends entirely on the question whether the injury arose out of and in the course of the applicant's employment and was caused to him while in the discharge of his duty. I am of opinion that the accident did not happen in the course of the applicant's employment and while he was in the discharge of his duty. While it is true that the applicant in going to the shipping room to get the oakum, was doing something in behalf of his employer and that was essential to the work he had to do, I cannot see in any part of the case sufficient evidence to justify the conclusion that it was any part of his duty to perform the service of a clerk in the shipping room of the wholesale department of the defendants' business. The applicant was employed as a plumber in the plumbing department of the defendants' business, which was conducted as a department quite distinct and separate from the wholesale and retail hardware departments. The plumbing department was in charge of R. H. O'Brien, who had been acting as foreman thereof for about 10 years. Three or four men were usually employed in it. O'Brien stated that they had orders that no plumber was to go to the wholesale department and help himself to material, but that he was to go to the desk and obtain the material from the clerk. This rule was made probably a couple of years after he became foreman and he communicated it to the plumbers on many occasions, though he said he had no recollection of having communicated it to the applicant on any particular occasion, and would not swear that the applicant ever heard it. Notwithstanding this, he admitted that he himself had a few times got stock in the wholesale department in the presence of the clerks and have the boss charge it. The applicant himself swore, when asked if it had been his custom to get material for himself, that he had done so lots of times and had it charged to the

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plumbing department, and that he had never received from the foreman or any one else any orders to the contrary. Lots of times, he said, he went to the clerks and lots of times he went and got the goods himself when the clerks were busy. Marvin Harrison, a clerk in the shipping department, swore that he knew there was an order made at the shop that the plumbers were not to help themselves and that so far as he knew this rule was observed. Harry Clark, the shipping clerk, who was in charge when the applicant entered to get the oakum, swore that Chestnut told him personally that they were to wait on plumbers the same as they would on outside customers and that he understood they were not to wait on themselves and that when he was there he always waited on the plumbers. He explained that when the applicant spoke to him about the oakum he was simply waiting to finish his writing before serving him, and admitted that at times he had told the plumbers to go and get the goods themselves. Flanagan, an employee of the plumbing department, said he did not remember getting any such order as Harrison spoke of, but would not swear he did not. Flanagan, asked about his practice in getting stock for use in his work, said he generally went to the shipping room and asked the clerks for it and they gave it to him, and that he had often gone down when there was no one in the shipping room and got stuff himself when he wanted it in a hurry, but he stated that when there was a clerk in sight he never helped himself. He had sometimes been told by the clerk to go and help himself.

It is quite immaterial, I think, whether or not the applicant had been personally forbidden to go to the shipping room and get material except from one of the clerks in that department, if the evidence fails to establish a practice on the part of the men employed in the plumbing department, known to the defendant as the employer, to go there and get the materials themselves as they required it. The plumbing department, being a distinct and separate department of the defendants' business, as above stated, the employment of a workman there would certainly not on its face carry with it the duty of going for material as it may be required, into the wholesale hardware shipping department, where a shipping clerk and other clerks were employed to give out the stock, and there performing the distinct and separate work of a clerk, and the only ground, I think, in the absence of an express order from the

employer, upon which the applicant's employment, as a plumber, could be held to be extended to such a duty, is that it was the practice of the employees of the plumbing department to do so and that this practice was known to and approved by the employer. The evidence fails entirely to establish that there was even a practice on the part of the plumbers to get the stock out of the shipping room themselves. The very most it can be held to shew is that sometimes when no clerk was present, and sometimes, at the clerk's request, some of the plumbers had themselves taken down the materials. But apart from this there is not a particle of evidence to shew that the defendant had any knowledge of any practice, if there were such a practice beyond what might be inferred from the managing director, having given the order years ago to stop it, and there can be no doubt, I think, under the whole evidence that not only was there not any such practice recognized by the employer, in a way which would so extend the duties of a workman in the plumbing department, but that the employer's express instructions were quite to the contrary. The fact, therefore, that the applicant had himself, on other previous occasions, or that other workmen had on other occasions done similar acts, which were no part of their duty, would not surely of itself enlarge or extend the scope or course of his or their employment so as to make the master liable for an act which he did not authorize the applicant to do. In this case the very farthest, I think, to which the applicant's employment or duty can be held to have extended is to his going to the shipping room and asking for the material which he wanted. It was Clark's duty and not the applicant's to ascend the ladder and get the oakum, and the applicant in doing so was quite outside the course of his employment, notwithstanding, as stated above, that the act was one which he was doing in the interest of his employer and in connection with the job on which he was that day engaged. The case of *Lowe* v. *Pearson*, [1899] 1 Q.B. 261, shews that a workman employed in one sphere of work cannot make his master liable for injuries sustained by him while acting in another sphere; and *Losh* v. *Evans*, 19 T.L.R. 142, is to the same effect. In the first of these cases a boy was employed to make balls of clay and hand them to a woman working a machine. He attempted to clean the machine while the woman was temporarily absent, and in doing so was injured. In *Losh* v. *Evans*, the

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applicant, a girl, was employed in a mine at a "shaker" which was worked by an engine, and later she was employed to pick bass out of slack while it passed over a belt, which belt was worked by a steam-engine. The man, who was in charge of the engine, was called away by an accident in the pit, and during his absence, the applicant, having heard a signal to start the engine, went to do so, as she had done two or three times the same day, and in doing so was caught and seriously injured. Several other girls employed in the same work of picking from the band had at various times stopped and started the engine, though they had been warned not to do so. It was held in both cases that the accidents did not arise out of or in the course of the applicant's employment and that the masters were not liable. The English Act, under which these cases arose, is in the same terms as the New Brunswick Act, except that the words "while in the discharge of his duty" do not appear in the former, and it will not of course be contended that the inclusion of these words in our Act extends the liability of the employer. On the contrary, they would seem rather to have a restrictive effect.

It was argued that the fact that Clark, the shipping clerk, pointed the applicant to the shelf containing the oakum, and thus requested him to get it himself, was sufficient to bring the case within the Act. I have no doubt that Clark in effect directed the applicant to go and get the oakum himself, but I cannot think that this fact would bring his act in doing so within the course of his employment, or that the act would thereby become an act "in the discharge of his duty" to his employer. It was a mere voluntary act on his part, which he was doing for Clark and in the place of Clark, who was himself disobeying his master's instructions in asking the applicant to do it.

The case of *Whitehead* v. *Reader*, [1901] 2 K.B. 48, was cited in behalf of the applicant. The decision in that case has no application to the present case except upon the assumption that the applicant in this case was, when he ascended the steps to get the oakum, in the course of his employment. If he had in fact been in the course of his employment, then *Whitehead* v. *Reader* would have been an authority for the contention that the fact that he had been forbidden to use the ladder, if he had been forbidden to do it, would not of itself take the case out of the Act. He might, in

doing an act which he had been forbidden to do, none the less be acting within the course or sphere of his employment, and *Whitehead* v. *Reader* decides that if a servant, *acting within the sphere of his employment*, violates the order of his master, the latter is responsible. In the present case the applicant, as I have pointed out, was entirely outside the scope of his employment and the discharge of his duty, and the evidence as to the defendants' orders is relevant only insofar as it affects the question as to how far such orders may have extended or limited the sphere of employment of the men whom it employed in the plumbing shop. On its face the employment of the applicant as a plumber would not of itself imply that it was within the course of his employment or of his duty to help himself to material from a distinct and separate department of the defendants' business in which clerks were employed to give out the stock, and as I have clearly pointed out there is no evidence to justify the conclusion that it was. It would be necessary in these circumstances for him to shew that he had the order of his master to thus travel out of the sphere of his employment in order to make the latter liable for the injury complained of, as it is clearly pointed out in *Whitehead* v. *Reader*, by Collins, L.J. *Application dismissed.*

McTAVISH v. LANNIN AND AITCHISON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. April 27, 1917.

COSTS (§ I—14)—SECURITY FOR—PUBLIC AUTHORITIES PROTECTION ACT. In an action against peace officers for trespass and slander while making an arrest, the defendants are not entitled to security for costs under *s.* 16 of the Public Authorities Protection Act (R.S.O. 1914, c. 89), if the alleged acts were not done in the execution of a public duty, and no good defence upon the merits has been shewn nor that the action is trivial or vexatious. (39 O.L.R. 49, reversed).

Statement.

AN appeal by the plaintiff (by leave of LATCHFORD, J., in Chambers) from an order of MIDDLETON, J., in Chambers, 39 O.L.R. 49, reversing an order of the Master in Chambers whereby the defendants' application for an order requiring the plaintiff to give security for their costs of the action, under the provisions of sec. 16 of the Public Authorities Protection Act, R.S.O. 1914, ch. 89, was dismissed, and requiring the plaintiff to give security accordingly. Reversed.

R. T. Harding, for appellant.

R. S. Robertson, for the defendants, respondents.

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Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The single question involved in this appeal is, whether the defendants can retain the extraordinary advantage over ordinary litigants, which the order appealed against gives them: an advantage which, it is said, and apparently said with very good reason, has the effect of depriving the plaintiff of a trial of her action, solely because her poverty makes it impossible for her to give the security for costs which the order requires her to give; the order also providing that, if such security be not given within 30 days, the action shall, without any kind of trial, be dismissed with costs.

If the action be of a vexatious, or merely trivial, character, one can understand the justice of that order, judged either by moral or legal methods; but, if that be not so—if the woman have a real and substantial cause of action—it can hardly be that the law permits of it being snuffed out by such a peremptory method. And that she has real and substantial causes of action, if her story be believed, is manifest; whilst, if the story of the defendants be believed entirely, she has yet been much aggrieved; and those who were the cause of the injustice done to her should have seized the opportunity, which the notice of action served upon them gave to them, to make, and have made, to her all the reasonable "amends" possible, instead of ignoring that notice and putting her to the expense and trouble of a law-suit to put herself right before every one in the matter; and, when that was brought, seeking to quash it through her poverty.

The action is really one for trespass to the plaintiff's lands, goods, and person, and for defamation of character in accusing her, in her own house and before her infant children, of theft, and threatening to take her to gaol for that offence, though they had no intention of doing so unless she was frightened into making a confession of guilt of a crime that had never been committed, a "confession" which was not impossible if made in order to avoid being taken from her house at 9 o'clock at night, leaving her two infant children alone in the house.

The defence is: that the defendants are peace officers, and that all that was done by them was done in the due execution of their duties as such officers.

Although not made part of their formal defence, each of the defendants has sworn upon this motion that nearly all they did was done by the leave of the plaintiff.

As the plaintiff's action is based entirely upon acts of trespass and defamation of character, which no duty of the defendants as peace officers could justify, it is difficult for me to perceive what their position in life has to do with success or failure in the case, or how they can be any more protected because peace officers than "private detectives" or any one else without office of any kind could be. In the first place, they are charged with trespass to land, breaking into the woman's house; and, as they did not go there to apprehend the woman, but only to get evidence against her, it is out of the question that that was done in the performance of any duty. Not only did they not go there to apprehend the woman, but they went away, according to the testimony of one of them, satisfied that she was not guilty. If an arrest had been made, it was the duty of the constable to take the woman forthwith before a Justice of the Peace, so that her case might be dealt with by a judicial officer; nothing of the sort was done, or intended to be done; these defendants entered the woman's house for the one purpose of obtaining evidence against her by inquisitorial method; and, if that were done without her leave, or with her leave extorted by fear, no law justifies or gives any encouragement to it; all laws of fair play, and indeed of decency, in one of its senses, condemn it. In the next place, they are charged with trespass to the woman's goods in searching her house; and, as there is no suggestion that this, or that anything else done by the defendants, was done under a warrant authorising it, how can they be aided by their official capacity? A jury might indeed think it an aggravation of the offence, but no one can say that in the eye of the law they are in any better position than any one else would be who did the same wrong, whether for a good or a bad purpose. In the next place, for the trespass to the woman's person the defendants are in the same position as in regard to the trespass to lands; they did not act, nor intend to act, under the provisions of sec. 30 of the Criminal Code. R.S.C. 1906, ch. 146. They intended to arrest the woman only if and after she had admitted, or shewn, that she was guilty; and that time never came; on the contrary, if one of them is to be credited on oath, they went away satisfied that she was not guilty. If these constables had gone to apprehend the woman at that time, it would have been a stupid and

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inexcusable thing, which a Justice of the Peace would have at once remedied as far as possible by directing her release upon her own recognizance. Arrests are not made for the purpose of punishing accused persons; their imprisonment before conviction can be justified only on the ground that, if not detained, they may become fugitives from justice. To have taken that poor woman into custody, even under a warrant, at that time, would have been a harsh and even inhuman act, entirely unnecessary in the interests of justice. In the morning she would have been there, and could have been dealt with just as well. And, in the next place, it is difficult to understand what justification their office, or the law, could afford, or protection give, in respect of the charge of slander. The only defence there can be to the third and fourth of these charges is "leave and license;" and so the order in question was obviously too wide, even if the defendants had plainly brought themselves within the provisions of the Public Authorities Protection Act in respect of the first and fourth of these charges, which, as I have said, and shall endeavour to make more abundantly plain, they have not.

It may be well now to state some of the facts of this case, with a view to see how the defendants should fare upon an application of this character, even if deemed to be sued as peace officers, and not mere trespassers: see *Parkes* v. *Baker* (1897), 17 P.R. 345; and in doing so I shall, unfairly to the plaintiff, state them only as undisputed or as related by the defendants.

One evening, in September, the defendant Lannin, who is the Chief Constable of Stratford, was telephoned to by a reputable woman of Stratford, and so told by her that she had had $25 in her "chatelaine" in the hall of her house in Stratford, that day, and that it had disappeared; and that the plaintiff was the only person, beside herself, who had been in the house that afternoon, and that there was nobody else to take it.

The plaintiff was known to both defendants, and known to them to be a reputable woman, living with her two infant children only in her own home in Stratford.

The defendant Lannin, on the same evening, and not long after getting this message, called in from his beat the sergeant of the force of constables; and the two together proceeded, at about half-past 8, to inquire into the matter; but, instead of being

led by common sense to the house of the woman who made the complaint, they went at once to the plaintiff's house to "try and discover if Mrs. McTavish took the money," according to the oath of this defendant. No explanation is offered for the failure to try and discover at the other woman's house, first, whether the money had ever been taken, or, if taken, whether taken by some one who might properly take it. It appears from the depositions that the woman has a daughter; and there might be a score of ways in which the money, if it ever disappeared, might have been taken quite innocently. The chief of the constables must have lived long enough to have learned that things that disappear so unaccountably are often found just where the person who lost them placed them, and then forgot about it, often in his own pocket, and not always in the pocket of "the other coat."

To suggest that on these facts a peace officer could come within the provisions of sec. 30 of the Criminal Code, and break into the woman's house and apprehend her on a charge of having committed a felony, is too absurd to call for serious consideration. No one in his senses could have thought that there were reasonable and probable grounds for believing that this known to be honest and reputable woman had committed that felony. The defendants well knew this; and so they went only to investigate, taking, as I have said, the wrong road at the outset of that investigation.

Then, arriving at the woman's house under those circumstances and for that purpose, it should be manifest that they had no right to enter without the woman's consent, and that in that respect they had no higher right than any other person coming to her door for the same purpose: to all she would have been well within her legal rights if she had "slammed the door in their faces."

When in the house, whether with her consent or without, they adopted inquisitorial methods; and, whether with or without her leave, searched the house, including her purse, taking from it apparently a receipt for a purchase of sugar she had made; and turned her infant children out of the room when they tried to cling to her; and then ordered her to put on her clothing that she might be taken to the police-station, leaving her two infant children alone in the house, and threatened to take her without her clothing if she would not put it on; and, this last turn of the

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mental thumb-screws failing to extort a confession, but only putting the woman into an hysterical state, the defendants left her house, satisfied, so one of them has sworn, that she was innocent.

Can the defendants rightly cut off the woman's right to a trial of her case, a case such as this, on the defendants' own shewing, by means of a summary application at Chambers, under the Public Authorities Protection Act?

Two things must be proved by them; and, after proof of those things, the Judge at Chambers must be satisfied that the case is a proper one for security for costs, before such an order as that now appealed against can rightly be made.

The things which a defendant must prove in such a case as this are: (1) that the things which the plaintiff complains of were done by the defendant in pursuance or execution or intended execution of a statute or of a public duty or authority; and (2) that the defendant has a good defence to the action on the merits or that the grounds of it are trivial or frivolous.

The first requisite is entirely wanting: no statute, public duty, or authority required or justified the defendants' conduct; it can be excused only if leave and license be proved. It is not what a defendant may imagine or believe some statute, duty, or authority justified; the "intended execution" is of a real, not an imaginary, statute, duty, or authority. If these defendants had thought the law allowed them to use physical as well as mental thumbscrews, and they had applied them, could any one imagine such a case within the statute? Had there been a statute, duty, or authority requiring or authorising an inquisition of a lone widowed woman in her own home at night by a constable of any degree, and had the defendants really intended to perform that duty or exercise that authority, but erred in some of their methods, the case would be a very different one. The law does not authorise such inquisitions; it can and does only emphatically condemn them even when constables are dealing with men, and men of known criminal instincts or practices. They are without any kind of excuse, except leave freely given, in such a case as this. Then, as I have pointed out, no defence specially applicable to a peace officer has been shewn to any of the plaintiff's four causes of action.

And that brings me to the last point in the case, which is by no means an unimportant one, but is one which seems to be some-

times overlooked; and that point is: how the discretion of the Court should be exercised in such cases as this.

The enactment under which the order appealed against was made was not passed until the year 1890 (53 Vict. ch. 23); and, until the revision of the statutes now found in R.S.O. 1914 was begun, it contained these words (sec. 2): "and thereupon the Court or a Judge, in its or his discretion in view of all the circumstances, may make an order that the plaintiff shall give security for the costs to be incurred in such action:" see R.S.O. 1897, ch. 89, sec. 2. In the great cutting down of words by the Commission which revised the statutes, the words "in its or his discretion in view of all the circumstances" were struck out; and the work of the Commission first appeared in the statutes of 1911, 1 Geo. V. ch. 22, sec. 16. But the law was not altered—the enactment has always been permissive, and has always meant that the Court should in a proper case make the order; and so the real question is, what is a proper case?

In answering that question, regard must be had to general principles, in the first place, such as that the doors of the Courts of this Province are wide open to all persons alike, who are amenable to its process, whether rich or poor, of high or of low degree; and that that general principle must always be upheld—that exceptions to it must be based on clear and unmistakable grounds. And the main purpose of this enactment is not to make the poor give security for costs; poverty is only an added ingredient. The main purpose is to save public officers, honestly performing, or endeavouring to perform, their duties, from vexatious litigation by persons from whom costs cannot be recovered because of their being possessed of no means out of which costs can be levied, that is, to save them from such litigation unless security for costs be given. And this purpose must be the more borne in mind now that the Rules of Court provide for a dismissal of the action—Rule 374—not merely for a stay of proceedings, as the statutes formerly provided.

It hardly needs a reference to the title of the Act to indicate its purpose, even to those not familiar with the law: and, because of these things, it seems to me, if neither of the two requisites were wanting, security for costs should not have been ordered in this

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case. No one can reasonably say—after ignoring the notice of action, and making no attempt to make amends to the plaintiff, though it is now admitted that the money was never lost, indeed that the woman who made the complaint never had the money which she impliedly accused the plaintiff, an honest woman and a faithful servant to her, of having stolen—can reasonably say that this action is a vexatious or trivial or frivolus one. Common decency, one would have thought, should have compelled this woman and the constables, who took the wrong road at the outset, and seem to have kept in it to the present time, to have volunteered as ample and public an apology as might be needed to relieve, as far as the defendants could, the plaintiff from the indignities she was put to.

It will not do for the defendants to protest against dealing with the merits of this case at this stage of it: (1) because they have succeeded in shutting the plaintiff out from ever being able to have them dealt with at a trial of her action; and (2) because it is they who raise the question of merits here, and undertake to shew that they have a good defence on the merits. If on the merits it appeared that the plaintiff's action was vexatious or trivial or frivolous, as, for instance, if the defendants had been guilty of a technical wrong which might entitle the plaintiff to nominal or small damages only, or if it was altogether unlikely that she could succeed at all, the order might be made. But, however it is put, the Court is bound to look into and deal with the merits, as far as it may be necessary, not only on the question whether there is a defence upon the merits, but also on the question whether the case is one in which the order ought to be made.

I can find no warrant for the order in question in any respect or to any extent; and so would allow the appeal. The defendants should pay forthwith the costs of the motion and of this appeal.

Riddell, J.

RIDDELL, J.:—The plaintiff, who resides in Stratford, sues the two defendants for "damages for search, assault, and imprisonment," and for "damages for slander." She charges that they "unlawfully entered" her "dwelling and trespassed thereon and made a search of the said dwelling, all without warrant or authority for so doing"—this seems to be part of the "search" for which she claims damages. She also charges that they laid hands on her and assaulted her and "did search the plaintiff's purse and other

personal belongings and places in which money might usually be put"—this seems to be the remainder of the "search," and also the "assault." Then she charges that they did arrest and imprison her in her house and "did detain . . . and deprive her of liberty"—this is the "imprisonment" sued for. A separate charge is made of slander.

It will be seen that the action consists of four separate claims for damages: (1) trespass to realty; (2) trespass to the person in the form of an assault; (3) imprisonment; (4) slander.

The defendants set up that they are constables; that they received a complaint from a credible person of the theft of money at her residence, and that the plaintiff was the only person who had been about the premises, "which imposed the duty upon the defendants as police officers to go to the plaintiff's premises and make proper investigation of the complaint . . .;" that they acted without malice and in due performance of their duty; they deny trespass, assault, and imprisonment; and plead privilege to the slander alleged, even if proved.

An application was made to the Master in Chambers for an order for security for costs under sec. 16 of the Public Authorities Protection Act, R.S.O. 1914, ch. 89; the application was refused; on an appeal to Mr. Justice Middleton, that learned Judge allowed the appeal; leave to appeal from this decision was given by Mr. Justice Latchford; and the plaintiff now brings on this appeal.

An order for security for costs, it is pointed out by the King's Bench Divisional Court in *Robinson* v. *Morris* (1908), 15 O.L.R. 649, at p. 651, is a "variation from the usual course of litigation," and "the provisions of the statute must . . . be followed with some approach to strictness."

Assuming that defendants who are in fact police constables, but are not sued in that capacity, are entitled to apply for security for costs under sec. 16, when they are sued for an act done by them *bonâ fide* and with an honest opinion that they are discharging their duty—*Lewis* v. *Dalby*, 3 O.L.R. 301; *Parton* v. *Williams* (1820), 3 B. & Ald. 330, at p. 335, *per* Bayley, J.—they must, to succeed, shew "to the satisfaction of the Court or Judge . . . that" they have "a good defence upon the merits, or that the grounds of action are trivial or frivolous." It cannot be said that the grounds of action here are trivial or frivolous. the

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defendants, then, must satisfy us that they have a good defence on the merits.

There cannot, I think, be any doubt that, upon the facts here, it is not shewn to our satisfaction that the defendants have a good defence on the merits.

The story of Lannin is, that, being Chief of Police in Stratford, and receiving information which indicated that the plaintiff (against whose character he knew nothing) was the only person in a certain house one afternoon when some $25 were stolen, he, without further investigation, made up his mind to go and see the plaintiff at her house. He took his co-defendant, Aitchison, over to the plaintiff's house "to try and discover if Mrs. McTavish took the money . . . by inquiry from Mrs. McTavish," and by no other means. He took no search-warrant and no warrant of arrest; he did not intend to arrest the plaintiff at all. So far I can see nothing wrong in the conduct of the defendants. Constables have, as I conceive, not only the right but the duty to discover the whereabouts of stolen money or goods, and are justified in making all due inquiry to discover them, even of those who may be suspected. This does not imply that they may use what are called "third degree" methods; but only that they may make inquiry, diligent inquiry, in all quarters. I do not think that going to, and even into, the plaintiff's house to make courteous inquiry, can be called a trespass unless the plaintiff objected—and it does not seem that she did. But the defendants at once proceeded to improper acts. When she denied that she had taken the money, Lannin said, "You expect us to believe that you haven't it!" And when she in desperation said, "You can search the house," they proceeded to search the house, not expecting to find anything, for, as he says, "In my estimation, I didn't think we could discover the money," but apparently simply to frighten her. Then he ordered her to get on her clothes and go to the police-station, threatening to take her as she was if she did not clothe herself—not in the least intending to arrest her, but "to attempt to discover if she had the money"—in other words, to force a confession by mental torture.

It is charged by the plaintiff that the defendants said that she stole the $25; Lannin denies this; and I pass it over, simply saying that it could not be asserted that such a slander could possibly be

made in intended execution of a duty—and therefore no security for costs could be granted against that cause of action.

But the undisputed facts shew that the defendants intended to do an improper and wrongful act—to apply torture and pressure to compel the plaintiff to confess. They did not enter the plaintiff's house to make civil inquiry, but obtained entrance through either her fears or their implied representation that they were entering with an intention of acting properly. I can find no excuse in law or in morals for this conduct; and I do not think a good defence is made out. Even if I could so find, I should not be inclined to make the order (it is discretionary and not *ex debito justitiæ*) in the circumstances of this case. It is to be hoped that such conduct on the part of policemen and constables is not frequent in Ontario.

Riddell, J.

I would allow the appeal with costs throughout, payable forthwith.

LENNOX, J.:—I am very far from feeling confident that the judgment in appeal is wrong. If the power to grant or refuse an order for security for costs is still discretionary, notwithstanding the change in the wording of the statute, the discretion exercised by the Judge of first instance ought not generally to be lightly interfered with. After reading the very full and careful judgments of the Chief Justice and my brother Riddell, and having regard to the flagrant misconduct alleged, I think the plaintiff perhaps should, in the circumstances of this case, be allowed to bring her action into Court without giving security to an officer who, after all, can hardly be said to have been acting in the *bona fide* exercise of any statutory or public duty imposed upon him, or to have satisfactorily established that he has a good defence upon the merits. It cannot be fairly argued from anything that appears at present that the action is vexatious.

Lennox, J.

I agree, though not entirely without hesitation, that the appeal should be allowed.

ROSE, J. (dissenting):—If this action is "brought . . . for any act done in pursuance or execution or intended execution of any statute, or of any public duty or authority," and if the affidavits filed in support of the motion, read with the examination of the defendant Lannin, shewed "to the satisfaction of the Judge that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment should be given in favour

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of the" defendants, "and that the" defendants have "a good defence upon the merits . . .," Mr. Justice Middleton had jurisdiction to make an order requiring the plaintiff to give security for the costs to be incurred: R.S.O. 1914, ch. 89, sec. 16. If he had such jurisdiction, and if, notwithstanding the fact that the words "in its or his discretion in view of all the circumstances" (R.S.O. 1897, ch. 89, sec. 2) were dropped from the statute in 1911 (1 Geo. V. ch. 22, sec. 16), the exercise of the power is still discretionary, it seems to me that his order, made in the exercise of his discretion, ought not to be interfered with unless a very strong case is made for interference: see *Southwick* v. *Hare*, 15 P.R. 222, 223.

Then was there jurisdiction? The defendant Lannin is Chief of Police at Stratford. The defendant Aitchison is a sergeant on the police force. A complaint having been made that money had been stolen and that the circumstances were such as to indicate that the plaintiff was the thief, Lannin, taking Aitchison with him, went to the plaintiff's house to make inquiries. In this, as it seems to me, he was fulfilling a public duty. Whether what he and Aitchison did and said at the house may properly be said to be in execution of a public duty, is another question: but Lannin swears that all that was done was in *intended* execution of the public duty of the defendants, and there is nothing that I can see in the evidence that tells against the conclusion of Mr. Justice Middleton that "what was done by these constables was done in execution or intended execution of their duty. They believed the statements of Mrs. Plummer" (the complainant), "and acted in good faith throughout."

It was argued that, even if the entry into the house, the search and the threat to take the plaintiff into custody, were in intended execution of the defendants' public duty, the alleged slander—the statement or suggestion that the plaintiff had stolen the money—could not have been uttered in intended execution of such duty; and it was said that, even if the order was to stand as regards the alleged trespass, it ought to be limited to that, and the plaintiff ought to be at liberty to proceed as to the slander.

I do not appreciate this distinction. Upon the defendants' evidence, all that they did was with the intention and object of discovering whether there was or was not reason for arresting the plaintiff; and, although the defence upon the merits to the claim

for damages for slander may be different from the defence to the claim in respect of the other causes of action—as I shall mention in discussing the question whether such a defence is disclosed by the affidavits and examination—it seems to me that, in so far as concerns the question whether the action is brought "for any act done in intended execution of any public duty," the claim in respect of the slander stands in exactly the same position as the other claims—all of which are, in my opinion, claims to which the statute applies.

The requirement as to evidence that the plaintiff is not possessed of property sufficient to answer the costs has been met; and, upon the question as to jurisdiction, there remains to be considered only the question whether the defendants have shewn that they have "a good defence upon the merits."

I cannot find in the statute or in any of the cases anything to indicate that the good defence must be a defence arising out of the fact that the defendants were public authorities or were executing a public duty. It seems to me to suffice to shew that the defendants were acting in intended execution of a public duty and have some *bonâ fide* defence which they are entitled to have passed upon by the jury, or, as put by Boyd, C., in *Swain* v. *Mail Printing Co.* (1894), 16 P.R. 132, that the materials under oath used by the applicants disclose a defence which ought to succeed if it is not answered or explained away at the trial. I do not think that *Paladino* v. *Gustin*, 17 P.R. 553, decides that the defendant must go beyond this in shewing the nature of the defence and that it is a good defence upon the merits, for that case turned upon the holding of the majority of the Court that the defendant, who swore that he did not use the words in question with the meaning alleged, had not given evidence as to what the bystanders understood him to mean, which was the point upon which the jury were to pass.

To the plaintiff's claim in respect of the wrongful entry, search, etc., the defendants set up and swear to a defence of leave and license. They say that the entry into the house was with her consent, and the search, such as it was, was at her suggestion. The slander they deny, except that Lannin admits saying, "You expect us to believe that you haven't it!" I do not mean that there are no other defences asserted to be open, but these are the defences most discussed. Now each of them is, if established,

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a perfectly good defence to the cause of action against which it is set up; and, as neither is displaced by the examination of the defendant Lannin, I think the defendants have brought themselves within the statute, except possibly, in Lannin's case, as regards the claim for damages for slander in respect of the words above quoted.

Then, there having been jurisdiction to make the order appealed from, is there any reason for interfering with the discretion exercised by Middleton, J.? The reason suggested, as I understood it, was that the defendants, even on their own shewing, had acted in a most overbearing and inhumane way towards the plaintiff, endeavouring to frighten her so that, if guilty, she would confess the theft.

I do not desire, at this stage of the litigation, to discuss at length or to express an opinion upon the course pursued by the defendants. It suffices to say that the reason suggested does not seem to me to be sufficient to justify a reversal of the order. Against it is the fact (of course I speak from the defendants' evidence alone—the plaintiff's story, except as set forth in the pleadings, is not, and could not be, before us) that, upon the complaint being made, Lannin did not suggest the laying of an information or the issuing of a summons or warrant, but took the trouble to investigate, and entered upon and pursued the investigation with the sole desire of discovering the truth, and ended by satisfying himself that the plaintiff was not guilty. I think that, bearing that fact in mind—and giving due weight to the holding of Middleton, J., that the defendants acted in good faith throughout—we ought not to say that the conduct of the defendants is so reprehensible that we should deprive the defendants of the security to which I think a defendant is *primâ facie* entitled when he shews that he was acting in intended execution of a public duty and that he has a good defence upon the merits.

I would dismiss the appeal, except that, if the plaintiff desires it, I would except from the order the claim against Lannin for slander in the use of the words that he admits he used. See the judgment of Street, J., in *Lancaster* v. *Ryckman* (1893), 15 P.R. 199.

Appeal allowed; ROSE, J., *dissenting.*

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RODRIGUE v. PARISH OF STE. PROSPER.

Quebec King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. March 12, 1917.

MUNICIPAL CORPORATIONS (§ II C—113)—SUNDAY CLOSING—"PLACES OF PUBLIC ENTERTAINMENT"—RESTAURANT—ULTRA VIRES.

A municipal corporation cannot, under the pretext of police power, legislate upon the observance of the Sabbath, and a by-law requiring the closing of restaurants on Sundays is *ultra vires*; nor are the latter "places of public entertainment" within the provisions of the Municipal Code.

[*Ouimet* v. *Bazin*, 3 D.L.R. 593, referred to.]

Statement.

APPEAL from the judgment of Belleau, J., of the Superior Court of the District of Beauce, 51 Que. S.C. 109, dismissing an application to quash a by-law. Reversed.

Bouffard & Godbout, for appellant; *Pacaud & Morin*, for respondent.

Lavergne, J.

LAVERGNE, J.:—The appellant asks that a municipal by-law passed by the respondent corporation during the summer of 1916 be quashed.

The court of first instance dismissed the application of appellant and maintained the said by-law.

Here are the provisions of the by-law:

Seeing that it is in the interests of peace and good morals to prohibit the opening of restaurants and the business of restaurants on Sunday:—1. It is hereby and will in the future be forbidden within the limits of this municipality to keep open restaurants and sell therein any merchandise whatever on Sunday during the whole of the day from Saturday at midnight until the following day at midnight, and the restaurants will be closed and the public will not have access to them; 2. The restaurants affected by the present article are places or shops where there is generally offered for sale tobacco, soft drinks, bonbons, biscuits, and other goods of the same kind; 3. Every person who infringes the present by-law will be liable to a fine of $20 to be recovered according to law.

This appeal is from a judgment maintaining this by-law.

As we have seen the by-law in question forbids for the future within the limits of the respondent municipality restaurants to be kept open.

The appellant is keeper of a restaurant in the municipality in which the by-law has been put in force; as such he is personally interested in asking that the said by-law be quashed.

The first question which presents itself is whether or not the appellant has a right to sell on Sunday.

On July 30, 1915, one of the judges of the police court at Quebec decided that art. 4466 of R.S.Q. 1909 does not apply to

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the kind of business done on Sunday by the appellant. The judgment in question cites the jurisprudence upon the matter, among others the cases of *The Queen* v. *Albertie*, 3 Can. Cr. Cas. 356; *Re Greene*, 4 Can. Cr. Cas. 182; *Kennedy* v. *Couillard*, 17 Can. Cr. Cas. 239. It appears to be admitted by the parties at the hearing that, in the actual state of the jurisprudence, no law exists for prohibiting the sale on Sunday by restaurant keepers. Can the council of the respondent deprive the appellant of his right to sell on Sunday, and has it the right to legislate upon Sabbath observance?

The Municipal Code has only two articles respecting Sunday for rural corporations; they are arts. 600 and 601, the latter of which does not concern the present case.

Art. 600 reads as follows:—

To cause to be closed the bars of inns, taverns and other places of public entertainment from seven o'clock in the evening on Saturday until the Monday following at four o'clock in the morning.

The appellant claims that his restaurant is neither an inn nor a tavern; is it a place of public entertainment as defined in the by-law which engages our attention?

Para. 3 of art. 904, R.S.Q. 1909, thus defines houses of public entertainment:—

They are houses or public places intended for the reception of travellers or of the public, where, for payment, board and lodging is habitually supplied.

This provision does not appear to me to apply to the restaurant in question in this case. These restaurants are not houses of public entertainment any more than a grocery or any other shop. Restaurants such as these are even defined in the by-law as being "places or shops where there is usually offered for sale tobacco, soft drinks, bon-bons, fruits, biscuits, and other goods of the same kind."

Art. 600 of the Municipal Code has, in my opinion, no application to the restaurant in question. There is no other law permitting the corporation to legislate in this fashion upon the observance of the Sabbath. The legislature would not, indeed, be permitted to authorize municipalities to legislate as to the Sabbath. *Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. 502.

Municipal corporations have only the powers delegated to them by law, and when it is a question of limiting the liberty of the subject in the exercise of his recognized rights, it can only be done in virtue of a formal authorization.

The text of the judgment complained of appears to admit that there is no law in existence to deprive the appellant of the right to sell on Sunday. The judgment says that the power relied upon by the respondent is a power that municipal bodies possess in the very fact of their existence, and that it exists independently of all positive law. The judgment admits, then, that the by-law is not supported by any legislation.

It is the first by-law of the kind passed by a municipality in the Province of Quebec, though the municipalities have existed for a long time; the passing of this by-law is then necessary neither to their existence nor to their progress.

Respondent has cited also art. 509 of the M.C. This article reads as follows:—

> Every council can also make, amend, or repeal in the interest of the inhabitants and of the municipality any other by-law for an object of a nature purely local and municipal and not specially mentioned in the provisions of this Code.

This general article does not give to the council of a municipality the right to deprive any citizen of a right legitimate and inoffensive in itself, the exercise of which the law in no way prohibits. It is plain that the legislation is one merely on peace and good morals and that, if there is a right to close restaurants on Sunday, there is also the right to close them during the week for the same purposes.

This is not the case of a by-law of a nature purely municipal. If the municipal council by virtue of art. 509 has the right to close the shops, it would have the right by invoking peace and good morals to close all the places to which the public are admitted on Sunday; it would only be necessary to give as a pretext peace and good morals. This would be an exorbitant power that the legislature has never conferred on the municipalities.

But there is more. By the very terms of the by-law, since the prohibition is for the whole day on Sunday, to begin from midnight on Saturday until midnight on the following day, it is evident that the intention was to legislate by this by-law upon the observance of the Sabbath, which would be *ultra vires* of the powers of the municipalities and even of the legislature of the province.

The object of the by-law was to prevent young persons from spending their money in the restaurants on Sunday, from assembling and amusing themselves there. It is not a question of good morals although these words are contained in the by-law.

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If the evidence in this case is examined it will be seen that nothing has ever been permitted in the restaurant of the appellant which is contrary to good morals. The appellant sells his goods, of the kind mentioned in the by-law, and he does nothing more.

The respondent says that the young men on Sunday, not being at work, assemble in the restaurants and amuse themselves there with noise. There is really no evidence to establish that disorders have been committed in the restaurant of the appellant. There has been noise in the street, a thing for which the appellant is not responsible; and the facts proved in this respect are of a nature very futile and all based upon hearsay.

It is claimed that the parish of St. Prosper is in a condition which does not apply to other municipalities; if that is the case, it could have obtained from the legislature special legislation for the parish.

Here is what is represented as the situation or special condition of Ste. Prosper; it is that this parish is upon the boundary of the American Republic; that there are in this vicinity many timber limits and consequently all the young persons work in the woods all the week and on Sunday come to amuse themselves in the village of Ste. Prosper.

I see nothing extraordinary in this position that calls for a special by-law. It appears to me natural and even very natural that young persons who have passed six days in the woods at work come on Sunday to perform their religious duties and take advantage of it to amuse themselves in a manner perfectly legitimate and reasonable.

I consider, for my part, that the by-law is absolutely abusive of and contrary to the liberty of citizens and is justified by no law. If it is the occasion of too much noise and even of disorder —something which I do not find in the evidence—then the parish, as it has a right to do, appoints one or two police officers to oversee and visit these restaurants on Sunday and oblige them to keep good order and if necessary to take proceedings and even to arrest the delinquent. It is, perhaps, a question of economy for the respondent, economy very trifling and petty.

The peace and good morals which are invoked are only a pretext that the corporation respondent gives for passing a by-law upon the subject. In view of the jurisprudence already well

established by many decisions I am of opinion that the respondent has exceeded its powers and that the judgment should be reversed and the by-law in question quashed and the appeal maintained with costs as well those of the court below as of this court.

ARCHAMBEAULT, C.J.:—The appellant asks for the quashing of the by-law already cited because it deals with the observance of the Sabbath which is a matter of criminal law.

The respondent answers that it is not a case of a law relating to Sabbath observance but merely a police measure necessary for the maintenance of good order and of the public peace. It cites in support of its defence the judgment pronounced by the Quebec Court of Review confirming that of the Superior Court in the case of *Tremblay* v. *Quebec*, 38 Que. S.C. 82. The judgment in question in that case was delivered in 1910.

The case of *Ouimet* v. *Bazin* had not then been decided by the Supreme Court (3 D.L.R. 593). In this case we had decided that the Quebec Act, 7 Edw. VII. ch. 42, called an Act for the Observance of the Sabbath, which forbids theatrical representations on Sunday, was a simple police measure and, as such, within the competence of the legislature. But the Supreme Court was of a different opinion. It decided that this Act was of the nature of a criminal Act, and consequently a matter for federal jurisdiction.

I am of opinion that we are bound by that judgment and should accept the doctrine which it lays down.

Fitzpatrick, C.J., says:—

The section in question is not a local, municipal or police regulation for the breach of which a pecuniary penalty is imposed, but legislation designed to promote public order, safety and morals.

In *Att'y-Gen'l for Ontario* v. *Hamilton Street R. Co.* [1903] A.C. 524, their Lordships (of the Privy Council) held the phrase "Criminal Law" in sec. 91 of the B.N.A. Act free from ambiguity and that, construed by its plain and ordinary meaning, it would include every such law as purports to deal with public wrongs, that is to say, offences against society rather than against private citizens. Apply this test to the section we are now considering, assuming a breach of the prohibition, what private right could possibly be affected and for what conceivable violation of the section would a private citizen have recourse? In what respect can it be said that attendance at a theatrical performance constitutes a civil injury against a private individual for which he has a remedy?

In the *Hamilton Street R.* case, their Lordships hold, impliedly at least, that Christianity is part of the common law of the realm, that the observance of the Sabbath is a religious duty; and that a law which forbids any interference with that observance, is, in its nature, criminal.

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Archambeault, C.J.

It is impossible for me to believe that the legislature intended, by the enactment in question, to "regulate civil rights." On the contrary, the evident object was to conserve public morality and to provide for the peace and order of the public on the Lord's Day.

If the Legislature of Quebec has not the right to pass an Act to forbid theatrical representations on Sunday no more can a municipal council possess the power to close on Sunday establishments that the by-law in question designates under the name of restaurants. In the one case, as in the other, it is a criminal matter according to this decision of the Supreme Court.

There is another ground for declaring illegal the by-law passed by the respondents. It is that we have federal legislation upon the question of Sabbath observance.

When the Act, which was declared *ultra vires* in the case of *Ouimet* v. *Bazin*, *supra*, was passed, the federal Act upon the observance of the Sabbath was not in force. The Quebec Act came into force on February 28, 1907, and the federal Act only on the following day, March 1, 1907. The Quebec Act could then be declared unconstitutional only because it was in the nature of an Act respecting criminal law. But in the case before us although the by-law attacked would not have in itself the character of a criminal ordinance, it would none the less be *ultra vires* because the federal Act concerning the Lord's Day has made the question of the observance of the Sabbath a criminal matter, and the by-law of the respondent is in consequence an improper intervention into a matter of federal jurisdiction. This point was decided, at least impliedly, by the Supreme Court in the case of *L'Association Ste. Jean-Baptiste de Montréal* v. *Brault*, 30 Can. S.C.R. 598, in 1900. The moment that a matter has become criminal in virtue of a federal Act the provincial legislatures have no longer power to legislate thereon.

The federal Lord's Day Act contains two provisions intended to respect the customs and laws in force in the provinces. Sec. 5 declares that the prohibitions in this Act do not exist as against provincial Acts then in force or that may be passed in the future; and sec. 14 adds that nothing in that Act shall be deemed to abrogate or in any manner restrict the provisions of any Act respecting Sabbath observance then in force in any province of Canada.

These provisions certainly have not the effect of permitting the provincial legislature to pass prohibitive Acts in the matter

of Sabbath observance. Their object is simply to delegate to provincial legislatures the power to declare that anything prohibited by the federal Act can be executed within the limits of the province. Davies and Anglin, JJ., interpret in this manner the provisions in question:—

My construction of the federal Act (dit le juge Davies) is that it was an attempt to enact generally prohibitive legislation with regard to the proper observance of Sunday or the Lord's Day for the whole of Canada. But that, recognizing the different circumstances, habits, customs, and religious beliefs which prevailed in the several provinces of the Dominion, parliament determined to delegate to each provincial legislature the power to declare that any act or thing prohibited by the Dominion Act might be exempted from the operation of such Act, and permitted to be done by provincial legislation existing at the time the Federal Act came into force or subsequently enacted.

ANGLIN, J.:—The Dominion Lord's Day act excepts from the operation of its prohibitive clauses everything which is, by provincial legislation, past or future, declared to be lawful. But there is not a word in the statute confirming or authorizing anything in the nature of prohibitive legislation past or future.

I would add that the clause interpreting the federal Act declares that the term "Provincial Act" signifies the charter of any municipality or any Act of public interest in any province whether passed before or after Confederation.

Then an Act of a provincial legislature or a municipal by-law can except anything from the operation of the federal Act concerning Sabbath observance, but cannot forbid or prohibit anything to be done on the Lord's Day.

The respondent claims that the by-law attacked is not a measure respecting Sabbath observance, but merely a police measure which has sanction only on Sunday because it is that day which produces the disorders which it wishes to suppress.

The parish of Ste. Prosper is situated near the American border. Its population is composed of lumbermen, and on Sunday, when all work is suspended, the young men seek to amuse themselves. They assemble in restaurants, and these assemblies occasionally produce uproar and sometimes even disputes and fights. The object of the by-law may be excellent but there exists, certainly, other means for suppressing these abuses than that adopted by the municipal council of the respondent. It has adopted illegal means, although the law authorizes others which would be entirely effective if employed. Whatever the motive for adopting the by-law for which the quashing is asked, whatever the

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circumstances which have brought it about, I can only see in this measure an ordinance relating to Sabbath observance. The federal parliament alone possesses the power to decree prohibitions in such matters. The by-law is then *ultra vires* and illegal.

For these reasons I am of opinion that the judgment of the court of first instance should be reversed and the action of the appellant maintained.

Pelletier, J.

PELLETIER, J.:—(dissenting) I do not think that the question of the federal Act respecting Sabbath observance is raised in this case.

The corporation of Ste. Prosper claims here a by-law respecting peace and good morals as well as of public order in the municipality; and if this by-law falls within the category of those of which it could be said that they regulate peace and public order the power of a municipality in the matter clearly exists and has always been recognized.

The only question, then, in my opinion, is whether or not this by-law is one of public order for the maintenance in the municipality of peace and order. If the by-law falls within this category the judgment submitted to us is sound; if not, it is not sound.

It is proved beyond any doubt that the restaurant kept by Rodrigue is a cause of disorder in the municipality. The municipality is situated on the border; lumbermen absent all the week come to Rodrigue's place for amusement on Sunday. Has a municipal council the right to regulate a matter of this kind? It seems to me that the power is inherent in the municipal organization itself.

Art. 509 M.C. authorizes the passing of any by-law for an object of a local nature, a state of things specially existing in the parish which would not be produced with the same result elsewhere, is, in my opinion, a matter purely local, which each council has the right to regulate for itself.

However, it is not entirely upon the foregoing that I form my opinion in the present case.

If the municipal council of Ste. Prosper has acted under legislation which specifically grants the right to close Rodrigue's restaurant, and if this legislation is not unconstitutional, the by-law submitted to us is valid. But we have also the Municipal

Code, art. 600, the constitutionality of which no one would think of questioning, and I have come to the conclusion that this article authorizes clearly and specifically what has been done. Here is the text of the article:—"To close the bars of taverns, inns, and all other places of public entertainment from 7 o'clock in the evening on Saturday until the Monday following at 4 in the morning."

Let us first examine the last part of this article; it confers the power of causing to be closed the bars in certain places of public entertainment from 7 o'clock on Saturday evening until the Monday following at 4 a.m. In prescribing, as the by-law in question does, that the closing shall be from midnight on Saturday until midnight on Sunday the respondent is then fairly within the limits of its powers in this regard.

All that remains is to ascertain whether or not Rodrigue's case concerns the bar of a tavern, inn or other place of public entertainment.

The appellant is a "restaurateur" and he keeps a "restaurant." There is no need for certain proof of this fact to go elsewhere than to the factum of the appellant himself. On the first page of his factum this is what he tells us: "The plaintiff is a restaurateur of the municipality in which the by-law has been put in force."

At the page following in his factum the appellant attempts to establish that it is a "restaurant" that he keeps, not an inn, a tavern or a place of public entertainment. According to him the restaurant is not a house of public entertainment, because the License Act defines a house of public entertainment as a place kept for the reception of travellers and of the public where on payment anyone may board and lodge; but the appellant recognizes that a definition made for the License Act merely to regulate the price of certain licenses, cannot be applied. Proceeding then to examine the general sense of these words, he tells us that his restaurant is not a place of public entertainment because it is not intended "to entertain the public, that is, to lodge them, feed them and even to clothe them for reward."

I do not see how the question of clothing presents itself from the point of view of the house of public entertainment. If this word is withdrawn we remain then, according to the appellant himself, with the condition of lodging and feeding for the house

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to be one of public entertainment. The whole question, then, in my opinion, resolves itself into this: Is a restaurant a place where one eats and where one can entertain the public?

If the thing can be demonstrated the appellant, who admits that he is a restaurateur and keeps a restaurant, falls clearly within the terms of art. 600.

What is the signification of the word "restaurant"? Larousse, the best dictionary to consult from the point of view of the French language, defines "restaurant" as follows: "A public establishment in which one eats."

We have not in this alone all that is necessary for arriving at a conclusion. There are large restaurants and small restaurants. On the boulevards in Paris there are grand restaurants where the most succulent food is served; in the Faubourgs and places less important there are small restaurants where one eats pastry at the bar, or drinks soft or alcoholic liquors as the case may be, but they are all restaurants. We would not need Larousse to tell us this because it is a public and well known fact.

But there is more: a restaurant is at the same time a tavern and an inn. How does the same Larousse define "inn?" He tells us that it is: "A house where, on payment, drink, board and lodging are supplied." The inn supplies the drink, and the tavern furnishes the lodging and food."

Then if the tavern bears this name because it especially sells drink and food, and if it is the word "hotel" that should be used when it is necessary to add the lodging to the drink and food, the inn is then the equivalent of the restaurant, and we have the word "inn" in art. 600.

We have there also the word "cabaret." What is a cabaret? It is, Larousse tells us, "A small inn where drinks are sold and food is supplied." Now the appellant, who admits that he is a restarauteur and keeps a restaurant sells for consumption on the premises biscuits, confectionery and drinks. He keeps, then, a cabaret, which is the absolute equivalent of restaurant.

After having determined that a cabaret is a place where drinks and food are sold, it is necessary to ascertain the meaning of the word "boisson" in order that we may not fall into the error, which is common, of assuming that the word "boisson" necessarily means "intoxicating liquor." Larousse also defines for us the

word "boisson," and that assists us in determining what is meant by speaking of the word "boisson" with the word "cabaret."

He defines "boisson" as follows: "Any liquid which can be drunk," and he afterwards makes a classification of four kinds of drinks, 1, water, 2, intoxicating liquors, 3, sweetened drinks (which we call here in our town "soft drinks"), 4, non-alcoholic liquors, that is, coffee, tea, cocoa, etc.

All these definitions taken together we recognize them clearly show that the tavern, inn and the restaurant are one and the same thing, and that therefore Rodrigue, the restaurateur, keeps as a restaurant what is at the same time an inn, a cabaret, and a place of public entertainment.

Art. 600 applies, then, in every respect as to Rodrigue, to the three cases that it deals with.

Moreover, I ask myself, to what other thing, if not to a restaurant, the words of art. 600, "any other place of public entertainment" could be applied.

It seems to me that it would be a misfortune not to aid the public authorities to maintain order and suppress causes of disorder. For what purpose can this restaurant of Rodrigue's be used if not to permit him to carry on business on a day when work is suspended to the detriment of public order for his personal gain? The restaurant that he keeps is not in the public interest, it is only for the consumption of food. And if he brings together so many people, and if they become there dangerous to public order, is it not perhaps perchance because that in the liquor "douce" there is mixed sometimes other things less soft? I do not know how that is, but I am surprised that the soft drinks produce so much effervescence.

The parish priest satisfies us that the mothers of families have for 5 or 6 years insisted that he endeavor to have the restaurants of Ste. Prosper closed. The mayor of the parish and councillor Dumas give evidence which leaves no doubt about the disorders which these restaurants cause; the young men play there for money and are very noisy at night which disturbs the public peace.

Can it be that a municipality has no longer the right to prevent disorders such as these within its limits because the federal parliament has passed an Act respecting Sabbath observance?

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But we have not before us an Act specially passed for the Sabbath. In fact, art. 600 of the M.C. does not apply merely to Sunday, but covers at the same time all of Saturday evening from 7 o'clock until midnight. This article has not then, for its object, to compel the repose of Sunday to be respected; it is specially passed for the period of time during which workmen, lumbermen, and young men returning from their work at the end of the week and may disturb the public peace.

I am of opinion that even under the text of the M.C., municipal councils may cause to be closed every evening of the week restaurants which would be centres of disorder.

The case of *Ouimet* v. *Bazin*, 3 D.L.R. 593, in which the majority of the Supreme Court reversed a judgment of this court has been cited to us. In my humble opinion that case does not apply at all to the case before us. The provincial legislature had passed an Act by which it claimed to regulate in a special manner the observation of the Sabbath, and the Supreme Court came to the conclusion that this Act was *ultra vires* and that the observation of the Sabbath was a matter within the exclusive domain of the federal parliament. In that case of *Ouimet* v. *Bazin*, the very title of the statute in question—and the Chief Justice of the Supreme Court insists strongly on this point—clearly indicates that it was passed to regulate Sabbath observance; it reads as follows: "A law concerning the observance of Sunday."

It was not at all the same in the present case; if it had been on Thursday that the people of Ste. Prosper who go to the woods returned to the village, I believe that the municipal council could have prevented the restaurant keeper from allowing them to assemble there and be disorderly on Friday.

I have examined with care all the jurisprudence applicable to the matter, and I have come to the conclusion that there is not a single judgment in which the complete autonomy of municipal councils in local municipal matters, or police regulation, has not been recognized. Even in this case of *Ouimet* v. *Bazin*, Fitzpatrick, C.J., found *ultra vires* the statute in question in that case because it was not only "a local municipal or police regulation."

In the case of *Hodge* v. *The Queen*, Sir Barnes Peacock, 9 App. Cas. 117, at 131, speaking for the Privy Council, says that:

> Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in

the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such are calculated to preserve in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct.

In the case of *Poulin* v. *Quebec*, 9 Can. S.C.R. 185, Ritchie, C.J., of the Supreme Court, laid down the same principle precisely.

In the case of *Montreal* v. *Gauvin*, 11 Que. P.R. 325, the Supreme Court decided that the closing of shops at certain hours was a police measure.

Upon the whole I am of the opinion that the municipality of Ste Prosper has passed a police measure in the public interest, and that we should aid in protecting public order in that municipality. I would confirm the judgment.

JUDGMENT:—Seeing that the appellant demands the quashing of a municipal by-law adopted by the respondent corporation in the summer of 1916; Judgment.

Considering that this by-law has for its object to legislate upon the observance of the Sabbath and that the respondent has no jurisdiction to do so;

Considering that there is error in the judgment of the Superior Court rendered on December 16 last dismissing the appellant's action;

Maintains the appeal, reverses the said judgment and proceeding to render the judgment which should have been rendered by the Superior Court, quashes and annuls the said by-law so adopted by the respondent corporation without jurisdiction, the whole with costs against the respondent as well in the Superior Court as in appeal.

CARROLL and PELLETIER, JJ., dissenting. *Appeal allowed.* Carroll, J. Pelletier, J.

Re WATSON AND MONAHAN.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. April 13, 1917.

1. MINES AND MINERALS (§ I B—10)—RELIEF AGAINST FORFEITURE—GOOD CAUSE.
Under the Ontario Mining Act (R.S.O. 1914, ch. 32, sec. 85), the Mining Commissioner has no power to relieve against the forfeiture of a mining claim for non-compliance with the requirements of the Act, unless some good cause is shewn for the omission.

2. APPEAL (§ I A—1)—FROM AN ORDER OF MINING COMMISSIONER.
An order of the Mining Commissioner under sec. 85 of the Ontario Mining Act (R.S.O. 1914 ch. 32) is appealable to a Divisional Court of the Appellate Division.

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Statement.

APPEAL by Walter Monahan from an order of the Mining Commissioner.

J. Craig Watson, the respondent, staked out and recorded two mining claims in a surveyed township. He did the first 30 days' work as required by the Mining Act of Ontario, R.S.O. 1914, ch. 32, but failed to do the 60 days' work required to be done at a later stage. Thereupon the appellant, Walter Monahan (making, it was said, a new discovery), restaked the claims. The respondent applied to the Mining Commissioner for reinstatement, under sec. 85 of the Act; the Commissioner granted the request; and the appeal was from the order of the Commissioner allowing reinstatement accordingly.

A. G. Slaght, for appellant.

R. S. Robertson, for Watson, the respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—If the rights and interests of the parties to this appeal only should be affected by our judgment in it, and if the power of the Mining Commissioner in such a matter were unlimited, there should be no hesitation in dismissing the appeal, the respondent being the first discoverer of "valuable mineral in place" on the land in question, and one who never had any intention of abandoning his rights as such, nor of evading his duties in acquiring title to the land, but who merely let the time slip by in which some of them should be performed, and is now willing and ready to make good his default: whilst the appellant is described by the Commissioner as a "vulture" hovering about mining centres seeking for opportunity to acquire such rights upon the default of the first discoverer even though inadvertently or through inability to perform his duties, a default which is noted in the mining records of the district and so made plain to the hoverer.

But other and much wider and more important considerations intervene: nothing should be done contrary to the policy and purposes of the Legislature intended to be given effect to in its mining legislation: and no one concerned in carrying out the provisions of such legislation should be permitted to exceed the power conferred upon him by it. The question is not whether "natural justice" has been accorded to these two parties: it is, what are the powers of the Commissioner in all such cases, and how should they be exercised in all cases: and, having regard to the answers

to those two general questions, how this case, upon its particular facts, should be dealt with?

The application to the Commissioner was made by the respondent for relief from a forfeiture or loss of his rights through such default as I have mentioned; and was based upon sec. 85 of the Mining Act of Ontario, that section being in these words: "85.—(1) Where compliance with any of the requirements of section 84 has been prevented by pending proceedings, or incapacity from illness of the holder, or other good cause shewn, the Commissioner within three months after default may, upon such terms as he may deem just, make an order relieving the person in default from the forfeiture or loss of rights, and upon compliance with the terms, if any, so imposed, the interest or rights forfeited or lost shall revest in the person so relieved, but as a term of such order in the case mentioned in clause (*a*) of sub-section 1 of section 84 the holder of the claim shall obtain a special renewal license, which shall be so marked and which shall be issued only on payment of twice the prescribed license fee, and in the case mentioned in clause (*d*) of the said sub-section the holder shall file a proper report and pay therewith a special fee of $25. (2) The Recorder, upon any forfeiture or abandonment of or loss of rights in a mining claim, shall forthwith enter a note thereof, with the date of entry, upon the record of the claim and mark the record of the claim 'Cancelled,' and shall forthwith post up in his office a notice of cancellation."

The order in appeal, relieving the respondent, was made under the provisions of this section; and this appeal is against that order.

Three questions are raised—they indeed raise themselves—upon this appeal: (1) whether an appeal lies to this Court in such a case as this; (2) whether the Commissioner had power to make the order appealed against, that is, whether the facts of the case bring it within the provisions of sec. 85; and (3) whether, on the merits of the case, if it be one within the section, the order should have been made. But it will be more convenient to consider question (2) first.

The material facts mainly affecting the case are: that the respondent, who was a licensee, under the provisions of the Act, had been duly recorded as a discoverer of "valuable mineral in place" in the land in question, and had apparently done all things

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necessary to perfect his claim until the expiration of three months next following the recording of it; but had done nothing after that up to the time when the Mining Recorder noted his rights as cancelled, on the 29th December, 1916; when he recorded the claim of the appellant as one by a new discoverer.

Section 83 of the Act is in these words: "Non-compliance by the licensee with any requirement of this Act as to the time and manner of the staking out and recording of a mining claim or with a direction of the Recorder in regard thereto, within the time limited therefor, shall be deemed to be an abandonment, and the claim shall, without any declaration entry or act on the part of the Crown or by any officer, unless otherwise ordered by the Commissioner, be forthwith open to prospecting and staking out."

The respondent's application was for relief, under sec. 85, from the effect of sec. 83 upon his claim; and for that only; and for that purpose it must be taken that he had made default and was to be treated as if he had abandoned it: and, that being so, he could rightly be given relief only if compliance with the requirement of the Act in respect of which he was in default, had been "prevented by pending proceedings, or incapacity from illness of the holder, or other good cause shewn:" words all of which cannot be given any good grammatical construction, but none the less words which must be given their real meaning if it can be ascertained from them and the context.

"Prevented by other good cause shewn" is not an intelligible expression literally; but if read, as it seems to me the section may and should be, as meaning "prevented by, &c., or for other good cause shewn," any doubt or difficulty is at once expelled. The words "or other good cause shewn" seem to me to have been inserted after the section had been drafted; and, as occasionally occurs, were awkwardly inserted. Section 80 (1) gives colour to this suggestion. Under it, the time for doing the work in respect of which the respondent must be taken, for the purpose of this case, to have been in default, may be extended by the Recorder in case of "pending proceedings or of the death or incapacity from illness of the holder of a mining claim." The words "other good cause" have not been added here. There does not seem to be any especial reason for confining the relief to cases of illness or pending proceedings; or any for excluding any other good reason for failure

to comply with the requirement of the Act; though such reason ought to be of a preventing character. And so, if any good reason for giving the relief which the order in appeal affords, were proved, the order ought to be sustained here, the appellant's conduct, upon his own shewing, being such as to deserve no better, if not worse, estimation of it than that given to it by the Commissioner.

But I am unable to find in any of the circumstances of the case any good cause for relieving the respondent. He simply neglected to comply with the requirements of the Act, which he had read, and was as capable as most of us of understanding.

The purpose of the legislation was to encourage the discovery of valuable minerals and the development of mines and mining in this Province; and for that purpose somewhat stringent provisions as to development and working of mining claims are necessary; and those provisions are not to be lightly regarded, and certainly not to be treated as if of no consequence, even where no claim has arisen.

There is, of course, the difficulty, and the disadvantage, which arises from the encouragement to those who were spoken of by counsel for the appellant as well as by the Commissioner as "vultures;" but that, if unavoidable, is not enough to displace the main purpose of the Act, a quick development of hidden mineral wealth of the Province: and it is avoidable to some extent, for, when an applicant brings himself within the provisions of sec. 85, relief may well be given against such a new discoverer, which would not be given against one acting in good faith, and not on searches of the records for the purpose of pouncing on the claims of the neglectful, or knowledge acquired in transactions with, or otherwise from, the first discoverer.

There being, then, no ground proved which could entitle the respondent to the relief he sought, this appeal must be allowed, if this Court has power to entertain it; and that it has seems to me to be plain.

The power conferred upon the Commissioner by sec. 85 is of a judicial character: the power to make good a claim which this legislation has said is to be deemed to have been abandoned; and to make bad a subsequent claim which, for the purposes of this application, was treated as a good claim under the provisions of the Act; though I feel bound to add that I can perceive no good

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reason why the Commissioner might not have dealt with the question of the validity, as well as the character otherwise, of the appellant's claim, not with a view to determine whether it was a valid one, but with a view to determine whether it afforded good ground for refusing relief to the applicant even if he had otherwise shewn good cause. In a case of equal equities it is not usual to interfere; though it may be that seldom the new discoverer is really a new discoverer unaided by the work of the earlier discoverer.

No good reason has been suggested why there should not be an appeal in such a case as this, whatever might have been said if conflicting rights were not, and could not be, involved upon such an application. It is not suggested that, if the question to be determined were whether the appellant's claim is a valid one, an appeal would not lie against a decision that it is not; yet on such an application as this he can be deprived of all his rights incidental to the restoration of the applicant to his, and so deprived without any compensation.

Then when the Legislature has intended that a decision of the Commissioner shall be final, it has, in one case at all events, plainly said so: see sec. 78 (1) (*b*); and the right to appeal generally is given in these wide words: "Where not herein otherwise provided, an appeal shall lie to a Divisional Court from every decision of the Commissioner, including an order dismissing a matter or proceeding under the provisions of section 141:" see sec. 151. The "decision" which may not be appealed against by reason of sec. 78 (1) (*b*) is one relating to the performance of "working conditions" under the Act; if such a ruling be called a "decision" in that section, it is difficult to perceive why a ruling under sec. 85 should not be considered a "decision" under sec. 151, and so expressly appealable.

And, besides all this, sec. 154 prohibits *certiorari*, injunction, mandamus, and prohibition, plainly shewing that the right to appeal to this Court was intended to afford protection in all cases against the errors of the Commissioner.

These conclusions being reached, the third question which I mentioned, as to the merits of the application, falls to the ground: the appellant succeeds on the ground of the want of power in the Commissioner to make any order giving relief under sec. 85: but

this conclusion does not leave the respondent remediless, if he should have relief. Under sec. 86, the Lieutenant-Governor in Council has power, a fact which adds weight to the conclusion that the Commissioner has not. Nor is the validity or invalidity of the appellant's claim to the land in any way affected. The appeal should be allowed; and the order of the Commissioner should be set aside: the general rule as to costs here should also prevail.

RIDDELL, J.:—Mr. Craig Watson, a mining engineer, graduate of a respectable American University, who had had for some years considerable experience in buying and selling mines in our mining regions, staked out a certain claim in a surveyed township. He performed the first year's work as required by the Act, but failed to perform the second year's. Thereupon Monahan (making, it is said, a new discovery) restaked the claim: Watson applied to Mr. Godson, the Mining Commissioner, for reinstatement, under sec. 85 of the Act; the Commissioner granted the request; and Monahan now appeals.

There are only two points which I think it necessary to consider.

1. It is said by the respondent that the exercise by the Mining Commissioner of the power given by sec. 85 is not the subject of an appeal under sec. 151.

I do not think that this objection can be sustained. Section 151 gives an appeal against any decision of the Commissioner—the Commissioner was called upon to exercise not an arbitrary but a judicial discretion on the application before him, and his determination was a "decision." It never could have been the intention of the Legislature to give any officer the power of arbitrarily, and according to his own whim, giving to one person and taking away from another rights which might be of great value.

2. It is argued for the appellant that the Commissioner had no power, in the circumstances of this case, to grant the application of the respondent.

It will be seen that the Commissioner has power only when compliance with the statute is prevented: (1) by pending proceedings; or (2) by incapacity from illness of the holder; or (3) by other good cause shewn. Nothing of the kind appears here: the holder was not prevented from doing the work at all; on his own story, he misunderstood the Act; and, while he did not intend to

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let his claim go, he did not intend or try to do the necessary second year's work at the proper time.

As Watson was not prevented from doing the work, the jurisdiction of the Commissioner did not attach.

There is of course nothing to prevent the respondent from applying to the Lieutenant-Governor under sec. 86, when all the facts can be taken into consideration: nor is there anything to prevent his asserting that his understanding of the Act is the true construction and so disputing the validity of Monahan's claim. All we do is to set aside the order of the Commissioner, with costs here and below.

Lennox, J.

LENNOX, J.:—I agree that appeal should be allowed.

Rose, J.

ROSE, J.:—J. Craig Watson, the respondent upon this appeal, staked out and recorded two mining claims. He did the first 30 days' work. As the Commissioner finds, he had no intention of abandoning the claims, but he neglected to perform the 60 days' work that ought to have been performed during the first year following the expiration of the 3 months immediately following the recording (sec. 78 (1) (*b*)); and under sec. 84 his interest ceased and the claims became open for prospecting and staking out. Shortly after the claims had become open, the appellant, Walter Monahan, searched in the Recorder's office, found that the claims were open, and proceeded to restake and to record his applications.

Upon an application to the Mining Commissioner, upon behalf of Watson, for relief under sec. 85 of the Mining Act, it appeared that Watson's failure to do the work was probably due to a misapprehension on his part as to the time within which the work had to be performed. He had either forgotten the precise effect of sec. 78 (1) (*b*), or had carelessly misread that section, and had formed the impression that the period from the 16th November to the 15th April was excluded from the computation of the time.

The Commissioner made an order relieving Watson from the forfeiture or loss of rights; and this appeal is from that order.

Mr. Robertson objected that no appeal lay. Judgment upon the objection was reserved, and the argument of the appeal proceeded subject to the objection. It seems to me that the order in question is a "decision" within the meaning of sec. 151, and that an appeal lies. I would, therefore, overrule the objection.

The Commissioner heard the evidence of both parties, investigated the conduct of each in connection with the matter, and in a considered judgment stated his reasons for thinking that, in the exercise of his discretion, he ought to "find that the applicant has shewn good cause for relief from forfeiture." The Commissioner has had great experience in the administration of the mining law, is very familiar with the practice of miners, and is peculiarly well qualified to say when relief ought to be granted against a forfeiture. If, then, I thought that this was a matter within the discretion of the Commissioner, I should be very loath to interfere, even if there was a right to appeal from such a discretionary order. However, I do not think that he had jurisdiction in the particular case. Section 85 gives jurisdiction to the Commissioner to relieve against forfeiture "where compliance with any of the requirements mentioned in section 84 has been prevented by pending proceedings, or incapacity from illness of the holder, *or other good cause shewn*." The section is not too clearly worded. It may be that it was intended to confer upon the Commissioner the power, which he treats himself as possessing, to relieve against a forfeiture, if he thinks there is good cause for so doing, and if the application is made within the three months mentioned in the section; but the section cannot be construed as conferring this power unless some words that are not there are read into it, and I feel bound to read the words "*other good cause shewn*" as controlled by the word "prevented," and to hold that no jurisdiction is conferred upon the Commissioner unless the license-holder has been *prevented* by good cause shewn.

The meaning of the word *prevented* has been considered in many cases. Perhaps the most helpful of them is *Burr* v. *Williams* (1859), 20 Ark. 171, at pp. 185 and 186; but in no case that I have seen was the context similar to that in the section that we have to construe; and there is, therefore, little assistance to be had from the decisions.

Taking, then, the words of the section as it stands, with such little assistance as is to be had from the decisions, I do not think that Watson was *prevented* from doing the sixty days' work within the time limited by the statute. He could have done it at any time if he had chosen to do so. He seems to have thought that he knew of reasons why he need not do it; but that does not seem to

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be the same thing as being *prevented*. Therefore, I think the Commissioner had no jurisdiction under sec. 85, and that the only jurisdiction is that conferred by sec. 86 upon the Lieutenant-Governor in Council, upon the recommendation of the Minister and the report of the Commissioner.

For these reasons I would allow the appeal with costs.

Appeal allowed.

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JARDINE v. PRESCOTT LUMBER Co. Ltd.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. March 16, 1917.

BROKERS (§ II B—14)— COMMISSIONS — QUANTUM MERUIT — PROCURING CAUSE.

Where land is sold through the instrumentality of a broker, to a purchaser procured by him, for a less sum than that for which he was employed to sell, the broker is entitled to his commissions, or to a *quantum meruit* equal to the amount of commissions.

[See annotation 4 D.L.R. 531.]

Statement.

APPEAL from the judgment of McKeown, C.J.K.B., in favour of plaintiff, in an action for commissions for the sale of defendant's real estate. Affirmed.

H. A. Powell, K.C., for plaintiff.

M. G. Teed, K.C., for defendant.

McLeod, C.J.

MCLEOD, C.J.:—This action is brought for the recovery of a commission that is claimed by the plaintiffs for procuring or causing the sale of the defendant company's property. The defendant company owned a property situate in Restigouche county, known as the Benjamin River property, and about 1912 or 1913, it entered into an arrangement with the plaintiff Clinch to make a sale of it for the company. Subsequently the plaintiff Jardine joined Clinch in the matter, and the defendant company then dealt with both of them.

The defendant company in the first place claimed that the plaintiffs were not the cause of the sale, and did not introduce the purchaser to it. The evidence on that question differed. It is, however, a question of fact, and was left to the jury. The jury found that the plaintiffs did introduce the purchaser to the defendant company, and thereby brought about the sale. This court is bound by that finding of fact, so that we must assume that the purchaser was introduced by the plaintiffs to the defendant company and the sale was thus brought about. The question

then is—are the plaintiffs entitled to any commission, and if so, what commission?

From the view I take of the case this depends on the construction to be put on certain letters that passed between the plaintiffs and the defendant company in the latter part of 1915, and the early part of 1916, which letters have already been referred to by my learned brothers.

It appears that a year or two prior to the writing of the first of these letters, the plaintiffs had been endeavouring to effect a sale of the defendant company's property. The price was fixed at $110,000, and the commission was to be ten per cent. of that amount. Various changes were subsequently made in the price of the property, but in December of 1915, it was reduced to $75,000. The evidence does not clearly disclose just when this price was fixed, but on December 6, 1915, Clinch wrote Myles, the agent of the defendant company, the following letter:—

Dear Mr. Myles,—I had a conversation with my friend to-day who will probably handle the sale of the Prescott property for us. While Mr. Jardine and I are perfectly satisfied with your verbal assurance as to the price, when dealing with outside parties they want it confirmed by writing. Would you be kind enough to write me stating the price $75,000. If you can give us a commission of 10% off this, please state it in your letter.

That letter would seem to imply that the plaintiffs at that time were not assured that they could get 10% commission if they did sell for $75,000, because they expressly say: "If you can give us a commission of 10% off this, please state it in your letter."

To that Myles replied on December 7, as follows:—

D. C. Clinch:

Dear Sir,—Your favour of the sixth instant to hand, regarding price for our property. We will accept $75,000 for same. Your commission must be a consideration above that amount. R. L. Myles, for the Prescott Lumber Co., Ltd.

Taking these two letters together, it would seem that if the plaintiffs arranged a sale of the property for $75,000 and no more they would not be entitled to a commission, but they would have as a commission any amount the property was sold by them for above $75,000. The plaintiffs, however, continued their endeavours to obtain a purchaser, and on February 9, 1916, having interested some one in the property, Clinch wrote the following letter to Myles:—

Dear Sir,—I am in communication with parties who are interested in your property, one of whom resides in this province and is willing to cruise the property as soon as snowshoeing is good.

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Your lowest price to me is $75,000 without commission.

The parties are close buyers, and in the event of the cruise being satisfactory they will probably make an offer. In this event I want to be assured of my commission in case I may have to turn them over to you.

Please reply at your earliest convenience.

That letter may mean two things, or possibly one of two things. It may mean that the plaintiffs desire to know what commission they are to get if they sell for $75,000. I think it is evident that the plaintiffs expected a commission. It may also mean that the plaintiffs wished to know whether they would be entitled to a commission if they were unable to close the bargain themselves with the purchaser, and were obliged to turn him over to the defendant company in order that the bargain might be closed.

To that letter Myles replied on February 12, as follows:—

Dear Sir,—Your favour of the ninth instant to hand. In regard to your commission I will have to consult Mr. George D. Prescott before giving you a definite answer on this. Have already written him about it, and will advise you on reply.

I think we must assume from that letter that Myles did communicate with Prescott, but no answer was made to Clinch.

These two letters, taken together, in my opinion mean that the plaintiffs were to be paid a commission if they effected a sale, or procured a purchaser of the property. Myles in his reply to Clinch's letter of February 9, did not deny that the plaintiffs would be entitled to a commission if they completed a sale for $75,000, or if they procured a purchaser and turned him over to the defendant company to close the sale; and the fact that the defendant company so closed the sale for less than $75,000 would not deprive the plaintiffs of their commission. The words in the letter: "In regard to your commission I will have to consult Mr. George D. Prescott," would convey to the plaintiffs that he was simply consulting Prescott as to the amount of the commission that they would be entitled to if they sold for $75,000, or if the sale had to be finally closed by the defendant company. The plaintiffs, as found by the jury, found a purchaser, and being unable to close with him turned him over to the defendant company, and the defendant company entered into a sale for $65,000.

It must be taken that the plaintiffs were the agents of the defendant company, to sell the property or procure a purchaser for it. It is evident that the plaintiffs expected a commission on the sale, and the defendant company knew they expected a commis-

sion on the sale. The purchaser was turned over to the defendant company, as Clinch suggested might be the case in his letter of February 9, and the defendant company thereby made the sale of the property. Having accepted the results of the plaintiffs' labour, it seems to me it is not open to the defendant company to deny that they are entitled to a commission on the sale. The question is what that commission should be under the arrangement existing between the parties at the time of the sale. In my opinion they are entitled to recover on a *quantum meruit* for their services thus rendered to the defendant company. The verdict, as found, appears to be 10% of the purchase price.

From the view I take of the case, there was no contract in force, by which the defendant company undertook to pay 10% but the plaintiffs were entitled to be paid for the services rendered and accepted by defendant company. The jury on rendering their verdict might, if they chose, assess that amount as the damages.

The judge appears to have charged the jury fully and fairly and the verdict has been found for that amount. My learned brethren think it is not too much, and that it is justified under the evidence. I therefore agree that the appeal should be dismissed.

The appeal, therefore, will be dismissed with costs.

WHITE, J.:—The pivotal question in this case is, whether, at the time the defendant sold the property, the plaintiffs were acting as agents for its sale under a general employment by the defendant. Although it is claimed by the defendant that the plaintiffs were not, through their negotiations with Culligan, the *causa causans* of the sale, the jury have found against that contention, and I think the evidence warrants such finding.

The defendant contends that its letter to the plaintiffs of December 7, 1915, or, at most, that letter and the plaintiff's letter of December 6, 1915, to which it was a reply, together with the plaintiff's letter of February 9, 1916, and the defendant's reply of February 12, 1916, must be taken as containing exclusively the terms under which the plaintiffs were authorized to sell at the time Culligan bought; and that these terms shew a limited, and not a general, employment within the meaning of the distinction between a general and limited employment drawn by Lord Watson in *Toulmin* v. *Millar* (1888), 58 L.T. 96. The plaintiffs, on the

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other hand, claim that these letters must be construed in connection with the contract of agency which they allege was in existence between the parties down to the time the first of these letters was written. They claim that when they wrote the letter of December 6, 1915, they were, and had for some time been, employed by the defendant under a general authority to sell the property in question; that the price originally asked by the defendant, and at which the plaintiffs had been trying to sell, was too high to attract a purchaser; and that in this letter of December 6, 1915, they were asking to have from the defendant authority in writing to offer the property at the lower price therein named.

Under the interpretation of these letters which we are asked by the defendant to place upon them, it would follow that the agreement arrived at between the parties was such, that the defendant could sell for any sum, not exceeding $75,000, to any purchaser sent to it by the plaintiffs, provided only such sum was the best price it could obtain, without its being required to pay any remuneration to the plaintiffs for the latter's services in obtaining such purchaser. It would require language to that effect, much more clearly defined and unambiguous, than is to be found in these letters, to lead me to conclude that the plaintiffs had, by this correspondence, assented to any such qualification of their original contract.

But, even assuming I am in error in thinking that the plaintiffs are entitled to retain their verdict for the reasons stated, and accepting the defendant's contention that there were really three distinct agreements, each covering a separate portion of the time during which the plaintiffs were endeavouring to effect a sale, I would still think the verdict must stand. If we were to look only at the last four letters which passed between the parties, and to regard these, as the defendant asks us to do, as exclusively embodying the contract existing when the sale to Culligan was made, we would find that the defendant agreed with the plaintiffs to sell to any purchaser procured by the plaintiffs who would pay a price netting the defendant $75,000. No time limit is fixed, within which the plaintiffs are to procure such purchaser, other than such reasonable time as is to be implied by law; and there is no reservation of power to the defendant to make sale itself during the pendency of the plaintiff's employment. Although the jury

were not expressly asked to find, and have not expressly found, that the sale to Culligan was made before a reasonable time had been allowed the plaintiffs in which to find a purchaser under the terms of the four letters last mentioned, there can be no reasonable doubt that the defendant, in selling when it did, failed to afford the plaintiffs such reasonable time as it undertook by these letters to allow. This, I think, is manifest when we regard the nature of the property to be sold, and the time necessary to permit a prospective purchaser to cruise the same. The plaintiffs, therefore, would be entitled to recover for their services upon a *quantum meruit*. The jury have found that the fair and reasonable value of the services performed by the plaintiffs for the defendant was $6,500. But it is claimed by the defendant, that, in so finding, the jury took into consideration the services performed by the plaintiffs, prior to the first of the four letters last referred to, and, therefore, allowed for services rendered under the prior agreements which had been terminated. It is not by any means clear that the jury did this. They would seem to have based their finding on the *quantum meruit* upon the 10% originally fixed by the parties themselves as a fair allowance for finding a purchaser. In the case of *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A.C. 614, the Privy Council approve of the action of the master in basing his finding as to the value of the services rendered by the plaintiff in that case, upon the commission he was to have received, had the original contract been carried out. In a case such as is this, where the plaintiffs have supplied a purchaser, they have performed the service contemplated by the parties, and the value of that service is the same whatever the amount of labour—whether it be much or little—expended by the plaintiffs in securing such purchaser. But assuming that the jury, in making their finding as to the value of the services rendered, did take into consideration the work done by the plaintiffs prior to December 6, 1915, I think they were justified in so doing as long as their finding is not in excess of the 10% originally stipulated for. For, even if we accept the defendant's contention as to there having been three successive agreements, it is clear that each of the first two such agreements were abrogated in consideration of the one which took its place. When, therefore, the defendant by its act of selling to Culligan, placed it beyond the plaintiffs' power to carry out the contract as it finally

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stood, the plaintiffs became entitled to sue, either for damages sustained through such breach, or upon a *quantum meruit* for all the services they had rendered in connection with the sale.

In addition to the contentions to which I have referred the defendant objects that there was misdirection by the trial judge in several particulars. If I am right in the view I have expressed as to the effect of the contract between the parties, all of these objections to the charge, save one, must fail, since, with one exception, they are based on the construction of the contract urged by the defendant. The one objection which is not so based is that indicated by the letters (*c*) and (*d*), in the defendant's factum; namely, that the judge erred in telling the jury that if they believed Shaw's version of the conversation there was sufficient evidence in that, if it produced that impression on their minds, to justify a reasonable man in drawing the conclusion that he was the effective cause of the sale; while, in the same connection, the judge told the jury that if they were convinced Culligan had given the correct version of what took place then there was not sufficient evidence. The defendant contends that this was shifting the onus upon the defendant of convincing the jury. But when we read all that the judge said to the jury in this connection, I do not think his charge is fairly open to the criticism made upon it by the defendant. The judge, in charging upon this point, said to the jury: "On the other hand, if you agree that Mr. Culligan has given the correct version of what took place then I say to you at once there is no evidence. I say to you, if you credit Mr. Shaw's version of what took place in that conversation, there is evidence." Taking together all that the judge said upon this matter, it was made by him quite clear to the jury, that if they believed Culligan then there was no evidence, while if they believed Shaw, there was evidence from which they might reasonably find that Shaw had been the effective cause of the sale.

There remains to be considered the defendant's contention that the plaintiffs' letter to defendant of March 8, 1916, was improperly admitted. The defendant claims that this letter is "a mere statement of the plaintiffs' case and claim, written after the event and falls within the principle laid down in *Gilbert* v. *Campbell*, 12 N.B.R. 474. One has but to read this letter and see how wide is the distinction between it and the letter held to have been wrongly admitted in *Gilbert* v. *Campbell*. It reads as follows:

Geo. D. Prescott, Esq., March 8, 1916.

Dear Sir,—I am glad to know that a sale of your property has been completed, and understand from Mr. Myles that the price was $75,000.

I beg to advise you that the sale was made through the efforts and representations of Mr. C. F. Shaw, acting for us. I had sent him the papers and full description of the property, and he has been working on it since early last summer with one or two people, including Mr. Culligan.

According to promise made by you in December, 1914, I, of course, expect you to pay me a commission on the sale. An early reply will much oblige.

If we exclude the closing paragraph of this letter, it amounts simply to a notice to the defendant that the sale was brought about throught the agency of Shaw, acting for the plaintiffs, and, to my mind, is proper evidence. Certainly its admission could work no such injustice to the defendant as would require a new trial. As to the concluding paragraph of the letter, the only ground upon which it could be reasonably argued to have been inadmissible is, that the reference therein to the "promise made by you in December, 1914," is designed to establish the plaintiffs' case. But the terms of such alleged promise are not set forth in the letter, and the other evidence alone shews what the terms of such promise were. I do not think the letter can be treated as one intended to make, or as one which did make, evidence for the plaintiffs.

For the reasons stated I think the verdict must stand.

I should perhaps add that I have not discussed the numerous cases cited, on the one side and on the other, nor other authorities which have fallen under my notice, because I think the remarks of Earl Loreburn in *Hampton* v. *Glamorgan County Council*, [1917] A.C. 13, at 18, are peculiarly applicable to a case of this character, where there can be no reasonable question as to the law, and such difficulty as there is arises wholly from the attempt to apply the law to the facts.

The defendant should pay the costs of this application.

Grimmer, J.

GRIMMER, J.:—There is no doubt that where an agent is engaged to sell land with a stipulation that the sale was to net the owners a certain price, and the agent's commission was to be a sum above the net price, the employment is a special and limited one, and the sale must be made above the stipulated net price in order to entitle the agent to a commission, or in other words that when the agent has a special employment as distinguished from a general employment he is entitled to commission only when he brings himself within the terms of the special engagement. In

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Toulmin v. *Millar*, 58 L.T. 96, 12 App. Cas. 746, Lord Watson states the principle governing cases of this kind. In *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A.C. 614, it is held that if an agent is employed to sell a property and if the same is eventually sold to a purchaser introduced by him, he would be entitled to a commission at the stipulated rate, although the price paid should be less than or different from the price named to him as a limit. In my view of the evidence and the findings of the jury in this case, these authorities are directly applicable to the events of this case, for it appears that about the time the letters referred to were written, Shaw, the plaintiffs' agent, approached one Arthur Culligan and offered him the property at $75,000, and while it seems he raised some objection to the price, Culligan, said it would be a good buy at $50,000 to $55,000, and Shaw swears Culligan agreed to cruise the property. This was the introduction of the purchaser to the owner of the property. Nothing further, however, was done by the plaintiffs or Shaw in the matter of sale; and shortly after the plaintiffs learned that Culligan had become the owner of the property at $65,000, having treated directly with the company in the purchase. There is a marked difference in the evidence of Shaw and Culligan as to what passed between them, and more particularly in that Shaw states that in their first conversation, Culligan said he did not know the land was for sale, whereas Culligan states he knew the property was for sale some time before he began negotiations for it, and as early as the summer of 1915, and that during that summer and autumn he gathered all the information he could about it. In addition Culligan swears he introduced the subject of the property being for sale to Shaw, who said he had not heard anything about it. In this respect the evidence of these parties is squarely contradictory, though it must be said that Shaw was able to and did testify to the financial arrangements which were made by Culligan prior to his purchase of the land, and which he, Culligan, carried out just as Shaw said he told him he intended to do, and the jury has found Shaw introduced the purchaser to the owner.

The judge left several questions to the jury, who found that the plaintiffs were employed by the defendants as agents to sell their property and that they were to be paid 10% on the purchase money of the sale on the price approved by the defendants; that

the sale of the property to Culligan was brought about by what took place between Shaw as plaintiffs' agent and Culligan; and that the agreement for a commission of 10% to the plaintiffs on the sale applied to this case. Also that the fair and reasonable value of the services performed by the plaintiffs as agent for the defendants was $6,500.

Upon these findings the judge directed a verdict to be entered for the plaintiffs for the said sum of $6,500. To my mind there is little involved in this case save questions of fact which have been passed upon and found by the jury. A question might fairly have arisen as to whether or not the plaintiffs were entitled to a commission of 10%, or whether there should have been a direct special finding on the *quantum meruit*. This, I think, however, has been avoided so far as this appeal is concerned by the sixth question which was left to the jury, viz.: "What is the fair and reasonable value of the services performed by the plaintiffs as agent of the defendants?" Without this question a new trial might have been ordered for the assessment of damages, but that necessity does not now exist. All the evidence has been given that could be furnished if a new trial was ordered and the jury had a full opportunity of hearing and considering the same. They no doubt were impressed with the fact that the plaintiffs, as agents of the defendants, had done as much work in bringing about the sale at $65,000 as if $100,000 had been realized, and that because the defendants had gone behind their backs, and made the sale to the man they had found, and had not even informed them of the sale, but had left them to get the information from outside sources and as best they could, it was no reason why the plaintiffs should be deprived of their just rights under their contract for the sale of the property, or the rate of commission reduced. There is no doubt under the evidence the plaintiffs devoted their energies and spent their money in their *bonâ fide* efforts to find a purchaser for the property, and the jury having found that it was due solely to those efforts that the sale was eventually made, and the purchaser found, I am not prepared to say the finding was unreasonable, or that there was no evidence to warrant or support it.

In my opinion, the judgment must be confirmed and the appeal dismissed with costs. *Appeal dismissed.*

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ABELL v. VILLAGE OF WOODBRIDGE AND COUNTY OF YORK.

Ontario Supreme Court, Masten, J. April 13, 1917.

1. EASEMENTS (§ II A—7)—PRESCRIPTION—LOST GRANT—USE OF HIGHWAY —WATERS.

An easement by way of lost grant may be acquired by long user of a highway for carrying a stream across it for milling purposes, though the right could not be sustained as a prescription at common law, or under the Limitations Act (R.S.O. 1914, ch. 75, sec. 34), for want of continuity of user.

2. PARTIES (§ II A—70)—DEFENDANTS—MUNICIPALITIES—HIGHWAYS.

A municipality in which a highway is situated is a proper party defendant in an action against the county testing a prescriptive right in the highway.

Statement.

ACTION to establish as an easement the right of the plaintiff to carry an artificial stream of water or raceway across a highway and to compel the defendants, or one of them, to restore the stream to the condition in which it was before they, or one of them, blocked it.

J. H. Moss, K.C., for the plaintiff.

O. L. Lewis, K.C., and *C. W. Plaxton*, for the defendant the Corporation of the County of York.

W. A. Skeans, for the defendant the Corporation of the Village of Woodbridge.

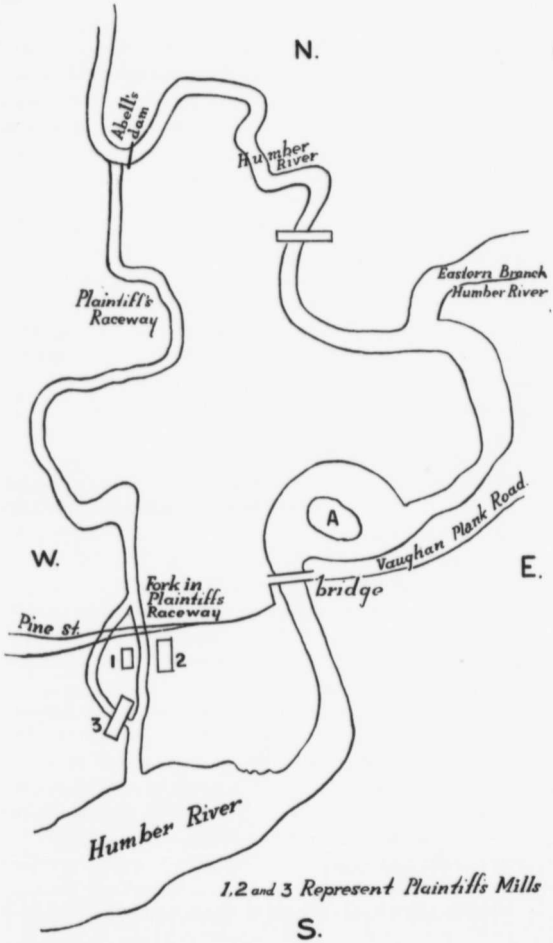
Masten, J.

MASTEN, J.:—The easement claimed by the plaintiff is the right to carry an artificial stream of water across a highway known as Pine street, formerly in the control of the defendant Woodbridge, now in the control of the defendant York.

The highway across which the easement is claimed runs in an easterly and westerly direction. The plaintiff is the owner of the abutting lands lying up-stream north of this highway, and through these lands there has been dug a waterway or ditch leading from a point on the Humber river above the plaintiff's dam, and so forming the head-race to his mill. The plaintiff is also the owner of the abutting lands down-stream, south of the highway. On these last-mentioned lands his mills were built and operated by water-power from the Humber river.

Before reaching Pine street, the head-race forked, and supplied two different mills by its two branches. The westerly branch crossed the highway by an open ditch, spanned by a bridge. The easterly branch crossed the highway in a flume built and maintained by the mill-owners, and also spanned by a bridge. The bridges were formerly maintained by the Corporation of the Village of Woodbridge.

The situation will be more clearly understood from the following sketch and from an examination of exhibits 1 and 8.



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plainants, in good faith, could be held liable in damages for false arrest.

That doctrine is no more admitted. Our jurisprudence is to-day firmly to the contrary; and everybody now admits that we are governed in such a matter by the principles of the civil law, the rule of art. 1053 C.C., which makes every person responsible for the damage caused by his fault to another, whether such fault consist of a positive act, imprudence, neglect, or want of skill.

This doctrine always prevailed in France. Here is what Pothier says on the subject:—

Denunciation is an act through which a private individual gives notice to the officer in charge of the public department that a crime has been committed. Such denunciation binds the denunciator to damages and interests towards the accused, in case he acted rashly; and he may be even subject to a greater penalty should it appear that the denunciation was evidently slanderous. Traité de procédure criminelle, No. 46.

Modern French authors teach the same doctrine. Sourdat (1, De la responsabilité, no. 666) speaks as follows on this question:—

The denunciation of a citizen to the authorities as guilty of some crime or délit is evidently one of the most prejudicial facts for the object of it, for it tarnishes the honour and may seriously injure material interests. Therefore if it be found to be false, the author who rashly came forward with it, without minutely examining the imputations which he was setting forth, without making sure about the truth of them, that person owes a civil reparation.

The jurisprudence in France is to the same effect.

As a rule it is permissible for the victim of a délit to denounce to the authorities the person he believes to be the guilty party. Still, however, the complaint has to be made, not only in good faith, but also with circumspection, for in itself it constitutes one of the most prejudicial facts for the object of it, because it tarnishes the honour and may seriously injure material interests. It is evident that a denunciation made through malice and with the sole intention of injuring, paves the way for an action in indemnity against the author of it; it is even enough that it be done rashly and without reflection.

So that for the author of a complaint or of a denunciation to be free from any responsibility because of the material or moral prejudice he may have caused, the facts denounced must be true, or at least, the complainant or denunciator must have acted in good faith without any guilty malevolence and without imprudence or rashness. Pandectes francaises, vo. Responsabilité, No. 544, 545.

As it is seen, the word malice which is commonly used receives a particular interpretation; it means rashness, imprudence, carelessness, as well as bad faith and wickedness. The rule is expressed by saying that there is responsibility in damages when the arrest is made without any reasonable and probable cause.

In the case of *Lake of the Woods Milling Co.* v. *Ralston*, 20 Que. K.B. 536, my brother Carroll, J., said:—

Malice, in a legal point of view, is inferred from the gross negligence of an individual who, without taking any information, and on mere suspicion, causes the arrest of somebody.

In English law the word "malice" means that the complainant was moved by another motive than to have a contravention of law punished.

One must not lose sight of the fact that, in such a matter, redressing justice and not punitive justice is dealt with. Law could not hesitate between the author and the victim of an error. Damages caused by an error due to a fault must be repaired, should that fault even consist of mere imprudence.

I am, therefore, of the opinion that in the present case the legal responsibility of the respondents exists; that the recourse of the appellant should have been maintained; and that the judgment of first instance which dismissed the action should be reversed.

As to the amount of damages to be granted, we must take into account the considerable costs which respondent will have to pay, through his fault, no doubt, since he offered no amends, but which are none the less burdensome for him. I would grant $50 and costs of an action of that class in the Circuit Court, and the costs of appeal.

JUDGMENT:—Considering that respondent had appellant arrested on a charge of illegally carrying a firearm and of having killed a dog belonging to him, and that he later on waived his complaint against said appellant after the latter had been arrested, had given bail for his appearance and had appeared before the tribunal of the justices of the peace; Judgment.

Considering that said arrest was made without any reasonable and probable cause and through imprudence and rashness on the part of respondent;

Considering that in those circumstances the appellant is entitled to reparation in the form of damages;

Considering that the judgment of the Superior Court at Three Rivers on October 18th, 1915, which dismissed the demand of appellant is not founded and must be quashed;

Doth quash and annul said judgment and proceeding to give the judgment which the Superior Court should have given, condemns respondent to pay to the appellant the sum of $50 with the costs of an action for that amount in the Circuit Court and the costs of the present appeal. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. June 22, 1917.

MUNICIPAL CORPORATIONS (§ II G—195)—LIABILITY FOR NEGLIGENCE—NUISANCE—FRANCHISE—ELECTRICITY—HIGHWAYS.

A municipal corporation cannot be held liable for injuries resulting from the negligent construction and operation of an electric lighting system in pursuance of a franchise granted by it, on the ground of a breach of duty to keep its highways free from nuisances; the power of such corporation, under art. 5641, R. S. Que. 1909, to regulate the use of highways and public places, are legislative or governmental, and unless specifically provided a failure to exercise them does not give rise to a right of action.

Statement. APPEAL from the judgment of the Court of King's Bench, appeal side, 25 Que. K.B. 124, reversing the judgment of the Superior Court, District of Three Rivers, and dismissing the action with costs. Affirmed.

N. K. Laflamme, K.C., and *A. Lefebvre*, for the appellant; *J. L. Perron*, K.C., and *Paul St. Germain*, K.C., for respondent.

Fitzpatrick, C.J. FITZPATRICK, C.J. (dissenting):—I agree with Idington, J.

Idington, J. IDINGTON, J. (dissenting):—The facts found by the trial judge that the appellant suffered very serious injuries from an electric current conveyed from an electric lighting plant in respondent town, by means of and by reason of another electric plant's wires unused and out of order having been long tolerated by the respondent on the streets of said town, are not seriously denied.

The first-named plant was used for lighting the town, and had been erected pursuant to a franchise granted by respondent.

The owners of the secondly named plant had never got authority from anyone entitled to give it, but by dint of sheer audacity, against which the respondent had formally protested, proceeded to erect poles and wires upon the streets of the town where, connected with the former plant, there had already been erected poles and wires.

The two sets of wires came dangerously close together from the time the second was erected, and as the result of neglect the latter got out of order and in places somewhat delapidated, and very obviously a serious source of danger to those using the highway, as well as others who might be placed near thereto, as appellant was, when he came in contact with something liable to conduct the current of electricity in use by those operating the first named plant.

This constituted in my opinion a public nuisance upon the high-

way, which was, as such, under the usual jurisdiction of respondent. But the respondent actually owned the road allowance over which, at that part in question, the highway ran.

Much elaboration in argument is submitted to support the propositions that the toleration of such a public nuisance by respondent was legal, or at least not a breach of duty, and in any event that its failure to use such powers as it had for the abatement thereof, was a mere omission of the observance of duty and hence not actionable.

If the like accident to that in question had happened, as it well might have done, to a traveller on the highway, could respondent have set up the answer put forward herein of the breach of duty being an omission and not a commission?

The duty imposed to maintain the highway in a travellable condition would have been the answer.

The appellant cannot avail himself of that, I imagine, in respect of the lane.

The very undesirable distinction that has grown up in our English law between nonfeasance and malfeasance, on the part of municipal corporations, when it comes to deciding a question of their legal responsibility to those suffering injury, as the result of either, does not seem to me to have so much room for expansion in Quebec if due heed is had to article 1053 and following of the Code.

Be that as it may, I cannot think that under either system of law the owner of any property—as respondent was of that in question—can legally tolerate upon his premises a nuisance obviously liable to produce injury to the person or property of another in the vicinity.

That is what respondent clearly was guilty of in relation to the secondly named electric plant being, without the first vestige of legal right, allowed so long to continue in the condition it was and constitute such a nuisance.

I suppose, if the same audacious and venturesome spirit as had conceived this enterprise had discovered, in the road allowance owned by the respondent, an excellent specimen of stone and proceeded to quarry it and blast therein, as a free miner might, from day to day and been enabled by smooth talk to set the council and others to sleep, we would be told, if some neighbour

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got injured by the flying rocks and sought a remedy against the respondent, that the sleeping officials had never authorized it and hence it was all a matter of omission and the law had no remedy to apply.

I do not think that is the law. I doubt if anyone would contend in such a case that it is. That thing would be too noisy. Electricity moving silently and unobtrusively does not seem to be so effective in rousing the average sleepy official.

Each operation under the circumstances would constitute a nuisance. I cannot in principle distinguish the two cases. The one man would suffer from a shower of flying rocks, and the appellant did suffer from a current of two thousand volts of electricity producing disastrous results.

The art. 5641 of the R.S.Q. referred to in argument, standing by itself might not avail much; behind that there is a legal principle which is represented by the maxim *sic utere tuo ut alienum non laedas*.

That article and others gave ample powers to the respondent, if it had seen fit, to use them to have put an end to the wretched condition of things that existed upon property it owned.

Indeed, the lawlessness was tolerated when those daring to enter and dig up the streets for their own purposes ought to have been promptly suppressed by an able-bodied constable when mild and courteous protests were of no avail.

Dr. Ricard, as a private citizen, owning a franchise, had no other resort than tedious litigation. It was otherwise with respondent that was liable to have been indicted for the continuance of such a nuisance.

The gist of the whole matter is that the respondent alone could have suppressed or abated the nuisance, though a private citizen could not unless he chose to prefer an indictment.

It was just as much at fault as the owner of a falling house and for the like reason as prevails in law in the case of such a house out of repair falling on the neighbour or his property when he, owning such a nuisance, who alone could have averted the loss caused by its fall is held liable.

I am sorry to hear it said that people using the protest form of expressing resentment had no means of knowledge of what they were about. It was an obvious duty under such circumstan-

ces as evoked the protest and mild submissions to justice in years of continuous litigation about the very thing that is now in question to have known a great deal more than the respondent pretends to have known and the law will impute that knowledge to it.

As to the want of notice of action, I think it was sufficient and the judge's discretion as to its not having been served within the delay mentioned in the statute was properly exercised under the circumstances.

The entire object of such a notice being required by the statute is to avoid stale demands being put forward and to enable the corporation blamed to investigate whilst the facts are present to the minds of those concerned or likely to know the facts.

I think the appeal should be allowed with costs here and below and the judgment of the learned trial judge be restored.

DUFF, J.:—I concur in the opinion of Brodeur, J. Duff, J.

ANGLIN, J.:—On the facts in evidence I should certainly not be prepared to find that there had been any negligence on the part of the unfortunate plaintiff. Neither do I think that the trial judge erroneously exercised in his favour the discretion conferred by art. 5864 R.S.Q. to excuse the giving of the notice which it prescribed when it is proved that the giving of it was prevented "by irresistible force or for any other reason deemed valid by the court or a judge." Anglin, J.

The narrow construction which has been put upon a corresponding clause of the Ontario municipal law does not commend itself to me as so satisfactory that I would hold that the application of the exonerating provision of the Quebec statute, different in its terms and somewhat more elastic, should be equally restricted.

Although convinced that the plaintiff is deserving of sympathy, I know of no legal duty owed to him which the defendant municipality has failed to discharge, breach of which would amount to actionable fault.

The granting of a municipal franchise to Dr. Ricard to construct and operate an electric lighting system in the town and to use its highways for that purpose and the recognition of the Phoenix Syndicate as transferee of his rights were admittedly within the statutory powers of the respondent corporation. Its position in regard to third parties injured in the course of the construction or operation of the system for which the franchise

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Anglin, J.

was so given was at least as favourable as it would have been had the works been constructed and operated for it by an independent contractor. Whatever its liability might be for injury caused by a danger inherent in the undertaking made the subject of such a contract, as owner it would not be answerable for the effects of collateral negligence on the part of its contractor. The injury sustained by the plaintiff was clearly due to negligence of that kind.

The granting of a franchise, such as was given to Dr. Ricard, does not entail upon a municipal corporation granting it a duty of supervision of the construction or the operation of the works authorized by the franchise. The powers conferred by paras. 11, 12, and 16 of art. 5641 R.S.Q. are clearly legislative or governmental and injury resulting from a failure to exercise them does not give rise to a right of action except where specifically so provided. The liability of the municipality for the bad state of the roads, streets, avenues, etc., declared by clause 11, does not cover such a case as this. Clause 16 is more directly applicable, if the Phoenix Syndicate's installation is not taken out of its operation by the saving of existing rights in clause 12. Clause 12 was enacted only in 1903 and was probably inapplicable to the exercise of the franchise powers conferred on Dr. Ricard in 1901 and by him transferred to the Phoenix Syndicate. If applicable, the power conferred by clause 16 is a governmental power to pass by-laws and failure to exercise it, in the absence of specific provision to that effect, cannot form the basis of a right of action.

But it is said that liability of the municipality to the plaintiff arose from the failure to fulfil the duty of keeping its highways free from nuisances and from the presence thereon of things which from their nature or their situation or both were a source of danger. This duty is said to exist both at common law and by virtue of the statutory provision of art. 5641 R.S.Q., sec. 11, already referred to. Any such duty, in my opinion, however, is owed only to persons using the highways—not to ratepayers or others upon or in occupation of private properties. Had the plaintiff been injured while travelling upon or otherwise lawfully using the highway, it is quire possible that he would have had a good cause of action either under the statute or at common law. But I know of no principle of law upon which a municipal corporation, because it grants a franchise authorized by statute, can be

held answerable in damages for an injury sustained by an individual on his own property ascribable to negligence in the carrying out of the undertaking for which such franchise has been given. I do not wish to be understood as expressing the opinion that an injury so sustained would give a cause of action against the municipality if ascribable not to negligence in carrying on the undertaking but to danger inherent therein. That question is not before us, and there would seem to be not a little to be said for the view that the statutory authorization of the grant of the franchise implies immunity of the municipal corporation from liability even for injury attributable to a danger inseparable from the undertaking.

BRODEUR, J.:—We have to decide in this case as to respondent municipality's responsibility in connection with the accident of which plaintiff was a victim. The question offers a good deal of interest in the point of view of the responsibility of the municipalities. Here are, shortly, the facts of the case:

Brodeur, J.

In 1901 the town of Grand-Mère granted to one Ricard the privilege of supplying electricity to the ratepayers and, to that end, to erect posts in the streets and place electric wires thereupon.

Later on, *i.e.*, on December 2, 1905, the provincial government granted a charter to a company called "The Grand-Mère Electric Company" and gave it the power to supply electricity in different municipalities, Grand-Mère included.

But besides that it authorized the company, in so far as the town of Grand-Mère was concerned,

to pass everywhere necessary and without any other authorization than that resulting from the letters patent of the said company in, under and above public roads and squares, streets and lanes of the said town of Grand-Mère.

So empowered by this charter, the Grand-Mère Electric Company came to place posts in the streets of the town and began to instal its electric wires. The municipality protested against those acts of the company, but the latter claimed to have been authorized so to do by the provincial government. An action was taken by the grantee of the exclusive privilege, Ricard, to have the posts and wires of the Grand-Mère Electric Co. removed and the corporation of the town was made a party to this suit.

The question was raised, amongst others, in this suit as to whether the charter of the provincial government giving to the Electric Co. the right to instal its electric system in the town of Grand-Mère was valid.

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The Superior Court, by means of an interlocutory injunction, forbade the Grand-Mère Electric Co. to continue to operate in the town; and the suit went on to have this question definitely settled.

While the trial was on the electric wires of both companies came one day into contact and the plaintiff, who was near a wire of the Grand-Mère Electric Co., was struck and wounded.

Thence an action against both electric companies and against the municipality.

The Superior Court decided in favour of the plaintiff against the municipality; but that judgment was reversed, in so far as the municipality was concerned, by the Court of Appeal.

The question is as to whether or not the municipality is responsible.

By art. 1053 of the Civil Code, one may be held responsible for the damage caused by his fault to another, whether by positive act, neglect, imprudence or want of skill.

The appellant claims that the municipal corporation of Grand-Mère was negligent, because, owning the streets, it had to see to it that no nuisance was committed in connection with them or to have any nuisance removed. It is claimed that the municipality should have had removed the wires of the Electric Co. which had been placed there illegally.

It seems to me quite certain—and that is to-day admitted by the parties to the suit—that the provincial government had no right to permit a company to go and place its electric wires in the streets of the town. It would not, however, have been wise on the part of the corporation to have those electric wires removed by its own officers without authorization by the court.

The question is then submitted for the decision of the tribunals by a suit taken by Ricard. The corporation is then made a party to the litigation. It is true that it does not itself come to any conclusion and that it leaves it to the court. But what is the use of multiplying the costs by raising itself the point when one of the parties to the suit alleges that the privilege granted by the provincial government was absolutely null? It cannot therefore be claimed, in my opinion, that there was negligence on the part of the corporation, so as to affect its responsibility.

Now what is the responsibility of a town municipal corporation

in connection with the streets? That responsibility is determined by art. 5641, (11) R.S.Q., 1909. That article empowers the council to

make, amend and repeal by-laws:

(11). To regulate the use of and prevent and remove encroachments in, upon or over streets, alleys, avenues, bridges, culverts, public grounds and public places, pavements, sidewalks, crossings, gutters, municipal streams and waters, and to prevent injury thereto and prohibit the improper use thereof; the municipality being responsible in damages for the bad state of such roads, streets, avenues, bridges, and culverts, public lands and places, pavements, sidewalks, crossings, gutters, municipal water-courses and public ways.

The latter part of this subsection therefore declares that the municipality will be responsible for the proper maintenance of the roads.

What is the extent of that responsibility? That it must see to it that the roads are always in such a condition as to permit of the public using them without danger.

There was in the present case no obstacle in the road proper which could affect travelling by the public; but the two electric companies had placed posts and wires. One had been authorized by the municipality, the other by the provincial government.

Those two companies were fighting before the courts to have their respective rights ascertained and especially to have a decision as to the power of the government to grant the authorization it had given the company. The question was under examination. During that time would the corporation have been justified in removing the posts of the Grand-Mère Electric Co.? Surely no.

It is possible that the wires of the two companies were placed too near each other. But how can the corporation be responsible for that under the provisions of subsec. 11? I do not think that the responsibility mentioned by the law covers a case like the one we have to examine here.

I am, therefore, of opinion that the municipal corporation was not at fault and did not engage its responsibility. A municipality empowered to adopt by-laws is not necessarily responsible if it does not adopt these by-laws. Those are questions of discretion which cannot engage its responsibility.

Tiedman on Municipal Corporations, says (p. 328):—

Not only are municipal corporations exempt from liability for the non-performance of public, or discretionery duties; but they are likewise exempt from liability from consequences, when they in good faith exercise such powers.

The judgment of the Court of Appeal should be affirmed with costs. *Appeal dismissed.*

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HUBBARD v. CITY OF EDMONTON.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ. October 30, 1917.

JURY (§ I A—1)—NATURE OF RIGHT TO TRIAL BY.

The right to a trial By jury is a procedural not a substantive right, and may be restricted by rules of court made under general statutory authority.

Statement.

APPEAL by the plaintiff from an order of Hyndman, J., which dismissed an appeal from an order of Mr. Blain, the Master-in-Chambers, whereby he refused the plaintiff's application to have the case tried with a jury.

B. Pratt, for appellant; *J. C. F. Bown*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff desires the action to be tried with a jury and the defendant opposes. The Master directed that it be tried by a judge alone, and on appeal to a single judge that direction was confirmed and the plaintiff now appeals.

The action is clearly one which can be much better tried by a judge alone and the plaintiff does not substantially argue to the contrary, but it is contended that the right to a jury in such a case was given by statute, and it has never been taken away by competent authority.

In *Godfrey* v. *Marshall*, [1917] 1 W.W.R. 1097, I referred to the new and the old rules and pointed out that the latter were statutory. While they were originally in the Dominion N.W.T. Act they became subsequently incorporated in the rules of Practice and Procedure contained in the Judicature Ordinance passed by the legislature of the Territories. There was a slight difference made by the rules, and the Dominion parliament confirmed the rules.

The rights to jury trial thus provided continued to be the rights until the present rules of practice and procedure came into effect in 1914. The present Rules of Practice and Procedure, however, unlike the former, are not statutory, but are passed by the Lieutenant-Governor-in-Council under the authority of sec. 24 of the Supreme Court Act (c. 3 of 1907), which provides that—

> The Lieutenant-Governor-in-Council may from time to time make and authorize the promulgation of rules of court governing the practice and procedure in the court. . . . and may alter and annul any rules of court. . . . for the time being in force, whether the same be included in the Judicature Ordinance or any amendments thereto or in any rules made by the judges, etc. . .

If the rules which give or restrict the right to a jury are rules of practice or procedure it seems clear that those now existing

have statutory authority, but it is contended on behalf of the plaintiff that the right to a jury is a substantive right and not a matter of procedure.

The right to a jury in a case in which it is authorized may be a very substantial right, as may also the right to examine the opposite party for discovery, and a hundred other rights conferred by our practice, but they surely are not substantive rights as distinguished from matters of procedure. They are all rights which are only ancillary to other rights. The right to a jury, like the right to any other privilege conferred by the procedure, is a right which depends for its existence upon the attempt to enforce some substantive right in the court by means of the machinery provided, one portion of which is a trial which may be by jury or otherwise.

By the Judicature Ordinance it is provided in sec. 20 that "the practice and procedure in the Supreme Court of the Territories shall be regulated by the Ordinance and the Rules of Court," and the "Rules of Court" then follow, the first part being entitled "General Practice and Procedure," and in those rules are contained the rules respecting jury trials.

It seems clear, therefore, from these provisions and the provisions of the Supreme Court Act to which I have refererd, that both the legislature of the Territories and the legislature of the province considered those rules of court including all that they did include as rules of practice and procedure.

By the first English Judicature Act in 1873 the rules of procedure were statutory as they were with us, and under the title Rules of Procedure and the sub-title Mode of Trial we find rules for trial with or without jury and with the right given to the judge to direct the mode in certain cases, and the prohibition which was imposed upon the judges under the Judicature Act of 1875 as to making rules affecting "the law relating to jurymen and jurors" seems to indicate that but for such restriction they would have had the power to make such rules under the authority to make "rules of procedure."

And whatever may be said about the common law right to a jury in England can have no application here because there can be no right to a jury without a court, and when the courts were established here the provisions fixing the rights to juries were enacted and they were always limited.

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Apart from the construction put by the legislatures upon these rules there is the general aspect of what is procedure as distinguished from substantive rights and an instance of it is furnished by the laws respecting limitations of actions.

In this jurisdiction a man has a right to bring an action upon a simple contract debt for a period of 6 years and then the right ceases. That is a very substantial right, but it could not be enforced in a foreign court where, by the law of its country, the right has become barred in a shorter time and before the action is commenced because these laws are considered laws relating to procedure. Surely it would never be suggested that, in an action in this court founded on a contract made in Ontario, where all the rights arose in Ontario, the parties could have the rights to jury trial in accordance with the laws of Ontario, but if they were substantive rights and not matters of procedure they would be carried to this jurisdiction.

In Dicey on Conflict of Laws (2nd ed.), p. 709, it is stated:—

Whilst, however, it is certain that all matters which concern procedure are in an English court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case.

The law on this point is well settled in this country, where this distinction is properly taken, 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,—but that whatever relates to the rights of the parties must be determined by the proper law of the contract or other transaction on which their rights depend.

Our rule is clear and well established. The difficulty of its application to a given case lies in discriminating between matters which belong to *procedure* and matters which affect the *substantive rights* of the parties. In the determination of this question two considerations must be borne in mind:

1. English lawyers give the widest possible extension to the meaning of the term "procedure." The expression, as interpreted by our judges, includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore, the whold field of practice; it includes the whole law of evidence, as well as every rule in respect of the limitation of an action or of any other legal proceeding for the enforcement of a right, and hence it further includes the methods, *e.g.*, seizure of goods or arrest of person, by which a judgment may be enforced.

2. Any rule of law which solely affects, not the *enforcement* of a right, but the *nature* of the right itself, does not come under the head of procedure. Thus, if the law which governs, *e.g.*, the making of a contract, renders the contract absolutely void, this is not a matter of procedure, for it affects the rights of parties to the contract, and not the remedy for the enforcement of such rights.

For all the reasons stated, it appears to me that the contention

by the plaintiff is untenable, and that the rules relating to, even if restricting the right of jury trial, are rules of procedure and are therefore valid and binding.

I would therefore dismiss the appeal with costs.

STUART, J. (dissenting):—The main contention raised by the appellant is that there has been no authoritative repeal of old rule 170 under which in as much as damages for a tort exceeding in amount $500 are claimed, she would have been entitled as of right to a jury.

That rule was statutory, that is, it was enacted by the legislature itself.

By the Supreme Court Act, sec. 24, it is enacted that the Lieutenant-Governor-in-Council "may from time to time make and authorize the promulgation of rules of court governing the practice and procedure in the court . . and may alter and annul any rules of court . . for the time being in force whether the same be included in the Judicature Ordinance or any amendments thereto, etc., etc."

The position taken by the appellant is that old rule 170 was not properly a rule of practice and procedure but a statutory law giving a substantial right to a litigant in respect of the tribunal by which his case should be tried.

Owing to the circumstance that the old rules were enacted directly by the Territorial Legislature there is no doubt that the distinction between what was substantive law and what was mere practice and procedure was not very carefully observed. It was not strictly necessary to do so. Neither do I think that an interpretation put by one legislature upon the words "practice and procedure" when it was *itself enacting* rules in that regard is of any relevancy with respect to the true meaning of the words when used by a different legislature altogether when it is *delegating* the power to pass rules.

But even though old rule 170 was statutory in its origin, there is no doubt that, if it can be said to have dealt with a mere matter of practice and procedure in the court, the Lieutenant-Governor-in-Council had power under sec. 24 to amend or annul it.

In my opinion the question whether a suitor in our courts is to have the issues of fact arrived at by the pleadings decided by

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the judge alone or by a jury is not a matter of practice and procedure. No doubt if we go back far enough in the history of English law we shall find many things which will suggest that it is a matter of procedure. But it is to be remembered that in the primitive stages of all systems of law procedure was considered much more important than it is now, and indeed nearly all substantive rights were expressed in the form of procedural rights. Without reviewing too particularly the most recent and generally accepted views as to the origin of trial by jury, it may be pointed out that the most eminent authorities refer to early royal statutes or constitutions which gave a complainant in certain specified cases the right to have his action begun by securing a writ to the sheriff directing him to summon "recognitors" to answer from their own local knowledge a certain definite question addressed to them. These were the "assizes" so called. The convenience and greater reasonableness of this method of ascertaining the fact so impressed itself upon judges and litigants that the practice spread by tacit agreement between the parties to all other cases. One litigant "put himself upon the country." The other did the like (*similiter*) and "therefore let a jury come." This was done by the writ of "*venire facias*." By the Common Law Procedure Act of 1852 these formalities were dispensed with and a general panel was summoned to try all causes both civil and criminal at the "Assizes."

But even as late as 1824 a defendant "waged his law" (*King* v. *Williams*, 2 B. & C. 538, 107 E.R, 483), that is, reverted to the original method of trial. Only in 1833 was the right of a litigant to "wage his law" abolished by statute. Only in 1819 was the right to trial by battle abolished, Nothing was substituted by the statutes. It was assumed, that the trial must therefore be by jury. The Common Law Procedure Act of 1852 assumed the right to trial by jury. Though that Act contained the first serious attempt to simplify procedure and contains many things now covered by rules made under statutory authority, it did not venture to interfere with, in the slightest degree, or even to mention, the question of the right to a jury.

The Judicature Acts of 1873 and 1875 gave the judges the power to make rules of procedure, which it is to be observed must be laid promptly before parliament, but sec. 20 of the Act of 1875,

still in force, declares that nothing in the Act, or in any rule made under it, should affect the law regarding jurymen or juries. This surely does not mean that the rules must not touch the manner of selecting jurymen but may control the right to have a jury at all.

It is true that the English judges did include in their rules a statement of the law as to trial by jury, but in my view the rules regarding the question are merely declaratory. There is nothing in them which diminished or curtailed the right of a litigant to have his case tried by a jury. See Yearly Practice (1910) vol. 1, p. 462, *Jenkins v. Bushby*, [1891] 1 Ch. 484, particularly p. 489. In any case we are not bound by the view taken by the English judges as to their powers under their Act.

I think the question whether a jury shall be present to determine the issue of fact had by 1873 become a question of the constitution of the court, not a question of procedure in the court. In *O'Connell* v. *Regina*, 11 Cl. & F., 155, 347, 8 E.R. 1061, 1134, Brougham, L. C., in the House of Lords, said:

> The court is composed of a judge and a jury for the trial of prisoners. That court consists of one permanent high officer, having jurisdiction, and of others who are not permanent. It consists of a judge and twelve lawful men. Those men have jurisdiction given them by the law of this country in respect of their being selected after a particular manner.

Holdsworth, History of English Law, vol. 1, p. 157, says: "The jury were in a sense witnesses—but they formed part of the court."

In *Reg.* v. *O'Rourke*, 32 U.C.C.P. 388, at 405, Wilson, C.J., in a judgment in which Osler and Galt, JJ., concurred, said:

> The jury when empannelled and sworn form a part, and an essential part, of the constitution of the court,

And, also, he says:

> *Process* relates to the means of carrying on an action. *Procedure* relates to the act and also to the manner of carrying on the different styles or proceedings in the action. These terms do not apply to the constitution or organization of courts.

See also 2 Hale P.C., pp. 260, 261; 1 Chitty Criminal Law, 2nd ed., p. 337; Burns Justice of the Peace, 30th ed., tit. *Process*, p. 1335, all cited in argument of Irving, Q.C., in *Reg.* v. *O'Rourke*, *supra*.

Of course the English Common Law Courts were of prerogative origin while our Supreme Court and its predecessor were created by statute. But the jurisdiction given by the Supreme Court

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Act to the Supreme Court was confined to (1) the jurisdiction of the English Courts of Common Law and Equity and the Commissioners of Assize and Oyer and Terminer and General Gaol Delivery on July 15, 1870; (2) The jurisdiction of the Supreme Court of the North-West Territories. The jurisdiction of the latter court was established by the North-West Territories Act of 1886 which, after referring to matters of law, also said (sec. 48) "and shall also hear and (with or without a jury as provided by law) determine all issues of fact."

It is really, so far as common law actions are concerned, only by virtue of this latter clause that this court is made something more than a court of law, that is, also a court to decide the fact, and this must be done "with or without a jury as provided by law."

The courts of equity in 1870 had no jurisdiction to try common law actions and the courts of common law had jurisdiction to do so only, except in certain very exceptional cases, *with a jury*.

The special power to make inferences of fact is given by statute only to the court *en banc* or Appellate Division and this only by force of a reference to the Court of Appeal in England at the end of sec. 32 of the Supreme Court Act. Of course, rule of court-No. 326 assumes to give a jurisdiction to the court to make inferences of fact but I take this only to be another unwarrantable extension of the meaning of the words "rules of practice and procedure."

The foregoing I think confirms the view that the jury is part of the court. The North-West Territories Act, in giving power and authority to hear and determine issues of fact, says, as above quoted, that it can do so "with (or without) a jury as provided by law." This is to say, the jurisdiction in cases where a jury is by law provided for is exercised only in conjunction with the jury. The jury are not administrative officials of the court like the clerk or the sheriff.

If it is in the power of the Lieutenant-Governor-in-Council under a statute authorizing him to enact rules of procedure to abridge, as has been attempted, the right to a jury trial he has power to take it away altogether even in cases where the absolute right is still untouched, that is, in libel, slander, etc. He has even consequent power to decide that an issue of fact shall be tried neither by the judge nor a jury but by battle or ordeal, as of old, or by the toss of a coin.

When the legislature has made no provision as was done in England for submitting the rules enacted to itself for approval or disapproval I think we should not place too liberal an interpretation upon the meaning of its words when giving power to the executive government to make rules of procedure in the courts. To extend this power so as to cover the question of the right to trial by jury is I think so politically dangerous, for example with reference to the question of libel and the application of Fox's Libel Act, that there would seem to me to be a strong presumption against any such intention in the legislature.

For these reasons I do not think this is what the legislature did intend when it referred to rules of practice and procedure, and therefore I think the present rule is nugatory and that the old statutory law contained in old rule 170 is still in force and the plaintiff is entitled to a jury.

I would also venture to point out that while there is a distinction between rights relating to procedure and substantive rights both of which are to be enforced by the court, there is also a distinction between substantive rights which may be enforced in the court and a right as to the constitution of the court itself which is to enforce these substantive rights. It is the former which is involved here.

The appeal I think should be allowed with costs, and the order of the Master discharged. The right not depending on any order of the Master, there need be no order below at all but the plaintiff should have her jury under the old rules in that regard.

Beck, J.

BECK, J.:—In *Salter* v. *City of Calgary*, 27 D.L.R. 584, 9 A.L.R. 334, I attempted to lay down some principles which I thought were involved in our rules as to juries and which I thought should be taken into account in construing them as elements for considering whether a particular case or some issue or issues in it should be directed to be tried by a jury.

Personally, I retain the opinions I then expressed; but giving effect to all the considerations which ought in my opinion to be taken into account I think the present case will be more suitably and conveniently tried by a judge alone.

The question, however, was raised as to the jurisdiction of the Lieutenant-Governor to make the present rules of court providing

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in what cases a party might demand a jury as of right and in what cases it lay in the discretion of the court, so far as the rules effect a change in the previously existing rules.

In my opinion the Lieutenant-Governor-in-Council had jurisdiction to do so. By the Supreme Court Act (c. 3 of 1907) s. 24, jurisdiction was given to make "rules of court governing the practice and procedure in the court" and to "*alter and annul any rules of court . . whether the same be included in the Judicature Ordinance or any amendments thereto* or in any rules made by the Judges of the Supreme Court, etc."

The former rules were statutory rules embodied in the Judicature Ordinance. The Judicature Ordinance treated the rules relating to the trial of cases with or without juries as rules relating to practice and procedure. They are embodied in "Rules of Court" headed "General Practice and Procedure."

It seems to me, therefore, to be clear that the legislature clearly intended to give jurisdiction by rule to alter or annul any of the rules contained in the statutory rules.

If there is any restriction I think it would extend only to rules dealing with matters which are unquestionably not matters of practice and procedure in any reasonable sense.

In this view I think the present rules under discussion were within the jurisdiction of the Lieutenant-Governor-in-Council.

The first English Judicature Act, that of 1873, contained a schedule of rules. By sec. 17 of the Judicature Act of 1875 the judges were authorized to make further or additional rules and to alter and annul any rules of court for the time being in force. Sec. 20 excluded from the power of the judges the power to make rules affecting "the law relating to jurymen or jurors." I take this to mean relating directly to jurymen or juries and not to rights of litigants; to the constitution and calling of jurors. If this is the correct interpretation, then the Imperial Legislature excluded this subject for fear that even it might be supposed to come under the head of practice and procedure while on the other hand dealing in the schedule of rules with the question of juries from the point of litigants as one of practice and procedure; the schedule to the Imperial Act being entitled "Rules of Procedure."

I have not investigated with care the question whether the English rules have in fact made any change in the rights of litigants

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to a jury, but I feel confident that they have done so. However, an enquiry into the question would not be of assistence in deciding the extent of the authority of the judges.

I have already indicated that in my opinion the appeal should be dismissed and I think the costs should follow the result of the appeal.

Beck, J.

WALSH, J.:—Without committing myself to the opinions expressed by Beck, J., in *Salter* v. *City of Calgary*, *supra*, I concur in his judgment on this appeal. *Appeal dismissed.*

Walsh, J.

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Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll, and Pelletier, JJ. April 27, 1917.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—POSTPONEMENT OF ADJUDICATION AS TO AMOUNT.

Where in an action under the Workmen's Compensation Act (Que.) the annual rent for a permanent partial incapacity cannot be properly ascertained at the trial, the court has power to postpone final adjudication to some future date and to grant a temporary allowance in the meantime.

Statement.

APPEAL by plaintiff from the judgment of the Superior Court by Maclennan, J. Affirmed.

The appellant is a sailor who, while working on board of his ship the "S.S. Joyland" fell into an open hatch, suffered a compound fracture of his right jaw, and of his right thigh and a severe shock of his nervous system. He brought an action under the Workmen's Compensation Act, and accused his employer of inexcusable fault. He alleges that his capacity of working has been diminished permanently to the extent of 90%, and asked a judgment for $800, and an annual rent of $700. He accompanied his action with a seizure upon the ship, by process of conservatory attachment, to assure the exercise of his right.

The defendant denied the inexcusable fault and retorted that the accident took place by the inexcusable negligence, if not by the voluntary act, of the appellant.

The Superior Court condemned the company to pay the appellant, for temporary incapacity, an allowance at the rate of $30 per month from July 18th, 1915, to December 10, 1917. As to the annual rent, the court made the following order:

and plaintiff's further recourse for temporary incapacity, if any, and for rent for permanent partial incapacity, is reserved to be dealt with by this Court on December 10, 1917, when the parties are ordered to appear again before

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this Court for adjudication on the remaining conclusions of the plaintiff's action.

J. M. Ferguson, K.C., for appellant; *Meredith, Holden*, etc., for respondent.

ARCHAMBEAULT, C.J.:—The reason given by the court for rendering this judgment is that it is not in a position to determine the extent of the appellant's permanent incapacity and that it will have to be dealt with on December 10, 1917.

The judgment declares that there was no inexcusable fault on the part of the company. Appellant objects to this judgment and asks us to quash it.

His first objection is that the trial court had no right to make the decree it did pronounce; that it was bound to decide immediately upon the contentions of the parties, instead of leaving them in obeyance and undetermined for a year. He quotes in support of his pretentions the Magna Charta (art. 40):

> To none we sell, to none we deny or delay justice and right,

the statute 9 Henry III., c. 29:

> We will sell to no man, we will deny or defer to no man justice or right,

the statute 14 Edw. III., c. 5:

> It shall be commanded to the judges before whom this plea did depend, that they shall proceed to give judgment without delay.

Appellant further quotes the Ordinance of 1667 which forbids the magistrates to delay the judgments in cases ready for argument and that any contravention to this rule renders them responsible in damages.

Respondent was satisfied to answer this learned demonstration only by an humble article of the Workmen's Compensation Act. That article enacts that as soon as the permanence of the incapacity for work is established, the employer must pay to the victim the amount of indemnity fixed by art. 7,322 (Art. 7,329, R.S.Q. 1909), which fixes the indemnity due in case of permanent partial incapacity to half of the reduction in salary caused by the accident. Upon those provisions of the law the judge relied in making the decree.

That decree bears the stamp of great wisdom. The tribunals exist to give justice to the parties and no more judicious ruling could exist in the matter of indemnity due because of a labour accident than to grant a temporary indemnity until the extent of the permanent incapacity can be ascertained.

Appellant's second objection to the judgment is that there

was an inexcusable fault on the part of the respondent and that the judgment errs in deciding to the contrary.

The judgment fixing the indemnity for permanent incapacity not being yet delivered in this case, the above objection seems to me to be premature. Nevertheless, it is probably better to dispose of this objection at once, so as to avoid another imprudent appeal after the definitive judgment has been rendered. I must say, in consequence, without going into details, that I carefully read this evidence and that I am of opinion that appellant did not prove his assertion of inexcusable fault on the part of the company. Appellant fell into a scuttle which he himself had opened. He should have known the danger and he ran into it. He has a recourse against the company according to the Workmen's Compensation Act; but I believe that he would have none at common law.

Appellant also invokes the provisions of art. 7,340 of the R.S. (1909), which enacts that the claim of the victim is guaranteed by a lien upon the movable and immovable properties of the employer. In his declaration, he concludes by asking that it be declared that respondent's boat be set apart for his privilege. In his memorandum on appeal, he claims that when a privilege does exist the creditor is entitled to a conservatory seizure to ensure the exercise of that privilege. Appellant used that right; he had the boat on board of which he was employed seized. That conservatory seizure is still pending. It will have to be disposed of in the final judgment. I do not see that this objection could in any way affect the judgment complained of by the appellant.

I am, therefore, of opinion that the judgment is well founded and should be affirmed.

CROSS, J.:—The appellant's chief complaint is, in effect, that there has been an illegal refusal or abstention to adjudicate on the part of the Superior Court, notwithstanding issue joined, proof made and case submitted.

Cross, J.

No doubt obscurity of the matter in issue or seeming silence of the law, does not warrant a judge in withholding judgment.

What has happened is this. It was proved that the appellant's incapacity for work would be total for a year but would be partial afterwards. There was a conflict of medical testimony as to whether this future partial incapacity would be between 25 and 50%

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as asserted on the one hand or would be 90% as asserted on the other. In these circumstances the Superior Court gave judgment for the appellant for compensation on the footing of total incapacity for a year and for his costs. So far the plaintiff's demand is adjudged to be satisfied in its entirety and for the term of a year, he will get satisfaction of all of his rights, as far as a court can provide it.

But the court has reserved the recourse for the compensation for future partial incapacity, and further temporary total incapacity (if any),

to be dealt with by this court on December 10, 1917, when the parties are ordered to appear again before this court for adjudication on the remaining conclusions of the plaintiff's action.

That is not a refusal to adjudicate. On the contrary, it commands the parties to reappear in court, on a named date, at which what is now uncertain and controverted can be made clearer. It is a step which commends itself to me, if I may say so, as being a sensible one, and one which might often be adopted with advantage in such cases.

Counsel for the respondent called attention at the hearing to the wording of art. 7,329, R.S., (1909): "As soon as the permanent incapacity to work is ascertained," as indicating that time may have to elapse before it can be ascertained, and it may also be noted that an applicant has to obtain leave before he can proceed under the Act at all.

In a recent case of *Montreal Tramways Co.* v. *McNeil*, 25 Que. K.B. 90, an action in damages arising from a mishap to a tramway passenger, where there was controversy whether an injury in the stomach was a real tumour or a "phantom" tumour, created by nervous susceptibility, one of the judges of this court was of opinion, in view of the time which had elapsed since the trial, that there should be an interlocutory to have the plaintiff's present condition ascertained before final judgment.

In the recent lessor and lessee action of *Hingston* v. *Bénard*, 32 D.L.R. 651, 25 Que. K.B. 512, we confirmed, in circumstances of an exceptional kind, an adjudication which reserved to the respondent the right to bring a new action for reduction of rent for the portion of the term subsequent to the date of judgment. I would dismiss the appeal. *Appeal dismissed.*

VANZANT v. COATES.

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Ontario Supreme Court, Mulock, C.J., Ex. May 30, 1917.

DEEDS (§ II F—65)—VOLUNTARY CONVEYANCE—PRESUMPTION—UNDUE INFLUENCE—PUBLIC POLICY.

A voluntary conveyance of land from an aged mother to her daughter will be set aside if at the time of its execution the relations of the donor and donee have been such as to raise a presumption that the donee had influence over the donor, and that presumption has not been rebutted by proof that the gift was the spontaneous act of the donor in circumstances which enabled the donor to exercise an independent will.

ACTION for the recovery of possession of land. Statement.

George Wilkie, for plaintiff; *Frank Arnoldi*, K.C., for defendant.

MULOCK, C.J.Ex.:—This is an action of ejectment to recover possession of the north half of lot No. 12, according to plan No. 115, registered in the registry office for the County of York. Mulock, C.J.Ex.

The plaintiff and defendant are the sole children of Elizabeth Coates, deceased. The plaintiff, Frances Rebecca Vanzant, claims title under a deed bearing date the 6th October, 1915, from Elizabeth Coates, her mother. The defendant, George Coates, on several grounds, denies the validity of this deed, and claims title under his mother's will and also by possession. Thus, both parties concede ownership, at some time in their lives, in their mother, Elizabeth Coates, but the defendant claims that he by possession acquired title against her.

So far as appears, the title of Elizabeth Coates was a possessory one. She was the daughter of one Wesley Coates, who for many years prior and up to the time of his death resided on lot 12, occupying as a residence the house situate on the south half. His daughter, Elizabeth Coates, with her two children, from the time of their birth until his death, had always lived with him.

The defendant George Coates was born on the 25th November, 1860, and the plaintiff Frances Rebecca Coates, now Vanzant, on the 8th November, 1864. The grandfather, Wesley Coates, died in the month of January, 1881, intestate. His daughter, the said Elizabeth Coates, his sole heiress at law, inherited his realty and continued in possession of the homestead, cultivating the land, raising vegetables and fruit and carrying on the market-garden business. Her two children continued to reside with her.

George, the defendant, at the time of the grandfather's death, was in his twenty-first year; the plaintiff was four years younger.

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In 1886, George married, purchased an adjoining lot, and built on it a small house, which he occupied until the year 1890 or 1891; then his wife and he separated, she leaving him. Thereupon he sold his property, reserving the right to remove the house, and he alleges that his mother told him that the north half was his; that he might move his house upon it and take possession; and that, acting on this permission, he did move his house upon the north half, and erected thereon from time to time other buildings, and that he has ever since resided there and cultivated the land.

The whole of lot 12, prior to and continuously since the death of Wesley Coates, was enclosed in fences; but, until the month of September in the year 1914, there was no fence separating the north half from the south half. Then the defendant erected a division fence, and has ever since been in exclusive possession of the north half.

The plaintiff continued to live with her mother on the south half until the year 1910, when she moved to a house in Dupont street, leaving her mother at the homestead.

In the autumn of 1911 or 1912, the mother became seriously ill, and her son brought her to the plaintiff's house in Dupont street, where she resided for about a year and a half. Then, having somewhat regained her health, she returned to her own house on the south half, the plaintiff accompanying her, and the two lived together there until the spring of 1915.

In 1914, the plaintiff began the erection of a house on the south half, and on the 31st August, 1914, her mother, Mrs. Coates, made a voluntary conveyance to her of the south half.

Some three or four months thereafter, owing to the intervention of Mr. Mills, Mrs. Coates' solicitor, the plaintiff executed an agreement, which was antedated to bear even date with that of the voluntary conveyance, whereby she granted to her mother, during her lifetime, the right jointly with the plaintiff to occupy the said south half, and also covenanted to maintain her.

In the spring of 1915, the plaintiff and her mother moved from the old house to the new one of the plaintiff, and they resided there together until the mother's death, which occurred on the 23rd January, 1916.

By deed bearing date the 6th October, 1915, "in consideration of natural love and affection, divers other valuable considerations,

and the sum of one dollar," Mrs. Coates conveyed to the plaintiff the north half of the lot, and this is the deed under which the plaintiff claims title to the north half, and the validity of which the defendant challenges. It was not registered until the 17th day of January, 1916, about one week before the mother's death.

The first intimation which the defendant had of its execution was in the latter part of April or the first of May, 1916, when he received from the plaintiff a letter in the following words:—

"2 Mulberry Avenue.

"Dear George:—You will remember that after March of last year you did not come at all to visit my mother but left her entirely upon my hands. The load was a very heavy one. Your conduct has been very strange towards me for a long time now and I do not see that I should keep you on my property rent free. My mother naturally resented your treatment of her and me and felt the action very much in which you entered a case against me. I do not think you should remain on my place without payment of any rent whatever. You had it for almost a year before my mother's death rent free and for several months since, and I think you should pay rent to me for it during my mother's ownership. You even went so far as to deny her fruit from the trees, and I hope you will not resent my resenting what you did to her.

"Yours sincerely,

"Fanny Vanzant."

There was no consideration for the conveyance to the plaintiff of the north half.

For some years prior to their mother's death, the plaintiff and defendant had been on unfriendly terms, but the latter continued to call at the plaintiff's house for the purpose of seeing his mother until May, 1915, when the plaintiff ordered him out of the house and threatened him with legal proceedings if he trespassed again on her property. Thereupon his visits ceased, and he never saw his mother again until, the day before her death, a neighbour informed him that she was dying. He then went to see her, but she was unconscious, and so remained until her death.

I find that the plaintiff, without cause, excluded the defendant from the presence of his mother for about nine months prior to her death, and during her fatal illness omitted to inform him of her

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condition. It was during this period of exclusion that the deed in question was procured.

The plaintiff alleges that the circumstances under which the deed in question was made to her were as follows: that in the autumn of 1914 the defendant erected a fence between the north and south halves of the property, and that then for the first time her mother expressed a desire to convey to the plaintiff the north half; that "she kept bringing it up all the time at me to go down, and I would tell her I would not do it, tried to put her off; then she said she would get some one else to do it; and then she told me one day, 'I want to leave things anyhow.' I went down to satisfy her and got the deed and brought it up; and it laid there quite a while before I told her, and then I shewed it to her and left it there; and, after it was signed, I left it at the lawyer's office, thinking she would change her mind; and, if she told me to tear it up, I would have done so; and she was not satisfied until I got it registered."

The evidence shews that the deed was executed in the plaintiff's house, in the presence of the plaintiff, Dr. Sheppard, the mother's physician, and Mrs. Broderick, an acquaintance who, at the plaintiff's request, came to the house for the purpose of witnessing the execution.

The following are extracts from the plaintiff's evidence:—

"Q. Before Mrs. Broderick came, did your mother know anything about the deed? A. Oh, yes, she had me bring down the deed and read it to her, and I read it, and I says: 'You need not sign this; think it over.' She says: 'I know what I am doing, I have lived a good Christian life, and I am not doing anything wrong.'

"Q. Was that before Mrs. Broderick came? A. Yes, I was alone with her.

"Q. You had read the deed to her before Mrs. Broderick came? A. Yes.

"Q. After she came, did you have any conversation about the deed? A. Only when we brought it out to sign it, and I read it all over to her . . . .

"Q. What was done with the deed? A. I left the deed there with the lawyer.

"Q. Did you give any instructions? A. No; I just asked him to keep it there. He asked me if I wanted it registered, and I said no . . . .

"Q. When you went down to get the deed of the north half, you went to Mr. Hughes? A. Yes.

"Q. He had never acted for your mother? A. I could not tell you; I never inquired . . . .

"Q. Then why did you go to Mr. Hughes and not to Mr. Mills? A. Because my mother told me not to have anything more to do with Mr. Mills.

"Q. Why? A. Because Mr. Mills wanted her to give my brother a deed of the north half, and she told him he had nothing to do with her property . . . .

"Q. Then Mr. Hughes was paid by you, I suppose? A. He is not paid yet.

"Q. You employed him? A. Yes.

"Q. And you are to pay him? A. Yes.

"Q. And he was your solicitor? A. Yes.

"Q. Now had your mother any independent lawyer to advise her before she made that deed? A. No, not to my knowledge.

"Q. Or any independent person? A. No.

"Q. Was it wholly a matter of resting upon the relations between you and your mother? A. Yes."

The plaintiff's explanation of her going to Mr. Hughes is, that her mother asked her to employ Mr. Gardner; that the plaintiff went to Mr. Gardner's office and learned that Mr. Gardner was absent and that Mr. Hughes was attending to Mr. Gardner's business.

Mrs. Coates had been paralysed in her right side for two or three years before her death, and was in her seventy-sixth year and in feeble health when she executed the deed by making her mark.

Mrs. Broderick, the witness to the deed, says that Mrs. Coates knew perfectly well what she was doing; that the plaintiff read and explained the deed to her; and to the question, "What do you mean by saying she explained it?" her answer was, "When she read it, she was fully aware her mother understood it."

Mrs. Broderick swore that she subsequently visited Mrs. Coates, when the latter said that she was glad it was done; that she had it seen to, the signing of the deed, so that she would leave Fanny all right.

Dr. Sheppard's evidence is, that he "happened to be there that

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day, and her daughter" (the plaintiff) "said to me, 'Now there is a deed to be signed, and would you kindly wait till I can get it signed, as a witness?' I said, 'Yes, if it is not too long;' and she says, 'I will get a lady in and she will come with you;' and I waited, and Mrs. Vanzant read the deed over to me, and made the remark that it was transferring the property to her; that is, to her daughter."

"Q. To herself? A. Yes, and now she says (evidently addressing Mrs. Coates): 'Will you sign?' And she says: 'Oh, yes, Fanny, I will sign the deed, and you have done a great deal more for me than anybody else, and I want to see that you have your rights.' That is about all that was said. She signed the deed then."

How Dr. Sheppard happened to be present was not explained. Apparently he was not making a professional call. Further, if the deed was prepared at the mother's request, in fact importunity, as suggested by the plaintiff, and if the mother, as the plaintiff says, was anxious to execute it, one would not, I think, expect a person who, like the plaintiff, deposed to knowing her mother's wishes and intentions, to ask her if she would sign the deed. Rather the natural observation would be that the instrument was ready for signature.

The part played by the plaintiff in connection with the deed may be thus summarised. She acknowledged that she gave instructions to the solicitor for the preparation of the deed; obtained it from him for execution; took it to her mother, read it to her privately; then sent for the witness to the execution; and afterwards, in the presence of Mrs. Broderick, the witness, read it again to Mrs. Coates, and this time also explained it to her, in order to ascertain "whether her mother understood it;" and then, in the presence of the witness and Dr. Sheppard, said to her mother, "Will you sign?" when the mother said, "Oh, yes, Fanny," etc., "and then signed it." Then the plaintiff at once possessed herself of the executed deed; and then, within about an hour, proceeded with Mrs. Broderick to Mr. Hughes' office, where the witness signed and swore to the affidavit of execution, and then the plaintiff instructed the solicitor to keep it unregistered; and later, about a week before her mother's death, caused it be be registered.

It is, I think, abundantly clear that this deed was procured

through the instrumentality of the plaintiff. Having regard to the mother's infirmities, helplessness, and dependent condition, she was unable to refuse her daughter's appeal, and was not in a position to form that "absolutely free and unfettered judgment" said by Lord Penzance to be necessary if the gift is to stand.

The facts of this case bring it, I think, within the principles laid down by Cotton, L.J., in *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, at p. 171, where he says there are two classes of such cases: "First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

The plaintiff pretends that she was reluctant to accept a gift of the north half, but that her mother really forced it upon her. I do not accept this account of the transaction; but, on the contrary, am of opinion that it was a result of the plaintiff's undue influence over her mother.

About 1890, Mrs. Coates assured her son that the north half was his and that he might move his house on it and take possession. Years afterwards she repeated this assurance to his son Harry. I think the defendant and his son were truthful witnesses. Doubtless what she meant, and what the defendant understood, was, that she would give the property to him by will. Relying on her promise, he moved his house, took up his residence, and erected other buildings on the north half, and made it his home. His mother lived on the south half, and the defendant took his

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meals with her. He worked on the whole lot, his mother, his sister, and her children, all of whom were living together, enjoying the fruits of his labour.

On the 19th December, 1911, the mother executed her will, whereby she devised to the defendant the north half of the lot and to the plaintiff the south half, and appointed her son sole executor. The statements made by Mrs. Coates to her grandson Harry and the execution of the will indicate her intention to carry out her promise to the defendant.

The plaintiff says her mother was a good and just woman. If so, it is improbable that she would of her own motion have broken her promise to the defendant, her only son, who had acted upon her promise and had devoted so many years of his life to her support.

The plaintiff in her evidence admits that the mother was fond of her son. If she was a just woman and fond of her son, she would not, I think, unless under great influence, have given to the daughter the premises which in good faith, and perhaps in law, she was bound to give to her son.

The evidence leads me to the conclusion that the plaintiff had been coveting the north half and had determined to acquire it, if possible, from her mother. She excluded the defendant from his mother's presence; and the sequel warrants, I think, the inference that such exclusion was for the purpose of prejudicing the mother against him and of thereby furthering the plaintiff's scheme. Months going by, and the mother, not seeing her son or knowing the reason for his absence, doubtless fell more under the daughter's influence. The fact that she prevented him from visiting his mother exposes the plaintiff to grave suspicion, and, in the light of what occurred, strongly suggests a sinister motive. The mother, in ignorance of the reason for her son's absence, might not unnaturally attribute it to lack of affection, and thus she would become the easier victim of the plaintiff.

The plaintiff gives an explanation for not employing Mr. Mills, her mother's solicitor, to prepare the deed, but doubtless the real reason was that Mr. Mills was familiar with Mrs. Coates' affairs and might have thwarted the plaintiff's scheme. He knew of Mrs. Coates' intention to give the north half to her son, that she had in fact so disposed of it by her will, which was then in Mr.

Mills' possession. Further, when Mr. Mills learned of the plaintiff's having procured from her mother a gift of the south half, he was instrumental in causing her to give security on the south half for the mother's maintenance. Further, the plaintiff was aware that Mr. Mills, on learning of the grant of the south half to the plaintiff, had suggested to Mrs. Coates to convey the north half to the defendant.

A shrewd woman, like the plaintiff, doubtless realised that, if Mr. Mills became aware of what was in contemplation, he might advise her mother unfavourably to the plaintiff's interest. Thus, a stranger to Mrs. Coates is employed by the plaintiff to prepare the deed, but he is not invited to come to Mrs. Coates and explain it to her. The plaintiff does that herself.

The plaintiff alleges that the deed was registered in order to satisfy her mother. Is it probable that this feeble old woman, who had, so far as appears, never bought or sold a foot of land or knew anything about the Registry Act, had forgotten her promise to her son, but remembered that the deed was unregistered, and urged its registration?

I wholly discredit the explanation, and am of opinion that the non-registration was in order to prevent the defendant learning of the existence of the deed; and it was only registered when the mother was so near death's door that knowledge by the defendant of what had occurred was not likely to prejudice the plaintiff's interests.

If the gift was the result of the free exercise of Mrs. Coates' wishes, and was unimpeachable, one would have expected the plaintiff to have promptly reported the matter to her brother. Even after her mother's death, she allowed him to remain in ignorance of the transaction until about the month of May, when she sent to him the letter above set forth. Why the delay? Was it that she shrank from telling him of the wrong done him? The letter itself is not frank and open, but a mere oblique intimation to him that she owns the property, but as to how or when she became the owner the letter is silent.

Whilst well knowing why her brother had not visited his mother, the plaintiff seems to make his absence a ground of complaint. If she acquired the property honestly, one would, under the circumstances, have expected her to give a full account of the

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transaction to her brother. Failure to do so suggests responsibility on her part for the mother's action.

As to the evidence that on various occasions Mrs. Coates intimated to Mrs. Broderick and others her intention to give the property to the plaintiff, it is to be observed that Mrs. Coates had for some years been in failing health, mentally and physically, and was wholly dependent on her daughter for the care required by a person of her advanced years and feeble health. She had been attached to her son; and, unless she had forgotten his existence, she must have remembered that he was living only a few yards from her. It may reasonably be assumed that the plaintiff did not inform her mother why her son absented himself. Thus her dependence on her daughter and the apparent neglect of her son may have caused her to express herself at times as testified to by witnesses; but, if her feelings towards him had changed, it was, I think, because of the improper conduct and undue influence of the plaintiff, and she is not entitled to profit thereby.

Where there is a conflict of testimony between the plaintiff and the defendant, I accept that of the defendant. Even if the deceased expressed it as her intention to give to her daughter the property which she formerly intended for her son, the question still remains, how was that intention brought about? If by undue influence, then the transaction must be set aside.

As said by Lord Eldon, in *Huguenin* v. *Baseley* (1807), 14 Ves. 273, at p. 300, and quoted with approval by Lord Romilly, in *Hoghton* v. *Hoghton* (1852), 15 Beav. 278, 299: "The question is, not, whether she," the donor, "knew what she was doing . . . but how the intention was produced." And Lord Romilly adds: "And though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside."

It may be said of the deceased, as was said by Lord Justice Knight Bruce, in *Wright* v. *Vanderplank* (1856), 8 D.M. & G. 133, 137, that she was "not, in the largest and amplest sense of the term—not, in mind as well as person,—an entirely free agent." And I am of opinion that the gift in question, having been procured by the plaintiff's undue influence, should be set aside.

Further, on the ground of public policy, the gift cannot stand. It is an established principle in equity that when persons are in

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such relations to each other that one of them may be presumed to possess influence over the other, a gift from the latter to the former, if impeached by the donor, is set aside, unless the donee shews that the donor was in such a position as enabled him to form an absolutely free and unfettered judgment. The rule is thus stated by Lord Penzance, in *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462: "In equity persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the Courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger or the inexperienced overreached by him of more mature intelligence . . . In the case of gifts or other transactions *inter vivos* it is considered by the Courts of equity that the natural influence which such relations as this in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside unless the party benefited by it can shew affirmatively that the other party to the transaction was placed 'in such a position as would enable him to form an absolutely free and unfettered judgment'."

In *Allcard* v. *Skinner*, *supra*, Lindley, L.J., says, with reference to the principle upon which Courts of equity proceed in dealing with cases like the present (36 Ch.D. at pp. 182, 183): "What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles . . . As no Court has ever attempted to define fraud so no Court has ever attempted to define undue influence, which includes one of its many varieties. The undue influence which Courts of equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is

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carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non-exercise, and, failing that proof, have set aside gifts otherwise unimpeachable."

In *McCaffrey* v. *McCaffrey* (1891), 18 A.R. 599, a husband, not having obtained independent advice, made a voluntary conveyance to his wife; at the time, hers was the dominant mind, and she possessed much influence over her husband. In his judgment, Maclennan, J.A., says (pp. 599, 600): "It may be conceded that, at the date of the deed, the plaintiff had sufficient legal capacity to make a valid deed; and also that it was duly explained to him, and that he understood that it was a conveyance of the land in question to his wife; yet I think that from the undisputed facts of the case, it must be declared invalid. I think the evidence shews that when the deed was made, the defendant's relation to her husband was confidential and fiduciary within the meaning of the decision in *Huguenin* v. *Baseley*, 2 W. & T. L.C., 6th ed., 597, and the numerous cases in which the principle of that case has been applied." And further on he says (p. 606): "Such being the circumstances of the case and the relations of the parties, I think it was incumbent on the defendant and her solicitor to see that before making such a conveyance the plaintiff had competent and independent advice."

Sir Samuel Romilly, in his argument in *Huguenin* v. *Baseley*, 14 Ves. at pp. 285, 286, thus states the law: "The relief stands upon a general principle, applying to all the variety of relations, in which dominion may be exercised by one person over another."

These words have received the highest judicial approval as a correct statement of the law.

In the present case, the plaintiff stood in fiduciary relations towards her mother at the time of the gift. The mother had left

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her own house, and was living with the plaintiff; she was in her seventy-sixth year, had for some years been paralysed in her right side, and was incapable of taking care of herself. She gradually became more helpless, and throughout the year 1915 was frequently confined to her bed, occasionally only with difficulty moving around the house but not outside of it. The plaintiff recognised her mother's helpless condition, and had for some years lived with and taken care of her, first in her mother's and then in her own house. She was her nearest female relative, and during the last year of her mother's life had been the only person in attendance upon her. As stated by Mrs. Broderick in her evidence, "Mrs. Vanzant cooked for her and washed for her and if she was sick got a doctor for her and took good care of her."

"Q. Was she wholly dependent on Mrs. Vanzant? A. Yes.

"Q. Entirely so? A. Yes.

"Q. And nobody else took any care of her? A. No one else that I know of."

These relations between the two were such that the plaintiff was in a position to exercise undue influence over her mother; and that circumstance, without proof that it was exercised, casts upon the plaintiff the onus of proving its non-existence.

The evidence shews that the mother had no competent and independent advice. Thus the case falls also within the second class of cases mentioned by Cotton, L.J.; and, the plaintiff not having proved the absence of undue influence, the gift fails and must be set aside.

Having reached these conclusions, it is unnecessary for me to deal with the defendant's claim by possession or under the verbal contract with his mother. She having devised the property to him, the gift being set aside, he takes as devisee.

There will be judgment setting aside the impeached deed, with costs to the defendant.* *Judgment for defendant.*

* [November 7. An appeal by plaintiff to the First Divisional Court was dismissed with costs.]

NORTHRUP v. THE KING.

CAN.

Ex. C.

Exchequer Court of Canada, Cassels, J. October 25, 1917.

CROWN (§ II—20)—LIABILITY FOR NEGLIGENCE—UNCOVERED BASIN—PUBLIC BUILDING—TRESPASSER.

A pedestrian falling into an uncovered catch-basin constructed by the Crown, on property not owned by it, to protect a post office building against accumulation of surface water, at a place not used for public travel, is a trespasser, and has no redress against the Crown for injuries sustained thereby.

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Cassels, J.

PETITION of RIGHT for damages for an injury sustained from falling into an uncovered basin constructed by crown. Dismissed.

N. R. McArthur, for suppliant.

T. S. Rogers, K.C., for respondent.

CASSELS, J.:—The petitioner, S. Gertrude Northrup, lives at Glace Bay, in the County of Cape Breton. She alleges that on or about April 11, 1915, while walking to the public buildings (the post office), she suffered damages by falling into a catch-basin which she alleges was uncovered and unprotected and in a dangerous condition, because of the negligence and unworkmanlike construction of the same by the respondent, its agents, servants and workmen, etc.

The allegation is that she fell into the catch-basin and was seriously injured, and she prays that the Crown be condemned to pay the petitioner the sum of $22,235 with costs.

The case came on for trial before me at Halifax on September 13 last. The evidence, with the exception of that of William Bishop, was taken by consent by a commissioner agreed to by all parties. By consent it was used at the trial. I had no opportunity, therefore, of personally seeing or hearing any of the witnesses, except Bishop.

The public building in question is the post office. It fronts upon Main St. Exhibit No. 2, filed at the trial, shows roughly the situation of the property. The post office was constructed about the year 1910. It appears from the evidence that the land sloped from the north towards the building, with the result that the surface water which drained from the ground on the north soaked into the northerly side of the post office—and thereupon, under directions of the Government, a catch basin was constructed in order to catch the waters, and, by means of a drain, the water from this catch-basin is conducted into drains which drain the post office into the main sewer on Main St.

On the west of the public building and on the Government land there was a passageway leading from Main St. and to the north of the building. It would appear that this passageway was utilized for the passage of teams and persons travelling on foot, and led to the houses situated on the north of the post office. This passageway had a width on Main St. of about 9 ft., and became wider towards the northern end. It was a beaten path

like a public street, and was used by the public. This passageway, while utilized by the public, was in part on government property. The people passing by this western passageway walked clear of the catch-basin in question.

On the easterly side there was an open piece of ground between the government building, which at Main St. was about the width of 12 ft. At the north-east corner of the building the width was about 3 ft. There was no beaten path on this westerly piece of land. This is conceded by the petitioner and also by the witnesses. The catch-basin in question was constructed on lands owned by the late Senator McDonald, and was at some distance from the northerly boundary of the land owned by the Crown.

The allegation of the petitioner is that she was going to Rice's Gents' Furnishings when, she says, I was taking a short cut through Senator McDonald's field when I got injured near the post office. She is asked:—

Q—Were you on the beaten path? A.—No. Q.—Were you passing a place where apparently nobody else passed? A.—I noticed no tracks and there was no road.

The case was presented before me on behalf of the petitioner by Mr. McArthur with great ability. He informed me at the trial that he had made a very careful search of authorities, but could find none in point.

In my opinion, the action does not lie against the Crown. Mr. Bishop seems to think that in Glace Bay people were in the habit of crossing any commons promiscuously. The land in question to the east of the post office building and to the Commercial Hotel is the property of the Crown. In utilizing this land with a view of taking a short cut the petitioner was a trespasser, and there was no duty on the part of the Crown towards the petitioner. Had she chosen to take the beaten road on the west passage, the question of a different character might arise—but for her own convenience she chose to take this short cut through grounds of Senator McDonald, upon whose lands the catch-basin in question was situate, with a view of passing down on government lands to the east of the post office.

The case of *Lowery* v. *Walker*, [1911] A.C. 10, reversed a decision of the Divisional Court, [1909] 2 K.B. 433, and a decision of the Court of Appeal, [1910] 1 K.B. 173. On page 11 it is stated:—

The contentions on both sides are so clearly and fully set forth in the report of the decision of the Court of Appeal that it is unnecessary to repeat

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them here. In this House their Lordships expressed no opinion upon the authorities, their decision turning on the construction of the learned County Court Judge's findings.

By referring back to the decision of the Court of Appeal it will be found that the judges dealt exhaustively with the principles that should govern the case of a trespasser. As their Lordships pointed out, there are authorities, perhaps, not all in harmony, but the general principles of law governing such cases are fully dealt with.

Reference may also be had to Pollock on Torts, 10th ed. (1916), at p. 544; *Leprohon* v. *The Queen*, 4 Can. Ex. 100, may also be referred to, although in some respects this case may be modified by the law as enunciated by the Supreme Court of Canada in the case of *Leger* v. *The King*, 43 Can. S.C.R. 164. The case of *Brebner* v. *The King*, 14 Can. Ex. 242; 14 D.L.R. 397, may also be referred to, and the collection of authorities therein cited.

I am sorry for the petitioner, as she seems to have suffered considerably. I would have preferred that she had been examined in open court before me. Looking at the doctor's evidence, the same injury might have been caused by slipping without getting, as she alleges, into this hole.

Another serious defence has been raised on the part of the Crown which I have not considered it necessary to investigate, namely, that the accident in question did not arise on any public work, and the Crown invokes the law as decided in the *Chamberlin* case (42 Can. S.C.R. 350), and the *Piggott* case (32 D.L.R. 461, 53 Can. S.C.R. 626), and numerous other authorities.

Any amendments to the Exchequer Court Act (R.S.C. 1906, ch. 140) remedying the law as decided in the *Chamberlin* case would not apply to this case; and the legislation in the last parliament, namely, the statute passed in 1917, would not be retroactive.

The petition is dismissed, and, if the Crown exacts them, with costs. *Action dismissed.*

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McCONNELL v. McGEE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. April 27, 1917.

COURTS (§ II A—150)—JURISDICTION—"PERSONAL ACTION"—TRESPASS—TITLE TO LAND.

An action for trespass to land, in which no question of title is involved, is a "personal action" within the jurisdiction of a Division Court, under sec. 62 (1)(*a*) of the Division Courts Act, R.S.O. 1914, ch. 63.

[*Harmston v. Woods*, 39 O.L.R. 105, overruled. See also *Dubuc v. C.N.R.*, 34 D.L.R. 401, 27 Man. L.R. 520.]

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MCCONNELL v. MCGEE.

Statement.

MOTION by the plaintiff to extend the time for appealing from a judgment of the County Court of the County of Huron in favour of the plaintiff for the recovery of $60 damages in an action for trespass to land, but allowing the plaintiff Division Court costs only. The plaintiff desired to appeal as to costs, in order to raise the point that the Division Courts have no jurisdiction in actions for trespass to land, even where the title to the land does not come in question.

L. E. Dancey, for plaintiff.

W. Proudfoot, K.C., for defendant.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The plaintiff, in this County Court action, applies, to this Court, for an extension of the time for appealing against the ruling of the Judge of that Court, that the plaintiff's cause of action was one within the jurisdiction of a Division Court, and his order, made upon that ruling, that the costs of the action should be taxed accordingly: see Rule 649 and the County Courts Act, R.S.O. 1914, ch. 59, sec. 40 (1) (*d*).

Various excuses are offered for letting the prescribed time for appealing pass; but the true reason seems to me to be this: there was no thought of appealing until a recent decision, that Division Courts have not jurisdiction in any case of trespass to lands, was reported: encouraged by that case, the plaintiff now desires to appeal, but has let his right to appeal, without leave, slip.

The report of the case I have indicated—yet in abbreviated form in the Ontario Weekly Notes only*—does not disclose the character of the trespass there in question—whether it was trespass *quare clausum fregit*, or trespass on the case for injury to lands; though, if there be not jurisdiction in the one case, it is difficult to understand why there should be in the other, why the rule should not be that there is no jurisdiction in Division Courts in any case in which damages for injuries to land are sought: it is equally difficult for me to understand why, in any such case, there should not be jurisdiction in such Courts, in cases in which the damages claimed do not exceed the amount in which such Courts have jurisdiction generally in actions *ex delicto;* and in a memory extending over more than half a century, and covering scores of cases of actions for trespass, of all kinds, to lands of all kinds, brought in Division Courts, there are but two in which

*See *Re Harmston* v. *Woods* (1917), 12 O.W.N. 23, 39 O.L.R. 105.

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the jurisdiction of such Courts was questioned upon any such ground as that now sought to be raised here; those cases being the recent one to which I have referred and the case upon which it was based.*

No one has yet suggested any good, or indeed any plausible, reason why Division Courts should not have jurisdiction in such cases, provided of course that no question of title to land should be involved in the trial of them. One may very well ask, indeed one cannot help asking, why, in a case of trespass to lands, in which the damages sought are small—and no question as to title to the land is involved—such as, for instance, for breaking windows intentionally, or unintentionally but negligently, the damages being but a few dollars—the parties should be driven to a County Court with its formalities, delays, and cost running up possibly to hundreds of dollars?

There being no reason why jurisdiction should be excluded in such cases, and that jurisdiction having been commonly exercised for a great many years, some very substantial reason, such as that legislation plainly enough excludes it, should be made apparent before this Court can properly interfere and put the Legislature to the trouble of more plainly conferring it.

If such cases as I have mentioned are "personal actions," then Division Courts have jurisdiction expressly conferred upon them in these words—personal actions—"where the amount claimed does not exceed $60." And why are they not "personal actions," damages only being sought and no question of title to land being involved? Why not quite as much so as if the action were for trespass to goods or any other action in which damages only are sought? If the position of the parties were reversed, and the defendant were suing the plaintiff for trespass to his cattle, which the defendant had impounded damage feasant, could it be said that a Division Court had no jurisdiction, though the damages claimed did not exceed $60? What peculiarity has damage to land that it cannot be dealt with in a Division Court, yet may be dealt with by the same Judge in a County Court?

With very few, if any, exceptions, the books make no such distinction, nor does any decided case, except those I have mentioned, one a dictum and the other a ruling at Chambers only.

*Neely v. *Parry Sound River Improvement Co.*, 8 O.L.R. 128.

The general, indeed the invariable, rule is: that a personal action is one brought for the specific recovery of goods and chattels, or for damages or other redress for breach of contract, or other injuries, of whatever description, the specific recovery of lands, tenements, and hereditaments only excepted; that a real action is one brought for the *specific* recovery of lands, tenements, and hereditaments; and that a mixed action is one partaking of the nature of real and personal actions, that is, one in which some real property is demanded, as well as personal damages for a wrong sustained: see Wharton's Law Lexicon, titles "Personal Action," "Real Action," and "Mixed Action;" Blackstone's Commentaries, vol. 3, pp. 117, 118; Chitty on Pleading, 7th ed., vol. 1, p. 109; Chitty's General Practice, 2nd ed., p. 760; Tidd's Practice, p. 1; 1 Corpus Juris, pp. 932, 933; American and English Encyclopædia of Law, 2nd ed., vol. 22, pp. 744 and 745; *ib.*, vol. 23, p. 892; *ib.*, vol. 20, p. 834; O'Brien's Division Courts Act, 2nd ed., p. 44; Harrison's Common Law Procedure Act, 2nd ed., p. 2.

Against this whole current of definition, all in full accord throughout the books, it is said that one of the more ancient books of legal phrases—"Termes de la Ley"—gives a narrower definition of the phrase "personal actions." That book is not at hand at the moment, and so I am unable to see whether the narrower definition attributed to it is all that is said on the subject, is not merely one, or a part of one, definition, the rest of which, or another, to be found in it, would bring that book in accord with all the others; and it is hardly worth while taking time to look into it, for, however the question may be dealt with there, it cannot affect the meaning now commonly attributed to the words, and indeed the true and obvious meaning of them. We have to deal with the meaning of the words written in quite modern legislation.

I say the true and obvious meaning, for what else can a right to such damages be but a personal one, personal property quite as much as a man's money in his pocket or his horse upon which he rides? The right of action does not "run with the land," it is nothing but a personal right of action: and not only a personal one in the full meaning of the words "personal action," but one to which the maxim *actio personalis moritur cum personâ* would

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apply but for the saving effect of statute-law: The Trustee Act, R.S.O. 1914, ch. 121, sec. 41; and C.S.U.C. ch. 78, secs. 1 and 2.

Then, turning to the statutes, Imperial as well as Provincial, the words in question are found in the Common Law Procedure Acts, in which it was always provided that "all personal actions" should be commenced by writ of summons. And under the Provincial enactment 4 Wm. IV. ch. 1, sec. 39—following Imperial enactment—the great array of ancient writs in real and mixed actions was abolished, and all such actions reduced to dower and ejectment. All such actions as that in question were personal actions which were required to be commenced by writ of summons under the provisions of the Common Law Procedure Acts. The character of actions, personal, real, and mixed, in legislation, is, in the enactments I have mentioned and in the Ejectment Act, plainly shewn to be just such as in the books they are defined, as I have mentioned.

And in the Statutes of Limitations actions for trespass to land have always been placed in the category of personal actions.

None of these things is at all gainsaid, by Mr. Dancey, in the applicant's behalf; they could not be with any degree of reason: the position which he takes is this: that, although the rule is that the term "personal actions" comprises all such claims as those in question, that term is used in a greatly modified sense in the Division Courts enactments; that the context shews that, and requires that, they should be so restricted that they cannot comprise any action for damages to land, whether or not any question of title to land arises in the action.

And his first point is: that, as the Act now in force confers jurisdiction in respect of certain claims arising out of contract—claims embraced in the words "personal action" specifically, therefore the words "personal action" must have been used with a restricted meaning, a meaning excluding actions *ex contractu* but why so? Why may not the words first used, "personal action," embrace all that comes within the ordinary meaning of those words? First the general jurisdiction is conferred to the amount of $60; then in particular cases, *ex contractu*, increased jurisdiction in amount—$100—is conferred; and then further increased jurisdiction in some particular cases of actions *ex contractu* is conferred in an increased amount—$200. The point, if it have any bearing on the question of the meaning of the words

in question, seems to me to support rather than to be opposed to the view that the words in question should be accorded their full common meaning. The general jurisdiction is first conferred in the usual words comprising all common law actions, except real and mixed actions, in an amount common to all; then are added the special cases of personal actions, as to which increased jurisdictions in amounts are conferred.

The next point is: that, in the County Courts Act, although jurisdiction is conferred in the common term "personal actions," there is also a special provision conferring jurisdiction in actions for trespass to land;* but here again the same answer is obvious; it is special jurisdiction that is thus conferred, giving a County Court power to entertain such actions *although the title to land may be in question*, if the value of the land do not exceed $500; contrary to the earlier County Court enactments, which excluded jurisdiction when the title to land was involved.

And in making this point Mr. Dancey has put himself on dangerous ground, as a reference to the earlier County Court enactments makes plain. Under them: see C.S.U.C. ch. 15, sec. 16; as I have said, no such jurisdiction was expressly conferred: jurisdiction was conferred in substantially the same manner, in common law actions, as it now is and then was conferred on Division Courts; and so, unless the words "all personal actions" comprised an action for damages for injuries to land, County Courts also had no jurisdiction in such a case; and so for the injury caused by throwing a dead cat over a line fence, or for negligently permitting poultry to run in a neighbour's garden to its injury, no action would lie except in the highest Court of the Province, if at all, though the damage were but a few dollars.

Then, following up this line of argument still further: side by side in the Consolidated Statutes of Upper Canada are "The County Courts Act," "The Division Courts Act," and "The Common Law Procedure Act," in each of which the words "all personal actions" are used for a like purpose, and consequently should convey the same meaning; and actions for damages for injuries to land must be excluded from the Common Law Procedure Act, as well as the County Courts Act, if they should be excluded from the Division Courts Act; and so they would not be

*See R.S.O. 1914, ch. 59, sec. 22 (*c*.)

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provided for in any of the Courts of law of the Province, not being within the Ejectment Act or any other enactment providing for exceptional actions.

But, reverting again to the Division Courts Act, as it is and always has been in this respect, as well as for many years it was in the County Courts Acts, among other cases, cases in which the title to land is brought in question are or have been excepted out of the jurisdiction of these Courts, so that, as the Division Courts Act now is, the general jurisdiction conferred is over "all personal actions" except—among other exceptions—those in which the title to land is involved; so that we have a plain case of the exception proving the rule: out of actions *ex delicto*, and also out of actions *ex contractu*, generally, those in which the title to land is involved are put without the jurisdiction; all others, if not affected by the other exceptions, none of which is applicable to this case, are within it, if the amount claimed be within the limit prescribed by the Act.

And, as I have said, no case that any one has ever heard of, except that to which I have referred as recently decided at Chambers, has decided anything to the contrary; though the jurisdiction now questioned has been exercised ever since the Division Courts were given jurisdiction in "all personal actions:" and the exercise of such jurisdiction has been entirely in accord with the general principles of the law, which, by reason of the far-reaching effect of *res adjudicata*, have, necessarily almost, excluded questions of title to land from being considered in the inferior Courts; of which the exclusion of the jurisdiction of a Justice of the Peace, whenever a question of title to lands really arises, affords a familiar instance: see, for one instance only, the Petty Trespass Act.

The case of *Attorney-General* v. *Lord Churchill* (1841), 8 M. & W. 171—for a reference to which we are all indebted to Stroud's Judicial Dictionary—is neither a decision in the applicant's favour nor does anything said in it give the least encouragement to this application. The question involved there was one of venue in a local, as distinguished from a transitory, action; the Crown claiming a prerogative right to lay the venue where it pleased in a local action, though a subject had that right only in a transitory action. The ruling was in these words (p. 193): "But with this uncertainty attending the principal case, on which the authorities in the text-writers wholly depend, and in the absence of any precedent what-

ever, in an information of intrusion, or other action usually termed *local* (for the precedents in cases of recovering *debts* due to the Crown, upon inquisitions in outlawry and extent, as has been before said, do not apply), we think that the Crown officers have failed to establish the right to the prerogative claimed." In regard to the meaning of the word *personal*, the learned Judge who delivered the judgment of the Court said: "The only point is, in what sense the word '*personal*' is there used"—"there used" meaning the report of the case of *Rex* v. *Webb* (1670)—an action for embezzling the King's goods—in 1 Sid. 412, 1 Vent. 17. "It is capable of two different senses. Actions may be personal, as contradistinguished from real and mixed; the first being actions against the person only, for damages, the second for the recovery of real estate, and the third for both. In this sense of the word 'personal,' there appears to be no question, but that an information of intrusion is a personal action, for its object is the recovery of damages, not the recovery of the estate, for the Crown has never in contemplation of law lost it. But the word '*personal*' may mean such actions as are for the recovery of debts or damages to the person or personal effects; and in this sense of the word, a writ of intrusion is not a *personal* action. It gives some colour to this construction of the word, that the dictum of the Court in the case, both as it is reported in Siderfin and Ventris, is in reference to an action of this nature,—an information in the nature of trover." Giving the fullest effect to this dictum of the learned Judge, what possible reason can be advanced for imagining that the words "all personal actions," in the three enactments to which I have referred, were not used in contradistinction to all real and all mixed actions. It does not need the word "all" to make it plain that personal actions of the two kinds—and the learned Judge might have subdivided them further—mentioned by him are included: nor does it need the further complete proof afforded by the exception of actions *ex delicto* in which the title to lands is involved.

My one regret is, that I should be obliged to feel that it may be necessary to speak so many words over a matter which seems to me to be so plain: but I still fear that many words may yet need to be added to counteract the ever-present judicial disposition to stem the tide of legislative effort, from time to time, to really

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extend the jurisdiction of the inferior Courts, legislation which we are commanded by legislation to treat as remedial.

I am in favour of holding that the dictum of Anglin, J., expressed in the case of *Neely* v. *Parry Sound River Improvement Co.*, 8 O.L.R. 128, is erroneous; of overruling the case of *Re Harmston* v. *Woods*, 12 O.W.N. 23;* and, accordingly, dismissing this application, and so of affirming the ruling of the learned County Court Judge, in this case, which was one of trespass on the facts of the particular case, formerly called "trespass on the case" or "case" only: and one in which no question of title to land was, or could be, involved, the parties being tenant and landlord; the plaintiff's claim being for damages for injury to his garden caused by the defendant's cattle, and the one question involved in it, and determined by a jury, being apparently, whether the landlord had contracted to keep up the fences between his land and that part of it let by him to the plaintiff.

Lennox, J.

LENNOX, J., agreed with the Chief Justice.

Riddell, J.

RIDDELL, J.:—In an action for damages for injury to the plaintiff's garden by the defendant's cattle, the plaintiff recovered $60 in the County Court of the County of Huron: the learned County Court Judge, thinking that this amount could be recovered in a Division Court, refused to award County Court costs. For reasons unnecessary here to set out, the plaintiff allowed the time to go by for appealing; application was made to me to extend the time, and I referred the application to the full Court. It appeared that the case was one in which the time should be extended if there should be good grounds for the appeal; and it was agreed that the whole case should be argued as though an extension of time had been granted.

The point is a neat one; and, had it not been for the case of *Neely* v. *Parry Sound River Improvement Co.*, 8 O.L.R. 128, and that of *Re Harmston* v. *Woods*, 12 O.W.N. 23, I should have thought the law to be plain.

The Division Courts Act, R.S.O. 1914, ch. 63, sec. 62, gives the Division Court jurisdiction, "save as otherwise provided by this Act," in (*a*) "a personal action where the amount claimed does not exceed $60;" sec. 61 (*a*) excluding "an action for the recovery of land, or an action in which the right or title to any

*See also 39 O.L.R. 105.

corporeal or incorporeal hereditaments . . . comes in question."

Admittedly the title to land does not come in question in this action; and the sole question to be determined is—Is an action for injury to land a personal action?

The action at the common law would be an action of trespass on the case, the damage being consequential, or of trespass *quare clausum fregit*, the damage being immediate.

Mr. Justice Anglin, in *Neely* v. *Parry Sound River Improvement Co.*, 8 O.L.R. at p. 129, is made to say: "An action for damages for trespass to land is not a personal action within the meaning of R.S.O. 1897, ch. 109, sec. 64. The Division Court, therefore, could not have tried this action." But he had already said: "Upon these pleadings the title to land is brought in question . . . I must determine according to the pleadings" (p. 129). Accordingly, the Division Court had no jurisdiction in that action, and anything said by the learned Judge by way of a general rule is purely *obiter*.

Mr. Justice Middleton, in *Re Harmston* v. *Woods*, says: "The decision of Anglin, J., should be followed; it was not a mere dictum; and the affirmance of the decision by a Divisional Court gives it greater weight" (12 O.W.N. at p. 24). We have no means of knowing whether the Divisional Court approved of the *obiter dictum*, and have no reason to suppose that that Court did; the reporter in his head-note specifically states that the title to land was brought in question, and does not mention the general statement.

That an action for trespass to land is a personal action at the common law no one doubts—arson being the only form of injury to property which was recognised by the common law as a crime, all other kinds of damage to property were treated simply as trespasses, and the man who laid waste his neighbour's field was sued in an action of trespass: Holdsworth's History of English Law, vol. 3, p. 294—as I have already said, if the damage did not result immediately from the unlawful act, the action was in case: Blackstone's Commentaries, book III., p. 209.

But either was a personal action. The common law division of actions into real, personal, and mixed, is too well known to require detailed treatment—the curious will find the division discussed in Blackstone's Commentaries, book III., pp. 117 *sqq.*—it will suffice to

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extract Blackstone's definition: "Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs . . . Of the former nature are all actions upon debt or promises; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like." No distinction is made between trespass to personalty and trespass to realty: and under this head a whole chapter (ch. XII.) is devoted to Injuries to Real Property in the form of Trespass or Trespass on the Case. See also Broom's Commentaries on the Common Law, 4th ed. (1869), pp. 118, 119, 125. The learned author gives as a personal action an action for trespass "in the case of a wrongful . . . entry on land."

Rastall's "Termes de la Ley," p. 19, is quoted: "Actions personal are such actions whereby one claims debt or other goods and chattels or damage for them, or damage for tort done to his person (*à son person*): and is properly that which in the civil law is called '*in personam*,' which is brought against him who is bound by contract or delict to do or concede (*concedere*) something." This definition is not at all exhaustive—e.g., it omits damage to personal property, defamation (which had by Rastall's time been recognised by the Royal Courts, having been cognisable at the common law by the local Courts: Holdsworth, vol. 2, p. 319); and some other personal actions mentioned by Blackstone. The book "Termes de la Ley" is not to be taken as of great accuracy or as of authority in any nice question.

The Ontario cases cited in the *Harmston* case do not seem to me to give much trouble.

In *Re McGugan* v. *McGugan* (1890), 21 O.R. 289, it was decided that the County Court, which had no equitable jurisdiction at all, but only common law jurisdiction, could not take jurisdiction where "the plaintiff's cause of action is one of purely equity jurisdiction" (p. 294), and that "personal action" in the statute meant what it meant at the common law (of course as being used in reference to a common law Court).

In *Whidden* v. *Jackson* (1891), 18 A.R. 439, it was held that an action for a declaration of right to rank as a creditor on the estate of an insolvent could not be disposed of in the County

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Court; for, though it might be a personal action, the County Court could entertain only such personal actions as claimed debt or damages, and it was not in contract (*per* Osler, J.A.) Maclennan, J.A., considered that it was not a common law action, and consequently the action was not a "personal action" within the meaning of the Act dealing with a common law Court (thus agreeing with Armour, C.J., in *Re McGugan* v. *McGugan*). Burton, J.A., also held that the cause of action, whatever it was, did not come within the classes of cases in the statute. (His judgment must be read with care; he does not mean that such an action could be brought "at common law;" but he is speaking of "an assignment at common law," and indicating that a bill in equity would lie in the case put.) He goes on to say that he does not consider this "a personal action, by which," he says, "I understand such actions as a man can bring 'for debt or other chattels or damages to them or damages for injury to his person.'" This is not an accurate quotation from "Termes de la Ley"—the words are not "to them" but "for them" (*damag' pur eux*). But in any case, as I have pointed out, the enumeration is not exhaustive. Hagarty, C.J.O., thought that "an action to prove a debt or claim" was a personal action—in other words, equitable causes of action might be cognisable in the County Court. The Chief Justice thought the claim a personal action; Burton, J.A., thought it was not; Maclennan, J.A., thought, as it could not be brought at law, it was "clearly not a personal action within the meaning of . . . the County Courts Act" (p. 444); while Osler, J.A., "even if it is accurately described as a personal action," thought it not such a personal action as came within the Act (p. 442).

Nor do I think *Attorney-General* v. *Lord Churchill*, 8 M. & W. 171, assists my learned brother's conclusion—there the Court were not interpreting the expression "personal action" in a statute, but in a report given by Siderfin of the reason for a decision reported by him. It was *Rex* v. *Webb*, an action (of course at common law) for trover and conversion. Siderfin alone of the three reporters says (1 Sid. 412): "Roy a ver prerogative a try ses personal actions lou il pleist"—the "King has the prerogative right to try his personal actions where he pleases." Neither Ventris (1 Vent. 17) nor Keble (2 Keb. 386) states this; and certainly such a proposition was not necessary for the decision. Siderfin was a reporter of no great authority—

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Dolben, J., thought his book "fit to be burned, being taken by him, when a student:" 1 Show. 252; also 2 Vent. 243. In Comberbach 377, Holt, C.J.: "Many good cases are spoiled in Siderfin: neither reported with that truth nor with that spirit which the case required:" see Wallace's Reporters, 3rd ed., pp. 202, 203. It would appear that the student, Siderfin, here either generalised from a particular case, or used terminology which he did not thoroughly understand—neither of which mistakes is without precedent or is entirely unknown even in these days of enlightenment and logic.

The Court in *Attorney-General* v. *Lord Churchill* were considering the meaning to be attached to Siderfin's phrase "personal actions;" and came to the conclusion that the prerogative applied only to chattels, not to realty—and that the word "personal," as it is "there used," i.e., used in Siderfin, means only actions for "recovery of debts or damages to the person or personal effects."

I think an examination into the course of legislation in our Province will shew that this appeal cannot succeed.

The origin of the Division Court goes back to the Court of Requests, instituted by (1792) 32 Geo. III. ch. 6 (U.C.), with jurisdiction only for a "debt or debts . . . not exceeding the sum of forty shillings Quebec currency" ($8). This Court was presided over by two or more Justices of the Peace; the jurisdiction was increased by (1816) 56 Geo. III. ch. 5 (U.C.)— not by (1797) 37 Geo. III. ch. 6 (U.C.), as stated in 30 C.L.T., p. 23; that statute, so far as it affects the Court of Requests, does not deal with jurisdiction—to £5 currency ($20) where the debt was ascertained by acknowledgment of the defendant in writing "or other proof than that of the oath of the prosecutor." In 1833, by 3 Wm. IV. ch. 1, Commissioners were provided for instead of Justices of the Peace as Judges—the jurisdiction was £10 ($40) in debt or contract; but not more than £5 if the defendant was not personally served or than 40s. ($8) on the mere oath of the defendant.

The Act of 1841, 4 & 5 Vict. ch. 3, changed the name to Division Court (my brother Middleton is in error in saying that there was no Division Court in 1852), displaced the Commissioners by the District Court Judge, and fixed the jurisdiction at demands of debts or contracts £10 ($40)—there was a proviso that no action should be brought in the Division Court for any gambling debt, for liquors drunk in a tavern or ale-house, or "for any cause

involving the right or title to real estate" (sec. 20). The Act of 1845, 8 Vict. ch. 37, by sec. 5, allowed the plaintiff to abandon the excess over £10; and that of 1849, 12 Vict. ch. 69, allowed attachment in the case of an absconding debtor, the claim being from 20s. ($4) and £10 ($40) for "debt or damage arising upon any contract express or implied, or upon any judgment;" but neither extended the jurisdiction.

At this stage the Division Court then had no jurisdiction in tort, but only in contract.

The next statute (1850), 13 & 14 Vict. ch. 53, for the first time gave jurisdiction in claims flowing from tort—sec. 23 enlarged the jurisdiction in "debt, account, or breach of contract, or covenant" to £25 ($100), and added "in all torts to personal chattels, to and including the amount of £10" ($40).

The terminology "personal actions" is not yet used, and the action in tort now allowed is only in respect to tort to personal chattels. The former proviso as to gambling debts, debts for liquor, and causes involving title to land, is continued.

The next statute introduces the present expression "personal actions"—(1853) 16 Vict. ch. 177, sec. 1. After reciting the jurisdiction given by former legislation, including "demands in actions of tort to personal chattels, to and including the amount of £10," the section proceeds: "And whereas it is expedient to extend the provisions of the said Act to all personal actions (except as hereinafter mentioned)" and enacts that the Division Courts shall have jurisdiction in "all personal actions where the debt or damages claimed is not more than £10." The proviso now excludes actions for gambling debts, for liquors drunk in a tavern or alehouse, or on a note given for any such debt, or "any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, custom or franchise shall be in question, or in which the validity of any devise . . . may be disputed, or of any action for malicious prosecution, or for any libel or slander, or for criminal conversation or seduction, or breach of promise of marriage." It will be seen that most of the exceptions introduced for the first time by this Act—all those which are specifically mentioned, indeed—are actions in tort. The jurisdiction in cases of debt, account, or breach of contract, &c., up to £25 ($100) given by the Act of 1850, 13 & 14 Vict. ch. 53,

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sec. 1, was not taken away, but remained as an additional head of jurisdiction: sec. 2 of 16 Vict. ch. 177.

It seems to me clear that the Legislature by this Act intended to give the Division Courts jurisdiction in actions of tort generally, and therefore repealed the provision limiting the jurisdiction in tort to torts to personal property. The terminology was changed, and the expression used which connotes both actions in contract and actions in tort—"personal actions."

On the revision of 1859, the jurisdiction was tabulated: C.S.U.C. 1859, ch. 19, sec. 54; but not changed—whether in tort or in contract the limit of jurisdiction was $40: *Hyland* v. *Warren* (1860), 6 C.L.J. O.S. 116; all actions in tort or in contract up to $40, including detinue, could be tried in the Division Court: *Lucas* v. *Elliott* (1863), 9 C.L.J.O.S. 147; and there was the additional jurisdiction up to $100 in actions based upon contract. But there were certain actions in tort excluded specifically.

At the time of the passing of the Act of 16 Vict., 1853, no one could possibly have any doubt of the meaning of the expression "personal action:" and nothing has since occurred to affect that meaning in any way.

The R.S.O. 1877, ch. 47, secs. 53, 54, is the same as C.S.U.C. ch. 19, secs. 54, 55; 43 Vict. ch. 8, sec. 3, increases the jurisdiction in case of personal actions to $60; 41 Vict. ch. 8, sec. 6, changes the language of the $100 provision; and 43 Vict. ch. 8, sec. 2, adds the third class where the amount, &c., is ascertained by the signature of the defendant. Any subsequent change in the legislation is not material from the present point of view.

It will be noticed that the first class is the widest, and includes the second and the third; the second is less wide, as torts are excluded; but it includes the third, which is the least extensive—as the class becomes more restricted the limit of the jurisdiction is raised: but it is not the fact that the three classes or any two of them are mutually exclusive.

From the very wording of the statute and its history I cannot find that the words "personal actions" have any restricted or peculiar meaning.

Nor do I find any difficulty from the legislation concerning County Courts.

The origin of the County Court is well-known. When in 1794,

by 34 Geo. III. ch. 2, the Court of King's Bench was instituted and the former Courts of Common Pleas in the four Districts of Upper Canada were abolished, it was necessary to erect Courts to dispose locally of cases of minor importance—accordingly in each District, a District Court was provided for such cases. The Court of Requests had jurisdiction in small "debts" up to 40s. ($8); and the District Court received jurisdiction (1794, 34 Geo. III. ch. 3, sec. 1) "in all cases of contract" above 40s. up to £15 ($60), but in no other case. In 1797, the Act 37 Geo. III. ch. 6, sec. 1, extended the superior limit to £40 ($160) "in such actions of contract only as relate to mere matters of debt, and are brought for the sole purpose of recovering some sum, or sums of money, the amount of which is already liquidated, or ascertained, either by the nature of the transaction itself, or by the act of the parties." Section 2 provided for jurisdiction in all questions of property in personal chattels, £15—and that the Court might award damages to the amount of £15 "in all matters of trespass, where the title to land does not come in question, and where future rights will not be bound by the decision of the said Court."

There were immaterial amendments in 1798, 1811, and 1819; but the next real change was the consolidating Act in 1822, 2 Geo. IV., 2nd sess., ch. 2, by which the jurisdiction was fixed as "all matters of contract from 40 shillings to £15, and when the amount is liquidated or ascertained, either by the act of the parties, or the nature of the transaction, to £40; and also in all matters of tort respecting personal chattels, when the damages to be recovered shall not exceed £15, and the title to the lands shall not thereby be brought into question." The analogy with the inferior Court is obvious: moreover, it is to be observed that the jurisdiction in tort is diminished—there is no longer a right of action in "all matters of trespass."

The Act of 1845, 8 Vict. ch. 13, sec. 5, gives jurisdiction in "all causes or suits relating to debt, covenant or contract, to the amount of £25, and in cases of contract or debt on the common counts where the amount is ascertained by the signature of the defendant to £50, and also in all matters of tort relating to personal chattels, where the damages shall not exceed £20, and where titles to land shall not be brought in question."

In 1849, the District Courts became County Courts—12 Vict. ch. 78, sec. 3; in 1850, by 13 & 14 Vict. ch. 52, sec. 1, their juris-

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diction was extended to £50 in debt or contract or £100 where the amount was ascertained by the signature of the defendant, and £30 "in all matters of tort relating to personal chattels . . . where the title to land shall not be brought in question."

In 1856, the Act 19 & 20 Vict. ch. 90, sec. 20, reciting that "it is expedient to enlarge and more clearly define the jurisdiction of the several County Courts," declared that the several County Courts "shall hold plea of all personal actions where the debt or damages claimed is not more than £50, and of all causes or suits relating to debt, covenant or contract where the amount is liquidated or ascertained by the act of the parties or the signature of the defendant, to £100, provided always that the said County Courts shall not have cognisance of any action where the title to land shall be brought in question or in which the validity of any devise . . . may be disputed, or for any libel or slander, or for criminal conversation or for seduction."

I think there could be as little doubt about the meaning of "personal actions" in this Act as about that of the same words in the Division Courts Act of 1853, 16 Vict. ch. 177, sec. 1, *ut supra*. The jurisdiction was tabulated but not modified by the consolidation in 1859, C.S.U.C. 1859, ch. 15, secs. 16, 17; in 1877, the revision did not shew any change, R.S.O. 1877, ch. 43, secs. 18, 19 (except that in 1860 certain jurisdiction had been given in ejectment by 23 Vict. ch. 43, secs. 1, 4); R.S.O. 1887, ch. 47, secs. 18, 19, 20, are to the same effect; but in 1896 occurred a change, by 59 Vict. ch. 19, of which something is made. The change from $400 to $600 of the Superior Court in cases ascertained by the signature of the defendant is of no importance in this discussion; but there are other changes—jurisdiction is given amongst other things, sec. 3 (8), "in actions for the recovery of or for trespass or injury to land where the value of the land does not exceed $200;" and the excluding clause is changed to read so as to exclude jurisdiction in any action "in which the title to land of a greater value than $200 is brought in question:" sec. 1, amending sec. 18 (1) of the R.S.O. 1887, ch. 47.

I find no difficulty or anomaly in these provisions—before this Act the County Court was, like the Division Court, prohibited from taking cognisance of any action "in which the title to land is brought in question:" R.S.O. 1887, ch. 47, sec. 18 (1): it was

thought that, while the prohibition against the Division Court should stand, it might be relaxed in the County Court if the land was not worth more than $200. This was done in effect by the removal of the restriction in the case of land worth not more than $200: but for the purpose of greater particularity sub-sec. (8) was added to sec. 3.

I venture to think that my learned brother Middleton does not exhibit his usual accuracy when he says (*Re Harmston* v. *Woods*, 39 O.L.R. 107): "It would be very singular if (in 1897) a County Court could not entertain an action for $50 damages to land worth over $200, while the Division Court could." I think both Courts could, at that time, have entertained a claim of $50, no matter what the value of the land might be, if the title to the land did not come in question; that, if the title to land did come in question, the Division Court had no jurisdiction at all, no matter how small the value of the land; but the County Court had jurisdiction if the land was not worth more than $200.

The more recent legislation does not affect this conclusion; now, since 10 Edw. VII. ch. 30, the jurisdiction is put in one section, and not by rule and exception in two sections as formerly: R.S.O. 1914, ch. 59, sec. 22.

The matter is not absolutely bare of authority. In *Stewart* v. *Jarvis* (1868), 27 U.C.R. 467, the action was "for trespass for entering the close of the plaintiff and seizing and taking a mare and colt, and selling and converting the proceeds," &c., i.e., an action in trespass *vi et armis*, and in trover; the defendants pleaded not guilty, goods not the plaintiff's, and a special plea under a *fi. fa.*, justified the entry and seizure, &c.; on issue joined on these pleas, the plaintiff had at the trial a verdict for $175: the Taxing Officer taxed on the higher scale; on appeal Adam Wilson, J., ordered the taxation to be on the County Court scale, and this order was appealed to the full Court of Queen's Bench. Morrison, J., delivering the judgment of the Court, said: "There is no plea putting in issue the title to land. The special plea . . . is a plea admitting the title, but justifying the entry," &c.; and considered that "the action was one within the competence of the County Court" (pp. 468, 469)—the rule was accordingly discharged. This was a general verdict on (1) trespass to land and (2) trover; yet the Court considered that the County Court had jurisdiction, the title to land not being brought in question.

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In *Ball* v. *Grand Trunk R.W. Co.* (1866), 16 U.C.C.P. 252, an action was brought for negligence in dropping fire which spread to the plaintiff's land—this is of course an action of trespass on the case (*Brereton* v. *Canadian Pacific R.W. Co.* (1898), 29 O.R. 57). It was held by the Court of Common Pleas that the defendants might have ousted the jurisdiction of the County Court by a *bonâ fide* dispute of the plaintiff's title to the land; yet, as they had not done so, the County Court had jurisdiction to try the case; an appeal from the judgment of the County Court awarding the plaintiff damages was dismissed. Unless we are prepared to overrule this case, the County Court at that time must be held to have had jurisdiction in trespass to land.

In *Bailey* v. *Bleecker* (1869), 5 U.C.L.J.N.S. 99, it was held by Sherwood, Co. C.J., that the County Court could "try trespasses to land, as well as other suits in which the title does not come in question."

At the time these cases were decided, the jurisdiction of the County Court was "in . . . personal actions where the debt or damages claimed do not exceed the sum of $200:" C.S.U.C. ch. 15, sec. 17 (1); that of the Division Court "personal actions where the debt or damages claimed do not exceed $40:" C.S.U.C. ch. 19, sec. 55; subject to the provisions that the County Court should not entertain an action "where the title to land is brought in question" (C.S.U.C. ch. 15, sec. 16 (1)), nor the Division Court one "in which the right or title to any corporeal or incorporeal hereditament . . . comes in question" (C.S.U.C. ch. 19, sec. 54 (4)).

I think that, as the County Court had (subject to the exception) the right to try trespass to land up to $200, so the Division Court had the right (subject to the same exception) to try trespass to land up to $40 (and now up to $60)—the same terminology being employed in describing the jurisdiction of each.

I am of opinion that the motion for leave should be refused, with costs as of an appeal, and including the costs of the application before me in Chambers.

Rose, J.

ROSE, J., agreed with RIDDELL, J. *Motion refused.*

REX v. BROWN.

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Alberta Supreme Court, Hyndman, J. April 11, 1917.

INTOXICATING LIQUORS (§ III K—94)—SECOND OFFENCE—PROOF OF PREVIOUS CONVICTION.

A summary conviction under the Alberta Liquor Act, 1916, with the additional penalty for a second offence will be quashed where there was no evidence by certificate or otherwise of a prior conviction and no reference thereto at the trial; the Court hearing a *certiorari* application will refuse to receive the magistrate's affidavit tendered in opposition to the motion for the purpose of shewing that the magistrate acted upon his recollection of the former conviction he himself had made.

Statement.

MOTION by way of *certiorari* to quash a conviction made by W. J. Hall, Esq., Justice of the Peace in and for the Province of Alberta, on the 15th day of February, 1917, whereby on the information of one John Hesketh the said Justice convicted the said E. Brown for that he did on the 23rd day of January, 1917, at Alderson, in the Province of Alberta, not being a vendor, unlawfully sell intoxicating liquor contrary to the provisions of sec. 23 of the Liquor Act of Alberta, A.D. 1916, and whereby the said Justice of the Peace imposed a penalty or fine of $500 to be paid by the said E. Brown.

The grounds relied on by the applicant were: (1) that the Justice was without jurisdiction or exceeded his jurisdiction in imposing the penalty aforesaid; (2) that the said penalty is in excess of the penalty authorized by law for the said offence; (3) that no alternative sentence of imprisonment in default of payment of the said fine was imposed by the said Justice of the Peace.

Section 40 of the Liquor Act, Alta., 1916, enacts: "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 $50 nor more than $100 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."

Blanchard, for the defendant; *Evans*, for the Crown.

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HYNDMAN, J.:—The wording of the information after the material part of the charge reads as follows: "And the informant says that the offence hereinbefore firstly charged against the said Brown is his second offence against the Liquor Act of Alberta, 1916," and in the conviction there are these words: "This being his second offence."

Mr. Blanchard, counsel for the applicant, contended that in any event the conviction would be bad, the word "offence" not being equivalent to "conviction." I do not, however, think this word material in view of the circumstances, as the evidence throughout does not in any way refer to a former offence or conviction. The procedure laid down in the Liquor Act for proving a former conviction was not attempted to be followed, nor was any evidence given by any of the witnesses, nor does there appear throughout the whole of the evidence any reference to the applicant having been formerly convicted. Without more, therefore, the conviction is clearly bad, as the fine of $500 was entirely outside the jurisdiction of the magistrate to impose.

Counsel for the Crown sought to put in evidence an affidavit by the convicting magistrate to the effect that the defendant was as a matter of fact convicted before him on the 9th day of January at Alderson aforesaid of an offence against the Act, and that at the time he imposed the penalty he regarded the knowledge which he himself had of the former conviction as sufficient to enable him to impose the fine referred to. I do not think, however, it would be proper to receive such an affidavit. Each case must be complete in itself so far as the record is concerned. There is no reason why the magistrate might not easily have followed the simple procedure laid down in the Act, and I think it would be a very bad precedent indeed to allow evidence to be put in at this stage in the manner referred to.

I see nothing else to do, therefore, than to quash the conviction, but without costs and with the usual protection to the magistrate. *Conviction quashed.*

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SMITH v. CAMPBELLFORD BOARD of EDUCATION.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 3, 1917.

SCHOOLS (§ II C—40)—DISMISSAL OF TEACHER—NOTICE—SUFFICIENCY—RESOLUTION—SEAL.

The engagement of the principal of a high school, terminable upon a month's notice, is sufficiently terminated by communicating to him the resolution of the board that he "be given a month's notice to resign"—the exactness of the language being unimportant; the notice need not be under the corporate seal of the board.

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APPEAL by the plaintiff from a judgment of the Eleventh Division Court of the United Counties of Northumberland and Durham dismissing an action for the recovery of a balance of the plaintiff's salary as principal of a high school under the jurisdiction of the defendant board.

The plaintiff was engaged for one year, at $1,800 per year; the year beginning on the 1st November, 1915, and ending on the 31st October, 1916; subject, as the written agreement between the plaintiff and the defendant board provided, to the right of either party to terminate the engagement by a month's notice.

The question arising was, whether the plaintiff's engagement had been terminated by a notice given in July, 1916.

W. C. Mikel, K.C., for appellant,

Grayson Smith, for defendant board, respondent.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from a judgment of the 11th Division Court of the United Counties of Northumberland and Durham, pronounced on the 23rd day of January, 1917. Meredith, C.J.O.

The appellant was the principal of the high school under the jurisdiction of the respondent, and his salary was $1,800 per annum. By the terms of his employment at the time—the events out of which this litigation has arisen—his engagement was for one year, beginning on the 1st November, 1915, and ending on the 31st October following, subject, as the agreement, which was in writing, provides, to the right of either party to terminate the engagement "by giving notice in writing to the other of them at least one calendar month previously and so as to terminate on the last day of a calendar month."

There appears to have been a difference of opinion among the members of the respondent board as to the desirability of retaining the appellant in its employment; but at length, on the 27th July, 1916, at a regular meeting of the board, the following resolution was passed, "that Principal Smith be given a month's notice to resign." And at the same meeting the following resolution was passed, "that the internal committee advertise in the *Mail and Empire* and *Globe* for a principal."

Following upon these resolutions, on the next day, the following telegram was sent to the appellant: "A resolution was passed at

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the regular meeting of Board of Education July twenty-seventh giving you one month's notice that your contract with the board is cancelled. Secretary Campbellford School Board."

On the following day a notice in these words was sent to the appellant: "Campbellford, Ontario, July 29th, '16. Mr. T. C. Smith, Guelph, Ont. Dear Mr. Smith: According to resolution of board at the regular June meeting you are hereby given a month's notice that your contract with Campbellford School Board is cancelled. Geo. O'Sullivan, Chairman."

The reference in this communication to the meeting as the June meeting was evidently a mistake, and what was intended to be referred to was the meeting of the 27th July.

On the 28th July, the appellant replied by telegram to the telegram sent to him on that day, and his reply is as follows: "Guelph, July 28, 1916. F. E. Gaudrie: Letter" (*sic*, but probably should be "ma[illegible]r") "settled at June meeting. I shall hold board responsible for next year's salary. T. C. Smith."

The reference to the matter as having been settled at the June meeting is, no doubt, to the fact that at that meeting a motion asking the appellant to resign was defeated.

The telegram to the appellant of the 28th July was sent by the chairman of the board, by direction of the board, and the appellant's telegram was received by the chairman during the absence of the secretary, to whom it was addressed.

It was contended by counsel for the appellant: (1) that the resolution of the 27th July was not in terms or in effect a resolution to give the appellant the notice which by the terms of the contract is necessary to terminate it; (2) that, if it was, it was of no effect, because it was not authenticated by the corporate seal of the board; (3) that the resolution is but a declaration of the intention of the board to give the notice, and did not confer authority on the chairman or the secretary to give it.

It was strenuously argued that, if any notice was authorised to be given, or if the chairman or the secretary might properly act upon the resolution by giving the notice, a notice to resign is a very different thing from a notice to terminate the contract between the parties.

"No particular form of words is necessary to effect a removal. The word 'suspend' may be taken to mean 'remove' where it

appears that the parties understood it in that sense, and a demand for one's resignation may be the equivalent of a removal:" Am. & Eng. Encyc. of Law, 2nd ed., vol. 23, pp. 432, 433. The cases which are referred to in support of this statement of the law are American, and they fully support it. The good sense of these decisions commends it to my judgment, and I accept it as a correct statement of the law. It follows that, if a demand of a resignation may be the equivalent of a removal, a notice to resign may be the equivalent of a notice to terminate an employment, and should be so treated if it was understood in that sense by the parties. That it was so intended and understood by the respondent is manifest, and that the appellant so treated it is shewn by his telegram of the 28th July, in which he took the position that the respondent could not cancel the agreement because of the action of the June meeting.

The case of *Stephenson* v. *London Joint Stock Bank*, 20 Times L.R. 8, affirming the decision of Wright, J., reported (1902) 19 Times L.R. 138, supports this view. The question there was as to the right of a bank-clerk to a retiring allowance, to which by the rules and regulations of the bank an officer retiring with the consent of the directors was entitled. In consequence of something that had happened, a letter was written by the secretary of the bank to the plaintiff in which he was required to resign his appointment in the bank, and which was followed by a letter from him to the secretary resigning his appointment. It was argued for the plaintiff that the effect of this was not that he had been dismissed from his employment, but that he had resigned with the consent of the directors. Delivering the judgment of the Court of Appeal the Lord Chancellor said that: "They had to look at the whole of the facts, and, doing so, there could be no doubt but that the plaintiff was dismissed. The use of polite instead of peremptory language did not alter the fact."

It has been held by Divisional Courts of the High Court of Justice in *Vernon* v. *Corporation of Smith's Falls* (1891), 21 O.R. 331, and in *Village of London West* v. *Bartram* (1895), 26 O.R. 161, that the removal of an officer of the corporation need not be by by-law, and that a resolution of the council is sufficient for that purpose.

If an officer may be removed by resolution, I see no reason for

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holding that the determination of the council to give notice to determine an employment, which is but a step towards removing the employee, may not properly be evidenced by a resolution.

It having been resolved to terminate the appellant's employment by notice, it was, in my opinion, within the power, and indeed the duty, of the executive officers of the board to act upon the resolution and to give the requisite notice. The first notice that was given was sent by the chairman of the board in the name of the secretary, and the notice by letter, which followed it, was sent by the chairman of the board, who acted after consultation with the chairman of the internal committee, to which was entrusted the hiring etc. (*sic* in the notes of evidence) of teachers.

If it is not necessary that the removal of an officer of a corporation be by by-law, but a resolution is sufficient, it, in my opinion, follows that it was not necessary that the notice to terminate the contract in this case should have been under the respondent's corporate seal.

A verbal notice to quit given to the tenant of a corporation by its steward is sufficient without any evidence of his authority: *Roe ex d. Dean and Chapter of Rochester* v. *Pierce*, 2 Camp. 96.

In *Doe d. Co. of Proprietors of the Birmingham Canal Navigations* v. *Bold* (1847), 11 Q.B. 127, a notice to quit had been given by the clerk and superintendent of the landlord corporation; and, although the objection was raised that authority to the agent to give the notice was necessary, it was not even suggested that it was necessary that the notice itself should be under the corporate seal.

This case is relevant on another branch of the case at bar, because it was there held (p. 129) that the jury were at liberty "to infer any possible valid authority."

For these reasons, I would affirm the judgment and dismiss the appeal.

In parting with this case, I desire to express my full concurrence in what was said by a learned American Judge, referring to the acts of municipal officers: "We are not to expect the greatest exactness in the language employed by such officers, but to give it a liberal and reasonable construction, and ascertain, if possible, from the language employed what was, and then give effect to, the intention:" *Westberg* v. *City of Kansas* (1877), 64

Missouri 493, 501. And, in my opinion, the same rule should be applied to the language used by municipal councillors and members of school boards. It would be intolerable if in a Province such as Ontario, with its hundreds of municipal councils and school boards, many of them in poor and sparsely settled districts, and the members of which are often, and necessarily, unlettered, exactness of language were required in their official documents, and their evident intention must be frustrated by giving to the language used its strict and technical meaning.

Appeal dismissed.

REX v. DEAN.

Alberta Supreme Court; Hyndman, J. April 19, 1917.

1. STATUTES (§ II A—104)—RULES OF COURT MADE UNDER STATUTORY AUTHORITY—CR. CODE SEC. 576.
Crown Rules made under Cr. Code sec. 576 have the same effect as though embodied in the Code and are to be so construed.

2. APPEAL (§ I C—28)—APPLICATION TO JUSTICE FOR A STATED CASE—CR. CODE SEC. 761.
Under the Alberta Crown Rules (Alberta Rules of Court 816-823) as to cases stated by justices on questions of law in summary conviction matters, the written application to the justice for a stated case must state whether the appeal is to be heard by the Appellate Division or by a Judge in Chambers, in pursuance of the option which the rules give to the appellant. Failure to do so within the time limited is fatal to that mode of appeal, notwithstanding the Alberta Rule 823 curing slight deviations, as the justice is required by Rule 822 to forward the recognizance in the one case to the Registrar and in the other to the Clerk of the Court at the place where the appeal is to be heard.
[*Foss* v. *Best*, [1906] 2 K.B. 105, applied.]

Statement.

MOTION under Cr. Code 764 for a rule calling upon justices of the peace to state a case for review of questions of law under Cr. Code sec. 761 and the Alberta Crown Rules in respect of a summary conviction.

A. H. Russell for the defendant, the applicant.

J. J. Trainor, for the Crown.

Hyndman, J.

HYNDMAN, J.:—This is an application of the defendant to compel L. Hartman and John Malcolm, Esquires, Justices of the Peace for the Province of Alberta, to state and sign a case pursuant to sec. 761 of the Criminal Code, they having refused to do so, the said defendant being desirous of appealing the conviction made against him by the said justices on the 14th day of February, 1917, for that he the said L. Dean at near Alix in the Province of Alberta on or about the 27th day of January, A.D. 1917, did wilfully obstruct C. P. Toepfer, a peace officer acting in the

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execution of his duty, and one Frederick McGonigal, a person acting in aid of such officer, contrary to sec. 169 sub-sec. (*a*) of the Criminal Code, upon the ground that the same is erroneous in a point of law and is in excess of the jurisdiction of the said justices.

The matter came on for hearing on the 26th March, 1917, by order of Mr. Justice Simmons.

Counsel for the justices took several preliminary objections, the most important one being that the notice or application to the justices of the 19th February, 1917, calling upon them to state and sign a case omitted to state whether the appeal would be to the Appellate Division or to a Judge.

Sub-sec. 2 of sec. 761 enacts:—

"The application shall be made and the case stated within such time and in such manner as is from time to time directed by rules or orders made under section 576 of this Act."

Our Rules of Court as to cases stated under sec. 761 of the Code are from 816 to 823 inclusive. Rule 816 is as follows:—

"An application to a justice of the peace to state and sign a case under said section 761 shall be in writing and be delivered to such justice or left with some person for him at his place of abode within seven days after the making of the conviction, order, determination or other proceeding questioned. Such application shall state the grounds upon which the proceeding is questioned, and whether the appeal is to be to the Appellate Division or to a Judge."

Whilst otherwise substantially complying with Rule 816 the notice failed to state whether the appeal was to be to the Appellate Division, or a Judge.

Mr. Russell, for the applicant, urged that this was a slight deviation and should not invalidate the proceeding.

Rule 823 reads:—

"Slight deviation from strict compliance with these rules shall not invalidate any proceeding or thing if the Court or Judge sees fit to allow the same, either with or without requiring the same to be corrected."

The rules having been made by virtue of the power conferred by the Code, in my opinion, have themselves the same effect and must be construed as though embodied in the statute. The

authorities are all to the effect that the statutory conditions are obligatory and if not strictly complied with the appellant will lose his right to a case. (See Short & Mellor's Crown Practice, 2nd ed. p. 419; *Foss* v. *Best*, [1906] 2 K.B. 105, 95 L.T. 127, 75 L.J. K.B. 575.)

Is the omission to indicate whether the appeal is to be to the Appellate Division or a Judge a slight deviation and in any event should it be regarded as directory only and not obligatory?

In *Liverpool Bank* v. *Turner* (1860) 2 De G.F. & J. 502, 45 E.R. 715, 30 L.J. Ch. 379-380, Lord Campbell said:—

"No universal rule can be laid down . . . as to whether a mandatory enactment shall be considered directory only, or obligatory with an implied nullification for disobedience."

In *Howard* v. *Bodington* (1877), 2 P.D. 203, 211, Lord Penzance, after citing this dictum of Lord Campbell, said:—

"I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision, and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory . . . I have been very carefully through all the principal cases but upon reading them all the conclusion at which I am constrained to arrive is, that you cannot glean a great deal that is decisive from a perusal of these cases . . . It is very difficult to group them together, and the tendency of my mind after reading them is to come to the conclusion which was expressed by Lord Campbell in the case of *Liverpool Bank* v. *Turner*."

If Rule 816 was of no consequence or importance to the justices, I would not hesitate to say that it should be looked upon as directory and as a slight deviation. The accompanying rules therefore must be examined. Rule 822 reads:—

> "The justices before or immediately after delivering a case stated to the appellant shall transmit the recognizance to the proper clerk of the Court if the appeal is to a Judge, or to the registrar if the appeal is to the Appellate Division."

It will therefore be noticed that the justices are required *before* or *immediately* after delivering the case to transmit the recognizance to the "proper" clerk of the court if the appeal is

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to a judge, or to the "registrar." Unless it is indicated in the notice by whom the appeal is to be heard how can the justice comply with the rule?

The recognizance is an important element in the matter and unless the provisions with regard to it are strictly observed, I can conceive of nice questions arising touching its validity. The notice failing to mention the Court appealed to, the magistrates are left entirely in the dark as to where to forward the bond. It seems, therefore, that it is of some consequence to the magistrates that they be notified by whom the appeal shall be heard and that it is not a mere matter of form.

Suppose the notice had been served eight days after the making of the conviction instead of seven, this to my mind would appear to be a trifling departure, but under the authorities is a fatal defect. I think the objection raised quite as important.

Whilst I regret that the defendant should lose his right to appeal on this ground, still I am of the opinion that the omission cannot be regarded as a slight deviation only, but as a substantial departure from what is equivalent to a statutory condition precedent to his right to the proceeding.

The application is therefore dismissed but without costs.

Motion dismissed.

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C. A.

STAHL v. MILLER.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. September 18, 1917.

PRINCIPAL AND AGENT (§ II—8)—CONFLICT OF DUTY—TO PURCHASE—TRUSTEE FOR SALE.

An agent employed to purchase land may bind his principal to a sale of land he was empowered to sell as trustee for another for a fixed price.

Statement.

APPEAL by plaintiff from the judgment of Macdonald, J. Affirmed.

A. L. P. Hunter, for appellant, *Cassidy*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal. Apart from the questions of law involved, the appellant, who did not think fit to give evidence, has failed to rebut the evidence of J. J. Miller, who while not quite positive, says that shortly after the making of the agreement in question, and therefore about 5 years prior to the bringing of this action, he told the appellant that it was the Kildall estate and not the defendants who were the real vendors of the property. He also adverts to certain

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advertisements which he says appellant must have seen, and which he thinks disclosed the fact that J. J. Miller was the selling agent of the Kildall estate.

Now the appellant knew the relationship which existed between J. J. Miller and William Miller. J. J. Miller was admittedly the agent of the appellant for the purpose of speculating in the purchase and sale of real property, and William Miller was his partner. If therefore the appellant was aware that the property was sold by defendants William Miller and Kildall, as trustees for the Kildall estate, or to go further, that J. J. Miller was the selling agent for the estate, he would know that William Miller as a partner of J. J. Miller was agent for the seller and for the buyer. The appellant was admittedly speculating in real property, but entrusted his speculations to J. J. Miller and William Miller, and with the knowledge which is imputed to him, and which he has not thought fit to deny, I think he comes too late, five years after the transaction, to have the agreement rescinded, especially when other parties, not parties to the suit, interested in the sale, and innocent of any knowledge of the transaction as between the appellant and the respondents would be vitally affected by a judgment of rescission. Moreover, it does not appear that the transaction was other than a fair and honest one. The uncontradicted evidence is that it was and this in the circumstances of their case is sufficient answer to appellant's claim.

MARTIN, J.A., agreed that the appeal be dismissed.

Martin, J.A.

GALLIHER, J.A.:—I think the appeal should be dismissed.

Galliher, J.A.

The facts in this case distinguish it from *Re Land Registry Act & Shaw*, 24 D.L.R. 429, 22 B.C.R. 116, and the authorities therein cited and so fully dealt with by my brother Martin.

Williams on Vendor and Purchaser, 2nd ed., at p. 988, cites this principle:—

> A trustee for sale is no more competent to purchase the trust property as agent for a stranger to the trust than he is to buy it for himself. For to act as agent on behalf of a purchaser would obviously be in direct conflict with his duty as a trustee for sale,

and refers to *Ex parte Bennett*, 10 Ves. Jur. 381, 32 E.R. 893.

The reason for the rule seems to be that where interest may conflict with duty the frailty of humanity should be guarded against, but I think in the case at bar when we examine the

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course of dealing between the parties and the circumstances under which this particular property was sold that it cannot be said that any conflict exists.

At the time this property was purchased J. J. Miller & Co., of which firm William Miller was a partner, were investing moneys for Stahl in the purchase of real estate and were also selling on his behalf, Stahl leaving it to their judgment as to what were desirable purchases, and William Miller held a power of attorney from Stahl to execute agreements and sign conveyances on his behalf.

Stahl paid no commission on lands purchased for him, the custom being that the vendor paid the commission, and this must have been known to Stahl as accounts of these dealings were from time to time rendered him shewing purchases and sales and the state of the accounts between them.

Had William Miller not been a trustee for the property in question there could not, as I view it, have been any question raised by Stahl; in fact, we find him in letters to J. J. Miller referring to this Kildall property and discussing prospective profits to be made on real estate.

William Miller and John Kildall were by order of the Court appointed trustees for the purpose of subdividing and selling the Kildall estate of which the property in question was a part, and by the same order J. J. Miller & Co. were appointed the selling agents.

The property was subdivided and a fixed price put upon each lot, and all the lots were sold at that fixed price, no more and no less.

J. J. Miller & Co. thinking it a good purchase, as all these lots were selling readily, purchased 6 for Stahl at $600 each payable in instalments, and William Miller as attorney executed the agreement as trustee and also under his power of attorney for Stahl.

Stahl was informed of this purchase, but it is not so clear that he was informed of the fact that Miller was a trustee as the agreement was not forwarded to him until long after the transaction. J. J. Miller says he believes he was, and Stahl, though present in Court, was not called to dispute this.

Miller's duty as trustee was fulfilled when he obtained the fixed price for the lots. He had no interest in the property other

than as a bare trustee except that he shared in the commission for sale, but that did not affect Stahl as he had to pay no part of that nor could Stahl have purchased for a less sum than the fixed price, so that it seems to me these circumstances take it out of the general rule which governs.

McPHILLIPS, J.A. (dissenting):—This appeal in my opinion should succeed and rescission be decreed of the three agreements for sale in the pleadings mentioned and that the defendants should be ordered to repay to the plaintiff all moneys paid by the plaintiff to the defendants under the agreements for sale. McPhillips, J.A.

Upon the facts as found by the trial judge the defendant Miller, when contracting and entering into the challenged agreements of sale, was in executing the same under the power of attorney from the plaintiff in the plaintiff's name acting in contravention of his duty, there being no disclosure of the facts. *Bank of Upper Canada* v. *Bradshaw* (1867), L.R. 1 P.C. 479, *Parker* v. *McKenna* (1875), 44 L.J. Ch. 425, L.R. 10 Ch. 96.

The nature of the disclosure which has to be made to the plaintiff, of which there was an entire absence in the present case, as I read the evidence, is pointed out in *Gwatkin* v. *Campbell* (1854), 1 Jur. (N.S.) 131; and certainly there never was any assent upon the part of the principal to the transactions. The learned trial judge would seem to think the plaintiff was put upon enquiry and could have discovered the true facts. With great respect to the judge, I am unable to agree that the law admits of this being any effective answer. *Dunne* v. *English* (1874), L.R. 18 Eq. 524 (also see *Stubbs* v. *Slater*, [1910] 1 Ch. 195, 632).

The contracts in the present case are executory, being entered into by the defendants the registered owners of the lands. It is true they would not appear to be the beneficial owners in the sense of being entitled to the moneys derivable from the sale of the lands, being trustees thereof, but no disclosure of this was made to the plaintiff. It is true that equity will not necessarily be controlled by the form but rather by the substance; but in this case there was absolutely a non-disclosure of facts and there was a conflict of interest, and the true application of the principles of equity will not admit of any curative effect. It is clear that the plaintiff was entitled to take the course which he did—that

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was upon discovery of the fact he repudiated the transactions and elected to rescind the agreements for sale.

Therefore the appeal in my opinion should be allowed and rescission granted and repayment of all moneys received in respect of the agreements for sale whether for principal or interest.

Appeal dismissed.

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SUTHERLAND v. CLARKE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. November 6, 1917.

1. BILLS OF SALE (§ II A—5)—TRUE STATEMENT OF CONSIDERATION—SUFFICIENCY OF AFFIDAVIT—RIGHTS OF CREDITORS.
A bill of sale is not void as against creditors under sec. 11 of the Alberta Bills of Sale Ordinance because of an untrue expression of the consideration in the affidavit of *bona fides;* it is good under sec. 9 of the Ordinance, unless the consideration be wilfully mis-stated, with intent to deceive, and the transaction it evidences is not an honest one.

2. FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCE—INTENT.
To constitute a fraudulent preference under sec. 39 of the Alberta Assignments Act, there must be a concurrence of intent to give and to accept the conveyance as a preference over other creditors, and the transaction must be attacked within the statutory period.

Statement.

APPEAL by defendant, an execution creditor, from the judgment of Simmons, J., sustaining a bill of sale made by the debtor. Affirmed.

G. H. Steer, for defendant, appellant.

A. M. Sinclair, and *G. R. Porte*, for plaintiff, respondent.

The judgment of the court was delivered by

Walsh, J.

WALSH, J.:—The issue in this appeal between the plaintiff Lenora Sutherland and the defendant is as to the validity of a bill of sale of certain chattels made to her by her husband, of whom the defendant is an execution creditor. Simmons, J., who tried the case, decided it in favor of the plaintiff and from his judgment the defendant appeals.

One of the principal grounds urged against this bill of sale in the pleadings, at the trial and on the argument of this appeal, was that the consideration for it is not truly expressed in it.

Counsel for both parties made their argument before us on this branch of the case on the assumption that if this is so it is void as against the creditors of the bargainor under sec. 11 of the Bills of Sale Ordinance (c. 43). This however is not the case, as a careful reading of the section will shew:

11. In case such mortgage or conveyance and affidavit are not registered as hereinbefore provided or in case the consideration for which the same

is made is not truly expressed therein the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration.

Bills-of-sale equally with chattel mortgages are within the scope of this section, but it is only chattel mortgages which untruly express the consideration for them which are thereby made void as against creditors, for the only creditors of whom the section speaks are creditors of the mortgagor. There is not a word in it to make such a bill of sale void against the creditors of the bargainor. Subsequent purchasers or mortgagees in good faith for valuable consideration of the goods covered by such chattel mortgage or bill-of-sale can take advantage of this section and in addition the creditors of such a mortgagor may do so, but this exhausts the classes to whom relief is given by it.

We have, however, had the benefit of a re-argument of the point. Mr. Steer contends that the words "or bargainor" have been inadvertently omitted from the section after the word "mortgagor." There is nothing in either its history or phraseology to warrant this assumption. The section reads in this respect exactly as it did when it was first enacted some 30 years ago though the Ordinance has since undergone more than one revision. It is only reasonable to suppose that if these words had been accidentally left out the omission would have been noticed and remedied in one or other of these revisions. There is not the slightest need to read them into the section to make sense of it, for it is easy enough to understand and interpret without them.

Then it is said that even if sec. 11 does not avail the defendant, the bill-of-sale is nevertheless invalid under sec. 9 if the consideration is in fact not truly expressed in it, because it requires the affidavit of *bona fides* to set out that the sale is for good consideration as set forth in the said conveyance. That section however does not avoid the instrument for anything but failure to register the bill-of-sale and the affidavits which the section calls for, and in this case the affidavits were made in strict conformity with its requirements and the bill-of-sale was registered in time. The most that can be made under this section of the untrue expression of the consideration is that if it was done with the intention of misleading it might justify or help to the conclusion that there was fraud in it or if there were elements of a

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suspicious character in the transaction outside of it this might be considered a further badge of fraud. There is nothing of that kind here however. There is a division of opinion amongst us as to whether or not the consideration is truly expressed in this bill-of-sale but that division exists simply because of differing views as to whether or not the facts out of which the consideration arises "are accurately stated either as to their legal effect or as to their mercantile and business effect, although they may not be stated with strict accuracy," to quote from Brett, L. J., in *Credit Co.* v. *Pott*, 6 Q.B.D. 295, at 299, a decision which was followed in *Ball* v. *Royal Bank*, 26 D.L.R. 385, 52 Can. S.C.R. 254. There is nothing to justify the suspicion that the consideration was wilfully mis-stated with intent to deceive or that the transaction which it evidences was not an honest one and so sec. 9 cannot in my opinion help the defendant.

Mr. Steer referred us to three Saskatchewan cases in each of which a creditor of a bargainor attacked a bill-of-sale under the section of the Saskatchewan Act which corresponds to our sec. 11, the phraseology of the two sections being identical. In none of these cases was the right of the creditor to maintain the action under that section questioned and in one of them he succeeded in having the bill-of-sale set aside. It is clear that in none of them was the limited character of the creditor's rights under the section noticed, a fact which until the very last moment escaped our notice in our consideration of this appeal because of the broad character of the section in other respects.

The bill-of-sale is further attacked under sec. 39 of the Assignments Act. The trial judge has found against the defendant on the question of the insolvency of the bargainor at the date of this transaction. Apart from this finding which, if right, would of course dispose of this claim, the evidence in my opinion quite fails to prove the intent to defeat, hinder, delay or prejudice the creditors of the debtor, which must be established to entitle the defendant to succeed. If the evidence proves anything in this respect it is an intent to prefer the plaintiff who admittedly was a creditor of her husband in about $10,000 and which liability was satisfied by the giving of this bill-of-sale. Mr. Steer applied for leave to amend by attacking the transaction under sec. 40 as a fraudulent preference. I think from what took place at the

trial that it was assumed in spite of the form of the pleadings that the transaction was complained of as a preference and so leave to amend should be given. Again, however, the defendant must fail for the evidence falls very far short of proving that concurrent intent of the parties which has been held, ever since *Benallack* v. *Bank of B.N.A.*, 36 Can. S.C.R. 120, essential to the success of the attacking creditor, under our statute, namely, a concurrence of intent on the one side to give and on the other side to accept a preference over other creditors. The transaction is not within sec. 41 of the Act as it was not attacked within sixty days.

I would dismiss the appeal as against the plaintiff Lenora Sutherland with costs taxable under col. 5.

The defendant appeals against so much of the judgment in favor of the plaintiff William B. Sutherland as relates to the engine, separator and gang plows. These things were given to this plaintiff by his father, the execution debtor, and the defendant attacks this voluntary transaction as a fraud upon him as a creditor of the father. The trial judge, in his reasons for judgment, did not refer to this part of this plaintiff's claim at all but confined himself to the other issues in which he was interested which he found in his favor and against which finding no appeal has been taken. The trial judge informs me that he said nothing about this claim because he understood from what was said about it in the course of the trial that these goods had been repossessed by the company who had the property in them under a conditional sale agreement and that there was nothing left to fight about over them. The passing reference made to them at the trial by both counsel quite justified that view. Upon the argument before us neither counsel seemed to know what had become of these things after their seizure by the company, and the only reason given for the assertion now of a claim to them by either party was that at some time in the future that company might realize more than the amount of its claim out of them and each of them would like to be then in a position to claim the surplus.

In view of the course taken at the trial and the exceedingly unsatisfactory character of the evidence necessary to a determination of this question, I think that we should dismiss this appeal too with a direction that the judgment in this action shall be without prejudice to any claim which the defendant may at

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any time make to the surplus, if any, resulting from the sale of these goods by this unpaid vendor of them or to any other claim that he may make against them or against the purchase money realized out of them in the hands of such unpaid vendor. No additional costs have been occasioned to anyone by this ground of appeal and I would therefore not allow any costs of it to either party. *Appeal dismissed.*

MAN.

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UNION BANK v. MURDOCK.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, Haggart and Fullerton, JJ.A. November 12, 1917.

FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN RELATIVES—CORROBORATION.

The *bona fides* of a conveyance by husband to wife cannot be established by the uncorroborated testimony of the parties thereto.

[*Koop* v. *Smith*, 25 D.L.R. 355, 51 Can. S.C.R. 554, followed; 34 D.L.R. 150, reversed.]

Statement.

APPEAL by plaintiff from the judgment of Curran, J., 34 D.L.R. 150. Reversed.

C. P. Wilson, K.C., and *W. C. Hamilton*, for appellant.

H. F. Maulson, K.C., for respondent.

Cameron, J.A.

CAMERON, J.A.:—This is an action brought by the plaintiffs, creditors of one Robert Murdock, to set aside a conveyance of certain hotel property in Binscarth made by him to his wife Maggie Murdock. In the same action the conveyance of a farm by Robert Murdock to a son was also impeached. This latter conveyance was set aside by Curran, J., who tried the cause, but as to the conveyance to the wife he dismissed the action. From this judgment the plaintiffs appeal.

The wife's defence is that the conveyance was made for valuable consideration, that certain sums of money had been advanced by her to her husband from time to time and that the conveyance was given in payment therefor. She appears to have derived these sums from the rents of certain property of her own paid her by the agents who collected them from the tenants. In his judgment the trial judge holds this defence established by the evidence.

The defence rests upon the evidence of the wife. The husband was not called at the trial, it being stated that he was physically unable to be there. There was no corroboration of the wife's story save for such as there might be considered to be found in

the cheques given to the wife by the rental agents which were endorsed by her and the son with apparently the exception of one which is not endorsed at all. How these can be considered as corroboration in any real sense of the term is not easy to see.

The courts of Ontario have frequently dealt with the requirements of evidence in cases of this kind. In *Merchants Bank* v. *Clarke*, 18 Gr. 594 (which is cited in May on Fraudulent Conveyancing at p. 57, note), Mowat, V.-C., says "that transactions of this kind ought not to be held sufficiently established by the uncorroborated testimony of the parties to it." In *Rice* v. *Rice*, 31 O.R. 59, at 70, Armour, C.J., says: "Corroboration, in such a case as this, was thought and I think rightly thought, essential in *Merchants Bank* v. *Clarke*." He also says in the same case, "If we are to believe implicitly what the parties to a fraudulent transaction swear in regard to it, any further attempts to set aside fraudulent transactions might as well be abandoned."

In *Ottawa Wine Vaults* v. *McGuire*, 8 D.L.R. 229, 27 O.L.R. 319, where the trial judge had set aside the conveyance, the Divisional Court, 24 O.L.R. 591, set aside his judgment, Falconbridge, C.J., dissenting, but the Court of Appeal restored it. Garrow, J.A., says, at p. 231: "The question is really one of fact, and much must also depend upon the impression made upon the mind of the trial judge by the parties when in the witness box." To the same effect is the judgment of Meredith, J.A. An appeal is not to be treated as if it were a new trial. The judgment of the Court of Appeal was upheld in the Supreme Court, 13 D.L.R. 81, 48 Can. S.C.R. 44.

The subject has been frequently discussed in our own courts. In *Harris* v. *Rankin*, 4 Man. L.R. 115, Killam, J., said:—

> Without determining that in no case will such a transaction be upheld upon the unsupported testimony of the parties interested, it is sufficient to say that it must at least be required that their account of the transaction should be clear and definite and that the evidence generally should be free from suspicious circumstances.

In *Osborne* v. *Carey*, 5 Man. L.R. 237, Taylor, C.J., said: "Such uncorroborated evidence of dealings between husband and wife . . . has in numerous cases been spoken of as not satisfactory;" citing *Harris* v. *Rankin*, *supra*; *Douglas* v. *Ward*, 11 Gr. 39; *Ball* v. *Ballantyne*, 11 Gr. 199, and *Merchants Bank* v. *Clarke*, *supra*.

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Cameron, J.A.

In *McDonald* v. *McQueen*, 9 Man. L.R. 315, Dubuc, J., upheld a family transaction, by which creditors were defeated, on the ground that the evidence of the parties to the transaction was direct and unshaken.

In *Kilgour* v. *Zaslavsky*, 19 D.L.R. 420, 25 Man. L.R. 14, Mathers, C.J., says, at p. 17: "The evidence to that effect (*i.e.*, to establish the *bona fides* of the transaction) must be clear and satisfactory. For that purpose the uncorroborated evidence of the parties to the transaction is in general not sufficient;" citing *Merchants Bank* v. *Clarke*, *supra*; *Osborne* v. *Carey*, *supra*; *Ripstein* v. *British Canadian*, 7 Man. L.R. 119; *Ady* v. *Harris*, 9 Man. L.R. 127; *Goggin* v. *Kidd*, 10 Man. L.R. 448.

In *Koop* v. *Smith*, 25 D.L.R. 355, 51 Can. S.C.R. 554, the action was brought to set aside a bill of sale executed in favor of the defendant by her brother, at a time when the latter was financially embarrassed, as a preferential assignment. The trial judge set the conveyance aside finding that there was no consideration, the evidence therefor being that of the brother alone, the sister not appearing at the trial. This judgment was reversed by the Court of Appeal, but the Supreme Court restored that of the trial judge. Davies, J., says: "I think the rule laid down by the courts of Ontario with regard to assignments made between near relations and impeached by the creditors of the assignor as fraudulent is a salutary one, namely, that where it is accessible some corroborative evidence of the *bona fides* of the transaction should be given." Idington, J., says: "These cases of alleged fraudulent assignment must generally depend largely upon the view of the facts taken by the trial judge. It is quite competent for him, if impressed with the veracity of the assignor, to accept and act upon his unsupported statement. The transaction and established surrounding circumstances might be such as to justify his doing so, or, on the other hand, they might be such as to render his doing so questionable." Duff, J., says: "I think it is a maxim of prudence based upon experience that, in such cases, a tribunal of fact may properly act upon that when suspicion touching the reality or the *bona fides* of a transaction between near relatives arises from the circumstances in which the transaction took place then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and

that, in such case, the testimony of the parties must be scrutinised with care and suspicion: and it is very seldom that such evidence can be safely acted upon as in itself sufficient. In other words, I think the weight of the fact of relationship, and the question of the necessity of corroboration are primarily questions for the discretion of the trial judge subject, of course, to review: and that any trial judge will in such cases have regard to the course of common experience as indicated by the pronouncements and practice of very able and experienced judges such as Armour, C.J., and Mowat, V.-C., and will depart from the practice only in very exceptional circumstances." "I think the true rule is that suspicious circumstances coupled with relationship make a case of *res ipsa loquitur* which the tribunal of fact may and will generally treat as a sufficient *primâ facie* case, but that it is not strictly in law bound to do so; and that the question of the necessity of corroboration is strictly a question of fact."

There is a great difference between a receipt of the income of a wife's separate property by her husband and the receipt of the corpus. In the latter case the onus is on him and must be clearly established. In the former the onus is on the wife (save, perhaps, as to the last year's income) and she must clearly establish that her husband received her income by way of loan. *Alexander* v. *Barnhill*, 21 L.R. Ir. 511, cited and followed by Armour, C.J., in *Rice* v. *Rice*, 31 O.R. 59, in which case he held that the sums there claimed to have been advanced as loans were not such and declared the conveyance which it was sought to support by them was voluntary.

This rule is stated in general terms by Taylor, C.J., in *Thompson* v. *Didion*, 10 Man. L.R. 246, 301, and by Mathers, J., in *Willey* v. *Willey*, 18 Man. L.R. 298, 305. Lord Macnaghten says, in *Edward* v. *Cheyne*, 13 App. Cas. 385, 398, that "when husband and wife have lived together, the wife cannot charge her husband or her husband's estate as her debtor for arrears of her separate income which she has permitted him to receive." And in *Hood Barrs* v. *Heriot*, [1896] A.C. 174, 184, he says "that when husband and wife are living together, the wife's separate income received by the husband with her permission, to be inferred merely from conduct and circumstances, cannot be recalled."

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These important considerations of law, going to the very root of the alleged consideration for the conveyance, have the effect of rendering valueless the evidence on which the judge made his finding of fact in respect of the alleged advances, and they were apparently not in his mind when he was weighing the evidence, specially as it is admitted that there was no contract to repay them. If she was not in a position to recall these advances from income how could they possibly be said to form a debt? With these considerations before us, however, we cannot avoid the conclusion that these advances from income, even if made, were merely gratuitous contributions to the domestic exchequer.

Moreover, the trial judge, in dealing with the question of the adequacy of the consideration, went further and took into calculation the value of the hotel property as affected by events subsequent to the conveyance. The passing of the local option by-law, to which he refers, some 6 days after the conveyance, was not considered a probability by either the husband or the son. The wife nowhere asserts that the possibility of the passing of the by-law influenced her estimates or calculations. But it is the state of circumstances at the time of the execution of the conveyance that must be looked at in deciding whether a disposition of property is void as to creditors. May, Fraudulent Conveyancing, pp. 11 and 12.

There are numerous suspicious circumstances attendant on this transaction which it is impossible to ignore. No accounts of these advances were kept, no vouchers given or taken, and it is admitted no stipulation for repayment was made. The husband still continued in possession of the premises after the conveyance and no transfer of the hotel license was effected as required by law. By this conveyance and the other conveyance made at the same time to the son he divested himself of all his property and thus disabled himself from meeting the just claims of his creditors. Mrs. Murdock's evidence as to the advances alleged by her to have been made to her husband is not clear or satisfactory and she varies in her account whether the conveyance was given to her as security or as payment. The discrepancy between the amount of Mrs. Murdock's claim and the value of the property is so great as to, in itself, arouse inquiry as to the *bona fides* of the transaction, even though we admit, as we must,

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the contention that the inadequacy of consideration between husband and wife is not to be scrutinised as closely as that between strangers. As between relatives the inadequacy of consideration may be so great as to bring the case within the rule avoiding conveyances under the statute of Elizabeth. *Merritt* v. *Niles*, 28 Gr. 346, 350. May, Fraudulent Conveyancing, p. 192-3. There is here no real corroboration of the wife's story, and it is difficult to see how the production of the real estate agent's cheques affords anything of the kind.

We have the finding of the trial judge that the wife knew nothing of her husband's debts or liabilities beyond the mortgage on the property for $4,000. There is no doubt that where there has been a conveyance for value, in order to avoid the transaction as against the purchaser, it must be shewn that he was privy to the fraud against creditors; May, p. 56. I find it difficult to believe that she was not aware of her husband's financial circumstances. But in the view I take of the authorities, such as *Alexander* v. *Barnhill*, 21 L.R. Ir. 511, and others cited above, the wife has here failed to establish the consideration she alleges, and the conveyance stands before us as a voluntary instrument, as the conveyance in *Rice* v. *Rice*, *supra*, was found to be by Armour, C.J. In such a case the grantee's knowledge of the fraud is not material.

In view of the rule laid down by the Supreme Court in *Koop* v. *Smith*, *supra*, I recognize the difficulty in setting aside the judgment of the trial judge upon what must be a question of fact. But I do not think the difference between contributions of income and of corpus by the wife to the husband was placed before and weighed by him. Nor did he, in my humble judgment, proceed upon a proper principle in arriving at his finding on the adequacy of the consideration as I have pointed out.

With all deference I feel compelled to differ from his conclusion and would enter judgment for the plaintiffs in the usual terms. The plaintiffs must have the costs of this appeal and the costs of the action in the King's Bench.

HOWELL, C.J.M., PERDUE and FULLERTON, JJ.A., concurred.

Howell, C.J.M.
Perdue, J.A.
Fullerton, J.A.

HAGGART, J.A.:—It is admitted by Robert Murdock in his examination for discovery that the hotel was worth some $34,000 or $35,000, and the farm was worth about $2,500.

Haggart, J.A.

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Haggart, J.A.

At the time of the execution of the impeached transfers, the defendant Robert Murdock owed the Union Bank some $600 or $700; the plaintiff McPherson a smaller amount; Strang, a wholesale liquor merchant, $1,000 or $2,000 (the sum of $1,000 is mentioned in one part of the evidence, and $2,000 in another part of the evidence), Drewry $4,500, and several smaller bills amounting in all to $300 or $400.

The defendants claimed that there was valuable consideration for the transfer of the property. The wife claimed that she had loaned her husband at various times sums of money amounting in all to more than the amount of the consideration mentioned in the conveyance. This money was the proceeds of certain cheques she received from her agent who was collecting the rents from tenants occupying a block which she had acquired some years before. The son claimed his father owed him for services rendered in helping in the hotel.

The trial judge dismissed the action as against the wife Maggie Murdock, but gave the plaintiffs the relief they asked for against the son and the farm. All parties submit to the judgment against the son, but the plaintiffs asked on this appeal to have the judgment varied by reversing that portion thereof which directs the dismissal of the plaintiffs' action against the defendant Maggie Murdock, and to have it adjudged that the conveyances from the defendant Robert Murdock to the defendant Maggie Murdock are fraudulent and null and void as against them.

The plaintiffs say that the defendant Maggie Murdock failed to establish the existence of any indebtedness from the husband at the time of the execution of the conveyance and deny that there was any adequate consideration to support the transaction. The plaintiffs further contend that the alleged consideration came from the wife's income and not from the corpus of her separate estate, in which case the moneys derived from income paid to the husband for the support of the family are presumed to be her contribution and the onus is upon her to establish the fact that there is a legal contract on the part of the husband to repay the same to the wife. The presumption is against the wife that it was simply a loan. In the case of moneys paid out of the corpus, the presumption is the other way.

The trial judge lays some stress upon the fact that the local option by-law and provincial prohibition subsequently enacted

seriously affected the value of the property in question. Such is no doubt the fact, but, for the purposes of drawing proper conclusions, we must look at the facts and at the surrounding circumstances as they existed at the time of the making of the impeached transfers or conveyances, and the fact that the hotel property became less valuable or desirable should not receive that weight, with all due respect, that is given to it by the trial judge.

The plaintiffs also contend that the stories told by the defendants with reference to these conveyances did not receive proper corroboration. Among the cases cited upon the argument is that of *Osborne* v. *Carey*, 5 Man. L.R. 237.

Carey being indebted to the plaintiffs in an amount exceeding $1,600, part of which was shortly coming due, sold his entire business, receiving $1,000 in cash and $3,500 in notes. He transferred the notes and all his book-debts to his wife the defendant, and shortly afterwards left the country, making no provision for plaintiff's claim. It was held:—1. That the unsupported and bald statement of a loan by a wife to a husband was not sufficient evidence of a legal indebtedness. 2. The onus is upon the grantee in a voluntary conveyance, when it is attacked by creditors, to shew the existence of other property available for creditors.

In *Rice* v. *Rice*, 31 O.R. 59, it was held that the onus of proof that payments of income to her husband were by way of loan, and not of gift was on the wife, and that the evidence of both defendants, being without corroboration, did not support the allegation, and the conveyance was set aside as fraudulent against creditors.

In *Willey* v. *Willey*, 18 Man. L.R. 298, 305, Mathers, J., considers this same question, and says:—

> There is a great difference between the receipt of the income of a wife's separate property by her husband and of the corpus. In the latter case the onus is on him to prove a gift by clear and conclusive evidence, otherwise he will be held to be a trustee for the wife. In the former case the onus is on the wife to prove that the income from her separate estate was received by her husband by way of loan.

For this proposition he relies upon the cases above cited, and also upon *Edward* v. *Cheyne*, 13 App. Cas. 385.

In *Hood Barrs* v. *Heriot*, [1896] A.C. 174, Lord Macnaghten says (p. 184):—

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UNION BANK v. MURDOCK.

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There is no doctrine, I suppose, better settled than this, that when husband and wife are living together, the wife's separate income received by the husband with her permission, to be inferred merely from conduct and circumstances, cannot be recalled. See *Caton* v. *Rideout*, 1 Mac. & G. 599.

Kilgour v. *Zaslavsky*, 19 D.L.R. 420, 25 Man. L.R. 14, is a later decision of Mathers, C.J., where he held that in transactions between relatives having the effect of defeating the claims of creditors, if the circumstances are suspicious, the onus is upon the purchaser of establishing the *bona fides* of the transaction. See *Langley* v. *Beardsley* (1909), 18 O.L.R. 67, 72. The evidence to prove this must be clear and satisfactory and the uncorroborated testimony of the parties to the transaction is in general not sufficient.

In *McGuire* v. *Ottawa Wine Vaults Co.*, 13 D.L.R. 81, 48 Can. S.C.R. 44, it was held, affirming the judgment of the Court of Appeal, that the conveyance by M. to his wife was voluntary; that it denuded him of the greater part of his available assets and was made to protect the property conveyed against his future creditors and is, therefore, void as against them.

One of the most recent cases is *Koop* v. *Smith*, 25 D.L.R. 355, 51 Can. S.C.R. 554, where it was held that where a bill of sale made between near relatives is impeached as being in fraud of creditors and the circumstances attending its execution are such as to arouse suspicion the court may, as a matter of prudence, exact corroborative evidence in support of the reality of the consideration and the *bona fides* of the transaction.

I would, with all due respect, grant the relief asked for by the plaintiffs and set aside the conveyance of the hotel property from the defendant Robert Murdock to the defendant Maggie Murdock, his wife, and also the bill of sale of the contents made between the same parties.

I would allow the appeal with costs. *Appeal allowed.*

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S. C.

REX v. AITKEN.

Alberta Supreme Court, Scott, J. May 7, 1917.

SUMMARY CONVICTIONS (§ VIII—85)—DUPLICITY—CR. CODE SEC. 710.

Two or more offences against the Alberta Liquor Act, 1916, can be included in one information only in the event of the time and place of each offence being stated (Liquor Act, 1916, sec. 42); an information for unlawfully selling on a date mentioned "and some time previous thereto" does not state the time of both offences and a conviction in the terms of the information is bad for duplicity, although the evidence related wholly to an offence of the specific date.

[*R.* v. *Code*, 13 Can. Cr. Cas. 372, 1 Sask. L.R. 299, followed.]

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REX v. AITKEN.

Statement.

MOTION to quash a conviction made by Walter S. Davidson, a Police Magistrate in and for the Province of Alberta, at the City of Calgary on the 27th day of February, 1917, whereby the defendant was convicted: "For that he the said Robert Aitken on the sixth day of February, A.D. 1917, and some time previous thereto at the City of Calgary in the said Province did unlawfully sell intoxicating liquor contrary to sec. 23 of the Liquor Act of the Province of Alberta, 1916" and was adjudged for his said offence to forfeit and pay the sum of $94.25 to be paid and applied according to law and the sum of $5.75 for costs.

J. McK. Cameron, for defendant.

H. W. Lunney, for the Crown.

Scott, J.

SCOTT, J.:—The information upon which the conviction is founded states the charge in the same words as the conviction.

One of the grounds of the application is that the information charges more than one offence.

There can be no doubt that the information charges at least two offences if not more, viz., one committed on 6th February, 1917, and at least one other committed some time previous to that date.

Section 710 (3) of the Criminal Code provides that every complaint shall be for one matter of complaint only and not for two or more matters of complaint, and every information shall be for one offence only and not for two or more offences.

Section 42 of the Liquor Act, 1916 (Alta.), provides that several charges of contravention of the Act may be included in one and the same information, provided that such information and complaint and the summons or warrant issued thereon contains the time and place of each contravention.

The charge does not comply with the last mentioned section, as, although charging more than one offence, it gives the required particulars of only one of them.

At the hearing of the application I was in doubt whether in view of the fact that the evidence before the magistrate was confined to the offence first described, the other charge or charges might be treated as not having been charged by reason of the fact that the necessary particulars of them were not stated, but I am now of opinion that they cannot be so treated.

In *Rex* v. *Code*, 13 Can. Cr. Cas. 372, 1 Sask. L.R. 299, the Saskatchewan Court *in banc* held that a conviction for two

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offences is bad although one of the offences is improperly charged, that the defendant being convicted of "his said offence" it does not appear of what offence he is convicted and only one penalty is imposed.

I quash the conviction with costs. *Conviction quashed.*

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Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. May 2, 1917.

DAMAGES (§ III L—260)—COMPENSATION FOR "INJURIOUS AFFECTION" TO LAND—PUBLIC LAVATORIES.

An owner of land abutting a highway is entitled to compensation for depreciation of the value of the land by the construction and maintenance of public lavatories on a highway by a municipal corporation.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 29 D.L.R. 618, 36 O.L.R. 189, affirming by an equal division the award of the official arbitrator. Affirmed.

Hellmuth, K.C., and *Fairty*, for appellant.

G. W. Mason, for respondents.

Davies, J.

DAVIES, J. (dissenting):—The respondent in this appeal claimed compensation under the 325th section of the Municipal Institutions Act, R.S.O. 1914, c. 192, for alleged injuries to his premises, located at the south-west corner of Parliament and Queen Streets, caused by the erection and maintenance of public lavatories for men and women by the Corporation of Toronto under Parliament St., which runs along the side of his shop fronting on Queen St. The claim came before the official arbitrator, who, after hearing a great deal of evidence, awarded the claimant $10,200 in full satisfaction for the injuries complained of. Of this amount the arbitrator allowed $9,000 on account of the lavatories as such, and $1,200 caused by water, or seepage, claimed as having escaped from the lavatories into the cellar of plaintiff's building.

The arbitrator in his written reasons for his award, finds as a fact that "no land of the claimant was taken" and that "he did not think it could be contended that *access* is really interfered with."

He seems mainly to base his conclusion as to claimants' right to compensation under the statute upon the fact that a lavatory constructed under the street, and near to claimants,

store and premises, "injuriously affected" claimants' premises, within the meaning of sec. 325 of the Act above cited.

There was some evidence that bad odours arose from the lavatories, but the arbitrator found against this, and rested his conclusion upon the depreciation of the value of claimants' shop and premises arising from the use of these lavatories as such.

He says:—

> The outstanding feature of the whole claim is the *user* of the structures, the fact that they are lavatories. This is particularly emphasized by all the claimants' witnesses.

It is clear, therefore, that the damage, exclusive of the seepage, was not caused by the construction of the lavatories but, if at all, by their subsequent use, and it seems equally clear upon the evidence, and the award, that it was this use which influenced the witnesses in estimating the damages and depreciation of the value of the claimants' premises and the arbitrator in awarding the damages. The lavatories being under ground, and not interfering with access to claimants' premises, would not as mere structures depreciate the value of those premises, however much they might injure his trade. The arbitrator did not find that the depreciation he awarded damages for arose apart from any injury to claimants' trade.

On appeal from the award to the Second Division of the Supreme Court, that tribunal was equally divided, Chief Justice R. Meredith and Riddell, J., holding that as no land of the plaintiff had been expropriated, and no legal right or easement therein interfered with, he had no claim enforceable by arbitration for injurious affection of his lands under the compensation clauses referred to, while Lennox and Masten, JJ., were of a contrary opinion and sustained the award.

The Chief Justice and Riddell, J., were both of the opinion that as under sec. 433 of the said Municipal Institutions Act "the soil and freehold of every highway were vested in the corporation of the municipality," such corporation had a common law right as owner to construct such lavatories in such places under the streets as they determined were necessary in the public interest, subject of course to the paramount rights of the public over the highway.

I must say that I am strongly inclined to take the same view of the corporation rights in the streets of which the soil and free-

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hold is vested in them with respect to the construction of lavatories and urinals as expressed by the Chief Justice, and more shortly by Riddell, J.

But I prefer to assume that these lavatories were constructed, and are used under the statutory powers of the corporation contained in the Municipal Institutions Act, and to deal with the award on that assumption.

In the last analysis it seems to me that the question of the claimants' right to recover damages depends upon the true construction of sec. 325 (1) before referred to.

These compensation clauses for land taken and injuriously affected have been present in many statutes passed by the Parliament of Great Britain, and very many decisions of the courts have been given as to their true meaning and extent. There is some difference in the language used in the different Acts, but I think after reading all of those referred to in the argument, and the cases cited at bar, and in the judgments below as to their proper construction, I am justified in saying that while there were at first great differences of judicial opinion even in the cases carried to the House of Lords as to what damages could be awarded under the compensatory clauses for "injurious affection" only, where no land was taken and no legal right, or easement appurtenant to the land was interfered with or obstructed, these differences were finally set at rest. It was held as the recognized rule of law applicable to compensation sections such as that now before us that such compensation can only be awarded where some physical interference is caused to the lands of the claimant or to some legal right or attribute attaching to these lands such as access or ancient lights, etc. Where no lands have been taken and no such legal rights or attributes or easement attached to land interfered with, no compensation can be given even though a man's property may be greatly depreciated in value by the exercise of the statutory rights granted to a company or a corporation. If part of an owner's lands have been taken, however, an entirely different result follows and damages are allowed not only for the lands taken, but for the remainder of claimant's lands connected with or belonging to the lands actually taken and for injuries thereto. The taking of any part of claimant's lands opens the door for the right to claim all damages actually sustained by the owner for the lands taken, and also for all his other lands connected with those taken.

It has, for instance, long been settled by the decision of the House of Lords in *Hammersmith* v. *Brand*, (1869) L.R. 4 H.L. 171, that an owner of land, no part of which has been taken by a railway company and no right connected with which interfered with, cannot recover damages for "vibration" arising from the running of the railway without negligence, no matter what extent such damages may extend to.

When I speak of damages I do so, however, with the well understood limitation that they must be an injury to lands and not a personal injury or an injury to trade, and also that they must be occasioned by the *construction* of the authorized works and not by their user, and must be of such a character as would have made them actionable, but for the statutory power.

Wherever a legal right has been interfered with by the exercise of statutory powers, all the damages done to the owner as a consequence of that interference is the subject of compensation. Cripps on Compensation (5th ed.), p. 140, and the cases there cited.

In the present case it appears to me that the finding of the arbitrator, that there has been no physical interference with the claimants' property or with the access to and from their premises, is conclusive.

It is the use of the structure as a lavatory that causes damage in the opinion of the arbitrator, based upon the evidence given before him, in which I fully concur, and statutory compensation cannot be awarded for damages caused him by the use of works constructed in accordance with statutory powers, and without negligence, unless expressly given by statute.

If the works are not so constructed, then the injured party may have an action for damages caused either by reason of excess beyond the powers, or from bad or improper construction of the works, but has no right of compensation under the compensating clause.

Nothing of the kind is suggested here except with regard to seepage damages with respect to which, if any (on which I express no opinion), are the subject matter of an action, and not damages under the compensation clause for injurious affection. They are caused, if at all, by the improper or negligent exercise of the statutory powers, and do not necessarily result from their proper exercise.

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The expression "injuriously affected by the exercise of the powers" given by the Act now under discussion or of any general or special Act, is copied from the English Acts to which reference has been made. They are technical words to which a legal meaning has been attached by the courts, and when used by the legislature as in this compensation section, should have that meaning given them by our courts.

I need hardly say that if any more extensive meaning was intended to be given to them when used in this Municipal Institutions Act, one would have found language expressive of that intention. I fail to find any such language.

In the absence of any such words shewing a different meaning, I feel myself compelled to follow the English authorities, and I may say that I do so without any reluctance, because I share with Chief Justice Meredith the feeling that any such extension or enlargement might, and probably would, have results which would prevent the construction of these necessary public utilities altogether. If the claimants in this case can recover $9,000 or $10,000 damages because a urinal for men and women is placed beneath the surface of the street on which their business premises abuts where no part of their land is taken, and no easement or right in or attached to it is affected, then it follows that every other land-owner in the vicinity would have a similar right to damages, greater or lesser than the amount awarded in this case, depending upon the facts of each case with the further result that the exercise of these powers would have to be discontinued because of the excessive cost of their exercise.

It cannot be contended that because the other land owners have not plate glass windows in their buildings fronting on the street, and because their business or trade is not injured by the turning away of the tide of customers, which might flow to them, but for the construction and maintenance of the lavatories, that their claims would be different.

The loss of trade is not a damage which can be allowed under the compensation clause, and it appears to me that is just what has been allowed in this case.

The principle that the use of the lavatory causes depreciation in the value of the adjoining lands is applicable in a more or less degree to all neighbouring land owners, and they certainly would

all make claims. As was said in *Ricket* v. *Metropolitan R. Co.*, L.R. 2 H.L. 175, at 199, by Lord Cranworth:—

> The loss occasioned by the obstruction now under consideration may be greater to the plaintiff than to others, but it affects more or less all the neighbourhood. He has no ground of complaint differing, save in degree, from that which might be made by all the inhabitants of houses in the part of the town where the works for forming the railway were carried on.

The cases of *Corp. of Parkdale* v. *West*, 12 App. Cas. 602, and *North Shore R. Co.* v. *Pion*, 14 App. Cas. 612, were relied upon in the Court of Appeal largely by Mr. Justice Masten. I cannot see what application these cases can have to the one before us. In each of them the owner's right of access to and from their land, to the street in the *Parkdale* case, and to a navigable river in the *Pion* case, was obstructed and interfered with, and "in both cases alike," as the Lord Chancellor said, p. 626 of the report of the *Pion* case, "the damage to the plaintiff's property was a necessary, patent and obvious consequence of the execution of the work."

The actions were held properly brought to recover damages on the ground that the company in the one case, and the corporation in the other, did not take the steps necessary under the respective statutes under which they professed to act to "vest in them the power to exercise the right or do the thing" for which if those steps had been duly taken compensation would have been due to the respondents (owners) under the Act.

But the thing done which in each of these cases made the works of the company and the corporation actionable was the depriving of the owners of their right of access to and from their lands.

Both of the judges who decided the case in the Divisional Appeal Court quoted at length from the judgment of the judge who decided the cases of *Vernon* v. *Vestry of St. James*, 16 Ch. D. 449, and *Cowper-Essex* v. *Local Board for Acton*, 14 App. Cas. 153, and speak of them as "illuminative" and "instructive" and no doubt they are with respect to facts at all similar to those dealt with in those cases. I fail, however, to find that they afford any assistance to such cases as we have now before us. The Court of Appeal in the *Vernon* case simply held that as the erection of an urinal was not necessarily a nuisance, the statute authorizing its erection did not empower the vestry to erect one

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where it would be a nuisance to the owners of adjoining property and that on the facts of that case the vestry *had exceeded their powers in placing the urinals where they did* and the court granted the injunction asked for accordingly.

No contention is made here, or could be made, of any excess in the exercise of the powers of the Corporation of Toronto in placing the lavatory and urinal where they did. On the contrary, the claimants' submission in the appeal is based entirely upon the exercise by the corporation of its legal right under the statute, and the claimed correlative right of the claimants to damages under sec. 325 of the Act because their lands were "injuriously affected" by the exercise of the corporation's statutory powers.

The *Cowper-Essex* case, *supra*, decided that *part of the plaintiff's land having been taken for sewage works* compensation might be awarded for damage by reason of it injuriously affecting his "other lands" connected with those taken not only by the construction of the sewage works but by their use.

These "other lands" of the plaintiffs were divided from the lands taken by a railway, but the court held that notwithstanding the division they were "other lands" within the meaning of the compensation clause of the statute they were considering, the Lands Clauses Consolidation Act, 1845.

I am quite unable to see how the judgment in this case appealed from can in any way be sustained by the *Cowper-Essex* case, *supra*, or by the reasons given therefor by their Lordships. The principle laid down in that case as having been "finally settled" respecting the broad distinction between the compensation which can be awarded for injurious affection in cases where part of an owner's land has been taken and cases where no part has been taken seems to me strongly against the judgment now in appeal.

Metropolitan Board of Works v. *McCarthy*, L.R. 7 H.L. 243, is an authority referred to in many cases not only because of its peculiar facts but because of the adoption by the House of Lords of that test submitted by Mr. Thesiger, as one which would explain and reconcile apparently conflicting cases, viz.:—

That where by the construction of works there is a physical interference with any right, public or private, which an owner is entitled to use in connection with his property, he is entitled to compensaton if, by reason of such interference, his own property is injured.

In that case there was a "special case" submitted to the court in which it was stated:—

That by reason of the dock adjoining the River Thames, and the destruction thereby of access to and from the Thames, the plaintiff's premises became and were as premises either to sell or occupy permanently damaged and diminished in value.

Their Lordships held that the plaintiff was entitled to compensation because his right of access to his premises to and from the River Thames had been destroyed, and his lands consequently depreciated in value, but that the damage or injury which is to be the subject of compensation must not be of a personal character, but must be a damage or injury to the land of the claimant considered independently of any particular trade that the claimant may have carried on upon it.

The recent case of *Grand Trunk Pacific R. Co.* v. *Fort William Land Co.*, [1912] A.C. 224, determined by the Judicial Committee of the Privy Council on the proper construction of the Dominion Railway Act, 1906, secs. 47, 15 and 237 (3), seems to me to apply the same principles to the construction of our Railway Act as have been applied by the House of Lords to the various English Acts as to lands taken or injuriously affected under statutory powers. That case should go a long way to govern the one before us.

The pith of the judgment, as I understand it, is that the power given by the statute to award damages was in respect of construction only, and not to damages arising from location, and that the power to award compensation is limited to matters specifically referred to in the statute, and could not be extended by the Board of Railway Commissioners as was attempted to be done in their order approving the *location* of the railway conditionally on the company "making full compensation to all parties interested for all damage sustained by reason thereof." In other words, the Board could not by an order authorizing the location of the road along certain streets in the City of Fort William extend the compensation clauses beyond the matters specifically referred to in the statute, and that the "location" of the road was not one of those matters.

The case of *The King* v. *McArthur*, 34 Can. S.C.R. 570, decided by this court in 1904, appears to me applicable in principle to the one now before us. I was one of the judges by whom that case

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was decided, and I know it received, owing to the apparent conflict between several of the English cases, a great deal of consideration. The conclusions there reached unanimously by this court apply with great force to the one now before us.

I have compared carefully the compensation clause 325 of the Act, respecting municipal institutions, with those in the English Acts on which the decisions I have above referred to in the courts were given. I am not able to find any *substantial* differences between this clause (325) and the compensation clauses of the Lands Clauses Act, 1845, sec. 68; the Railway Clauses Act, 1845, secs. 6 and 16; the Waterworks Clauses Act, 1847, sécs. 6-12, and the Public Health Act, 1875, sec. 308. I say substantial differences, because, of course, there are verbal ones, but for all purposes of this appeal I construe the compensation clause of the Municipal Institutions Act now before us as having the same meaning and object as the compensation clauses in the various English Acts I have referred to. These decisions in the House of Lords are, of course, binding upon us and with great respect I cannot see the use of quoting from the judgments of the dissenting law lords, however distinguished, as to this meaning and object, as has been done by the judges who gave the judgment in the courts below.

These decisions lay down a clear and definite rule with respect to the damages allowable for injurious affection where no land of the claimants or right or interest therein has been taken or obstructed. Being unable to distinguish between the section we are dealing with and those of the English Acts referred to, I feel bound to apply that rule to this case, and doing so, have reached the conclusion that the damages awarded cannot be sustained and that the appeal should be allowed with costs in all the courts, including the arbitrator's, and the claim of the respondents dismissed.

Idington, J.

IDINGTON, J.:—The appellant in 1912 erected two lavatories, urinals and water-closets on Parliament St., Toronto, in the exercise of the powers conferred by sec. 552 (1), of the Consolidated Municipal Act, 3 Edw. VII., ch. 18, which is as follows:—

552 (1) The councils of cities or towns may provide and maintain lavatories, urinals and water-closets, and like conveniences, in situations where they deem such accommodation to be required, either upon the public streets or elsewhere, and may supply the same with water, and may defray the expenses thereof, and of keeping the same in repair and good order.

The respondent then owned a parcel of land on the north-west corner of Queen and Parliament Sts., on which was erected a large building suitable and used for carrying on therein the business of dealing in furniture and house-furnishings, and also clothing, millinery and furs.

These urinals and a separate structure called a breather, occupied a considerable part of the side of Parliament St., next to said building and about only 7 feet distant therefrom.

They were separated from each other so that the entire space so occupied was not continuous, but permitted public travel between them.

I assume that no allowance could be made for damage to the business, as such, and it is only the depreciation in the market value of this property of the respondent for which he can claim compensation under sec. 437 of said Act, which is as follows:—

Every council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken or used by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon shall be determined by arbitration under this Act.

This section being that in force when proceedings began, must be held to govern what is here in dispute.

And let us clear our minds by realizing that the construction put upon another Act, less simple than this, and very differently worded, in any single section, and conceived in another atmosphere, when modern England had got born again, as it were, and was grappling with new problems, may not fit the situation confronting our legislatures. I submit that we better eliminate from the section all that is superfluous in relation to the facts and claims in question herein and read the section as follows:—

Every council shall make to the owners . . . of . . . real property . . . injuriously affected by the exercise of its powers, due compensation for any damages . . . necessarily resulting from the exercise of such powers.

We have long been told by eminent judges and others, that when the language used by the legislature is precise and unambiguous, a court of law at the present day has only to expound the words in their natural and ordinary sense. There is no ambiguity about this legislative expression. Nor is there any ambiguity in the language of the power I have quoted above,

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which enabled the appellant's council "to provide and maintain lavatories, urinals and water-closets," etc., on Parliament St. alongside respondent's building.

Nor do I feel that there is the slightest doubt as to the probable conception which the average business man seeking a corner such as the one in question, would have, relative to the market value of such a property, before and after the exercise of power, that provided and maintained such conveniences.

The plain ordinary meaning of the language used seems to me expressly to require that the owner should be compensated according to the conception of such business men relative to such values before and after the execution of the power.

Then comes the difficulty and to my mind the only difficulty in the problem presented to those concerned.

But the solution of that problem is by the statute dealing therewith, expressly relegated to the judgment of an officer with which, unless he clearly has proceeded upon an erroneous apprehension of the principles which should have governed him, we have no right to interfere, or upon the evidence properly adduced his allowance has been so grossly excessive or inadequate as to call for a review thereof.

Excess of damages is not made a ground of this appeal and hence we are relieved from an analysis of the evidence and careful consideration of the results derivable therefrom.

Assuming he proceeded upon the plain unambiguous nature of the language used in the statute, I see no ground for interference. All that has been urged as to the cases decided in England under the Lands Clauses Consolidation Act, and the cases resting thereon, so much relied upon, seems to me beside the question. That Act is so entirely different from the Act upon which we must proceed, that it seems a waste of time to dwell thereon.

The decision in *Brand* v. *Hammersmith*, L.R. 4 H.L. 171, needed the consideration of four clauses of the Lands Clauses Consolidation Act, together with two of the Railway Act, to be expressly linked up with it, and the frame of the former Act, in order to be able to arrive at it.

And the substance of the whole matter turned upon the supposed necessity of shewing that some part of the owner's land

had been taken in order to permit of injurious affection being considered at all, despite the weighty opinions to the contrary effect of Lord Cairns and 3 of the 4 judges to whom the question had been submitted.

That mode of thought dominated many later cases even under other statutes, when the condition precedent thus established as necessary to relief under that particular statute existed no longer as a barrier. Thus, indirectly, it seems to have come about that in later times some imagined the word "injuriously" must be held to import something technical as *injuria* as a condition precedent to the allowance of damages for injurious affection.

Later than the *Hammersmith* case, *supra*, Lord Blackburn, the dissenting judge of the four to whom the question had been submitted in that case, saw his way in the case of *Buccleuch* v. *Metropolitan Board of Works*, 1870, L.R. 5 Ex. 221, at page 244, to hold that "a part of the premises being taken it let in the claimant to have damages assessed for everything." We have no such condition imposed in the Act now in question, and I see no reason why we should engraft upon the ordinary meaning of the words used something that is not there, and can only be imported there by giving to the word "injuriously" a highly technical meaning which Lord Blackburn, and others, including Lord Cairns in the case lastly cited, did not find.

Nor did Lord Selborne in the case of *Brierley Hill Local Board* v. *Pearsall*, 9 App. Cas. 595, which turned upon sec. 308 of the Public Health Act, 1875, where the expression used is "damages" seem to imagine it was necessary to prove a right of action for the wrong done but treats the language in its plain ordinary sense.

Nor did we, or any one else concerned in the recent case of *West Vancouver* v. *Ramsay*, 30 D.L.R. 602, 53 Can. S.C.R. 459, imagine that it was necessary to enable a plaintiff suing on an award for damages caused to his property by narrowing the street to shew that independently of the provision for compensation he would have had a right of action.

Why should we? It is answered some other Acts having used the word "injuriously" cases decided thereon should be followed.

But the case of *Horton* v. *Colwyn Bay*, [1908] 1 K.B. 327, so much relied upon in argument of counsel for appellant, turned upon a section of the Public Health Act, which did not use the word "injuriously" at all.

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That brings us back to the proposition that legal damages are implied in such legislation, though I think the case is distinguishable on other grounds upon which I need not enlarge.

It is exceedingly difficult to reconcile all the numerous cases bearing more or less upon the question. I doubt if everything decided in England upon merely analogous statutes and cases binds us.

We, of course, receive such decisions with the greatest respect, but when it comes to a question of the construction of one of our own statutes, neither identical in language nor even fitted to the like conditions, we must give our statute the meaning probably attached to it by the legislature enacting it.

But even if we are bound to apply the word "injuriously" in the technical sense that there has been something done for, or in respect of, which an action would lie, I see no difficulty in this case.

Let us assume for a moment that without legal authority, the appellant had, or to put it more broadly, some one else had, presumed to erect and maintain such structures, either for such uses or not, on such a street in such close proximity to the respondent's premises as appears in the case presented, I have no manner of doubt the respondent would have had a right of action as one suffering beyond the general public by reason thereof, and could have successfully maintained a claim for injunction or damages.

Everything in such a case must depend upon the surrounding circumstances, and the use, or possible use a proprietor may be making, or desire to make, of his premises.

For example, a farmer might not be able to maintain such an action arising from the erection of such a structure on a country road alongside his farm, so long as his entrance, or probable entrance, to his premises was not obstructed or otherwise interfered with.

But here the proprietor not only for the present uses he is putting his property to, but the evident possible use he might find it advantageous to put his property to by making entrance thereto from Parliament St., does suffer loss and injury beyond the rest of the public.

In short, as one of the appellant's own witnesses puts it, he is deprived of the value inherent in a corner lot.

There are some reasons why, apart from the technical reasons which rest upon the right to bring an action for the nuisance, the adoption of such a test may be of value in guiding an arbitrator who has to solve the problem of diminution of value.

If the proprietor suffers no such damage as would entitle him to bring an action, then, roughly speaking, the probability may be that he suffers no damages, or at least such as he should trouble any one about. And again there are conceivable cases where the institution of some establishment might tend to lessen the value of property in a whole town or district thereof, and for practical purposes a proprietor might be suffering no more than the rest of the public and hence any assessment of damages would be but taking it out of one pocket to put it into another by reason of his having to pay in his rates a share of what each similarly situated might be awarded.

Hence, in either way we look at the construction of the statute, I think the appellant fails.

A question is raised as to an item of $1,200 of damages caused by the erection being only matter of the negligent exercise of the power and hence possibly not within the reference.

I cannot, however, see the clear evidence of negligence, nor does it seem to me the case was fought out on that line before the arbitrator. It was separated from the total merely upon the point being taken accidentally in argument.

As to the cross-appeal, I think the damages allowed ample compensation, even if the whole of the respondent's property is to be considered, instead of merely one shop at the corner as possibly a correct view to take, and therefore the cross-appeal should also be dismissed.

I think the appeal should be dismissed with costs.

DUFF, J.:—The authority for the construction of lavatories under which the appellant municipality acted is that given by sec. 552 (1), of the Consolidated Municipal Act, 1903, and the compensation clause applicable is sec. 437 of that Act. Some doubt was expressed on the argument on this point, the suggestion being that the rights of the parties were perhaps governed by the provisions of the Consolidated Municipal Act of 1913. But it seems to be undisputed that, before that Act came in force, on

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July 1, 1913, the lavatories had been provided. It appears to be a case in which sec. 14, sub-sec. c., ch. 1, R.S.O. 1914, of the Interpretation Act applies; and that the change in the law, if there was any, could not affect any "right, obligation or liability acquired, accrued, accruing or incurred" under the Act of 1903.

Compensation for "damages" caused by the exercise of the powers of the municipality is provided for by sec. 437.

It is conceded that the necessary result of the construction and maintenance of the lavatories is to diminish the value for selling and letting of the respondent company's property. An essential condition, however, of the company's right to recover compensation under the enactment above quoted is that its property is "injuriously affected" by this "exercise of the powers" of the municipality; and, on behalf of the municipality, it is contended that the property has not been "injuriously affected" within the meaning of this section.

The phrase "injuriously affected" was a subject of much controversy, but more than 50 years ago it was settled that as used in sec. 6 of the Railway Clauses Consolidation Act (1845) and in sec. 68 of the Lands Clauses Consolidation Act (1845), the phrase imports something which, if done without the authority of the legislature, would have given rise to a cause of action. *Ricket* v. *Metropolitan R. Co.*, L.R. 2 H.L. 175, *Metropolitan Board of Works* v. *McCarthy*, L.R. 7 H.L. 243, *Caledonian R. Co.* v. *Walker's Trustees*, 7 App. Cas. 259. It has, moreover, been settled that since a condition of the right to compensation is that the claimant's property has been "injuriously affected," it is incumbent upon him to establish that the injury he complains of was an injury to his estate and not a mere obstruction or inconvenience to him personally or to his trade; *Ricket* v. *Metropolitan Railway Co.*; and further that the damage complained of must be in respect of the property itself (in its existing state or otherwise) and not in respect of some particular use to which it may from time to time be put: *Beckett* v. *Midland R. Co.*, L.R. 3 C.P. 82, at 94 and 95.

It is undeniable and admitted in fact that the learned arbitrator in assessing the compensation has limited his attention to depreciation in value of the building and depreciation in value of the land.

The appellant municipality's contentions are, first, that the compensation clause above quoted gives a right to compensation only for damages caused by the construction as distinguished from the maintenance of the conveniences in use, that is to say, the damages occasioned by the structural form of the works without reference to the use to which they are put, or to the concomitants of them as public lavatories; secondly, that the first condition of the claimant's right is unfulfilled, namely, that the injury suffered by him should be one for which an action could be maintained in the absence of statutory authority for what the municipality has done; and thirdly, if such an action could have been maintained, another condition, namely, that the damage complained of should have been the necessary result of the exercise of the lawful statutory powers of the municipality, is absent because the section under which the municipality professed to act (sec. 552 (1)), does not authorize the creation of a nuisance.

It should first be noted that sec. 437 provides for the payment of compensation in respect of harm done through the exercise of a great variety of powers; and that its language, when read without reference to judicial decision in relation to other statutes or to practice under other statutes and without preconception originating in familiarity with some such course of decision or practice, does not justify any restriction upon the scope of the remedy given; there being nothing here which even remotely suggests that for the purpose of determining what is due compensation to the sufferer from the exercise of a municipal power to "provide and maintain lavatories," a lavatory provided under that power to be maintained under that power is to be regarded only as a physical construction interrupting the continuity of the surface of a public street. "To provide and maintain public lavatories" involves the provision of conveniences which the public are invited and expected to use and the "damages" resulting therefrom are, if the words are to be given their natural and ordinary meaning, damages arising from the execution of the powers to "provide and maintain."

It is contended that the language of sec. 437 closely resembles the language of sec. 68 of the Lands Clauses Consolidation Act and of secs. 6 and 16 of the Railway Clauses Consolidation Act,

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and that a long series of decisions in the English courts by which the rule has been developed that the right of compensation given by these sections and like enactments has been held to be limited to loss arising from the construction as distinct from the subsequent user of the works, has been applied in this country to Canadian enactments which differ from those enactments as much as sec. 437 does, and that in view of this course of decision something more explicit than anything to be found in sec. 437 is required to shew that the legislature intended "damages" for "injurious affection" to be awarded under that section on any other principle.

In examining this argument, the first point to consider is: are the decisions of the English courts under the two Acts specifically mentioned decisions which ought to govern the construction of the statute we have to construe? Secs. 6 and 16 of the Railway Clauses Consolidation Act were authoritatively interpreted and applied in *Hammersmith* v. *Brand*, L.R. 4 H.L. 171, and it was there held that the proviso of the last mentioned section requiring "satisfaction" to be made to all "parties interested . . . for all damage by them sustained by reason of the exercise of such powers" must be read with reference to the initial words of the section, which were held to shew that all the powers specifically conferred by that section were to be exercised exclusively for the "purpose of constructing the railway" (see judgment of Lord Chelmsford, at p. 205); and that the proviso must be limited to "damage sustained" through the exercise of the powers conferred by that section; and consequently that the proviso had no relation to "damage" sustained by reason of the exercise of the authority given by the 86th section of the Act to "use and employ locomotive engines" upon the railway. As regards the somewhat similar words used in the 6th section, it was held that the generality of the terms must be restricted by reference to the "heading" of a group of clauses in which that section, as well as the 16th section occurs, and this "heading" was considered to manifest that the legislature was dealing with the subject, in that group of sections, of the construction of the railway alone.

In *Brand's* case, *supra*, their Lordships rejected the view pressed by Lord Cairns, that when compensation is to be awarded for damage caused by the construction of a railway, regard must

be had to the character of the thing authorized as it was contemplated by the legislation, not a physical thing made once for all, but a railway in operation. Similar reasoning led to the same result in the interpretation of sec. 68 of the Lands Clauses Consolidation Act, by which compensation in respect of "injurious affection" is to be given where lands are "injuriously affected" by the "execution of the work."

This reasoning, which proceeds upon the particular words of these enactments, and upon a very strict view of the words "construction" and "execution" as applied to works of the description authorized, has obviously no kind of relevancy in itself to the question of the effect of the broad language of sec. 437.

So much for the decisions on these specific sections. There are authorities upon the effect of secs. 49 and 63 of the Lands Clauses Consolidation Act, however, that may usefully be referred to as emphasizing the inutility of the decisions on the sections first mentioned as precedents in questions involving interpretation of statutes couched in such general terms as those of sec. 437. Secs. 49 and 63 of the Lands Clauses Act deal with the case of "severance" and in that case the owner is to be paid not only the value of that part of his land which has been taken, but he is also to receive compensation for damage sustained by him by "severance" or by "otherwise injuriously affecting such other lands by reason of the exercise of the powers of this or the special Act." "Damage . . . by otherwise injuriously affecting such other lands by reason of the exercise of the powers of this or the special Act" are words not in themselves distinguishable in effect from those employed in sec. 437, so far at least as affects the question now before us; and the law is very clearly settled that in cases governed by secs. 49 and 63 compensation is assessable in respect of damage caused by subsequent user. *Duke of Buccleuch* v. *Metropolitan*, L.R. 5 H.L. 418. The effect of sec. 63 is fully discussed in the judgment of Montague Smith, J., speaking for Willes and Brett, JJ., as well as himself, L.R. 5 Ex. 221, at 252 *et seq.*, and by the Law Lords in *Essex* v. *Local Board for Acton*, 14 App. Cas. 153, at 162, 165, 166 and 167.

The decisions upon secs. 49 and 63 of the Lands Clauses Act negative conclusively the theory that some general principle of construction has been established applicable to compensation

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statutes by which the effect of general words such as those of sec. 437 (not distinguishable, as I have said, from those of secs. 49 and 63) can, in the absence of some qualifying context, be restricted in the way suggested.

This is aptly illustrated by an authority referred to on the argument, *Fletcher* v. *Birkenhead*, [1906] 1 K.B. 605. The controversy there related to the right to compensation under certain clauses of the Waterworks Clauses Act, 1847, compensation being demanded for what was conceded for the purposes of the decision to be maintenance or user as distinguished from construction of the works. The defence relied upon *Brand's* case, L.R. 4 H.L. 171, and I quote the observation of Bray, J., at p. 611:—

> It seems to me quite sufficient to say that the sections are not similar, and that it is wholly misleading to try and construe one Act by another Act, and on the ground that the differences between the two are small. The safest course is to construe the Act by its own language.

In the Court of Appeal, [1907] 1 K.B. 205, the provisions of the Waterworks Clauses Act were compared and contrasted elaborately with those of the Railway Clauses Consolidation Act by the Master of the Rolls, who pointed out what has already been indicated above as touching the grounds of that decision. The Lords Justices (Cozens-Hardy and Farwell,) emphasized the distinction between a railway as conceived by the majority of their Lordships in *Brand's* case, "a causeway or embankment with rails laid upon it, and nothing more, a thing which was made once for all," and the subject matter of the Act they had to construe, works which are described as waterworks "consisting of a well and pumping station by which water is obtained, a reservoir in which it is stored, and pipes by which it is carried to and from that reservoir;" and Farwell, L.J., says at p. 217:—

> It must be remembered that the case of *Hammersmith City R. Co.* v. *Brand* determined no question of principle. It dealt merely with the construction of a particular Act, and not with the Act with which we are dealing. Moreover, the Act upon which that decision turned dealt with a subject-matter so different from that with which the Act now in question deals, that it is obvious that the construction of one statute can be little or no guide to the construction of the other.

It is quite true that the Waterworks Clauses Act in express words gives a right to compensation for damages arising from "construction and maintenance;" but the observations of their

Lordships afford strong confirmation of the conclusion above indicated that no such general principle as that contended for is established by the English decisions on the two Acts referred to.

A brief reference to the decisions under sec. 308 of the Public Health Act is perhaps not out of place. The enactment provides that

> where any person sustains any damage by reason of the exercise of any of the powers of this Act . . . full compensation shall be made to such person by the local authority exercising such powers.

It was long ago settled that the right given by this section is available only where the act giving rise to the damage in respect of which compensation is claimed would be actionable in the absence of statutory authority. *Lingke* v. *Christchurch*, [1912] 3 K.B. 595. But subject to that it has been broadly held, to quote the language of Lord Esher in *Re Bater and Birkenhead*, [1893] 2 Q.B. 77, at 79, that "the words . . . must include any pecuniary loss which a man suffers when he is not himself in default." *Hobbs* v. *Winchester*, [1910] 2 K.B. 471; *Walshaw* v. *Brighouse*, [1899] 2 K.B. 286; *Re Davies and Rhondda Urban Council*, 80 L.T. 696; and accordingly compensation has been held to be awardable under them for damages suffered by reason of user as distinguished from the construction of the sewage works. *Durrant* v. *Banksome*, [1897] 2 Ch. 291, at 298, 300, 304 and 305; *Uttley* v. *Local Board of Health of Todmorden*, 44 L.J.C.P. 19, at 23. *Horton* v. *Colwyn Bay*, [1908] 1 K.B. 327, which was pressed upon us by the appellant municipality, is also a decision under sec. 308 of the Public Health Act, and it is sufficiently evident when the case is understood, that it has very little relevancy to any question before us. The defendants there acting under the Public Health Act, had constructed a sewer, pumping station and sewage reservoir, forming one scheme of sewerage. The sewers were in part constructed on the property of the claimant; the pumping station and the reservoir on the property of other persons. The present value of part of the claimant's lands was depreciated by reason of the contemplated user of these works for sewage purposes and in respect of this depreciation he claimed compensation.

The decisive consideration rested upon the fact stated at p. 342 in the judgment of Buckley, L.J., that the erection and user of the pumping station and reservoir would be no actionable

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wrong as against the claimant; of this there seems to have been no dispute and *primâ facie*, therefore, sec. 308 of the Public Health Act had no application.

An ingenious attempt to get over the difficulty by appealing to some rather sweeping observations made in *Re London, Tilbury, etc. R. Co., and Gowers Walk Schools*, 24 Q.B.D. 326, and applying them to the fact that the system was a system in part constructed on the claimant's land failed; it would serve no useful purpose to follow the discussion on this last mentioned point.

We have now to consider the decisions upon the Canadian statutes. First, there is a series of authorities in the Ontario courts on the Dominion Railway Act in which it was held that the effect of the compensation clauses of that Act as touching the point now in question was the same as that attributed to secs. 6 and 16 of the Railway Clauses Consolidation Act in *Brand's* case, L.R. 4 H.L. 171, and these decisions of the Ontario Courts were assumed in the *Fort William* case, [1912] A.C. 224, to have settled the law under the "Dominion Railway Act." In *Holditch* v. *Canadian Northern Ont. R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536, the Judicial Committee of the Privy Council, as I read the judgment, held (see p. 554) that no importance can be attached to any difference in language between sec. 155 of the Dominion Railway Act and the proviso to sec. 16 of the Railway Clauses Consolidation Act of 1845, and their Lordships' language seems to imply that they approve of the view that the construction of sec. 155 as regards the point now in question is governed by the decision in *Brand's* case.

Now it is too clear for dispute that if sec. 155 of the Dominion Railway Act was to be construed apart from its context, it could be given no narrower effect than the language of sec. 437 of the Municipal Act. On the other hand, sec. 155 is found in a group of sections, which, like the group of sections in which sec. 16 of the Railway Consolidation Clauses Act occurs, has the heading "construction" and (although sub-section (*f*) of sec. 151 in that same group of sections deals with the manner of operation as regards motive power and otherwise) it is, I think, a proper conclusion from the whole tenor of their Lordships' remarks at p. 554 in the *Holditch* case, *supra*, that the foundation of their Lordships' view was that the language of sec. 155 when read

with the context in which that section is found, sufficiently evidences an intention to adopt the law of *Brand's* case.

The other Canadian decisions to which I shall refer concern the effect of sec. 47 of the Exchequer Court Act and of provisions of the Dominion Government Railways Act of 1881.

The King v. *McArthur*, 34 Can. S.C.R. 570, a decision of this court, at first sight is a formidable obstacle for the respondent company.

The court was there governed by the provisions of the Dominion statutes, the Expropriation Act, and sec. 47 of the Exchequer Court Act. There is in these enactments no explicit statement of any specific rule or principle upon which compensation is to be awarded, although some right to compensation (when property is taken or injured) is necessarily implied.

The court in the case just mentioned appears to have assumed, without argument on the point, that the rules developed by the English courts in compensation cases under the Railway Clauses Act and the Lands Clauses Act, were proper guides for the interpretation of the "Exchequer Court Act" and the Expropriation Act. The decision can therefore have no weight as an authority on the construction of sec. 437. If the court had been dealing with sec. 437 of the Municipal Act another question might have arisen; although in view of the course of this court in its decisions upon art. 1054 C.C., see *Vandry* v. *Quebec Light, Heat and Power Co.*, 29 D.L.R. 530, 53 Can. S.C.R. 72, of Lord Blackburn's observations in *Brand's* case, *supra*, and of the decision of the Privy Council in *The Queen* v. *Hughes*, L.R. 1 P.C. 81, I should not have felt myself constrained to do violence to the language of the statute by a decision in which the point in question had passed *sub silentio*. The statute in question in that case was, however, another statute, and as the decision cannot be said to establish any principle, we are not bound to give effect to everything which may appear to be a logical consequence of it. *Ex parte Blaiberg*, 23 Ch. D. 254, at 258; *Spencer* v. *Metropolitan*, 22 Ch. D. 142, at 157; *Admiralty Commissioners* v. *S.S. America*, [1917] A.C. 38, at 42 and 43.

In *Paradis* v. *The Queen*, 1 Can. Ex. 191, Taschereau, J., observed at p. 193 that "our statute," meaning the Government Railways Act of 1881, was but a re-enactment of the Imperial

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statutes on the subject of compensation and it followed, of course, that the decisions on the English statutes were considered to be authoritative. The particular clauses of the Government Railways Act, to which Taschereau, J., referred, have since disappeared from the statute, but I am afraid I am unable to agree with the assumption that they were a mere reproduction of the Imperial statutes.

On the whole my conclusion is that there is nothing in the decisions of this court on the Dominion statutes, which constrains us to give sec. 437 an effect not justified by the words themselves which the legislature has selected for the expression of its intention.

The point being settled that the right of compensation given by sec. 437 extends to cases where property is "injuriously affected" by the exercise of powers of maintenance and user of works as distinct from the power to construct works, in the narrower sense of those words, the next question to be considered is whether the first of the conditions above mentioned has been satisfied, namely, that the depreciation in value of the respondent's property which admittedly has taken place is the result of acts which in the absence of statutory authority would have been wrongful and actionable.

I shall not repeat the reasons given by Masten, J., in which I concur for thinking that the openings and the railings about them constitute illegal and indictable obstructions to the public right of passage in the highway. The general principle that an illegal and indictable act is wrongful as against an individual and actionable at his suit if it has occasioned to him some particular loss more than that sustained by the rest of the public, has been applied frequently in compensation cases: *Metropolitan Board of Works* v. *McCarthy*, L.R. 7 H.L. 243, at 263 and 266; *Chamberlain* v. *West End of London*, 2 B. & S. 636; and especially in the exposition of Willes, J. in *Beckett* v. *The Midland R. Co.*, L.R. 3 C.P. 82, beginning at p. 97. There is a distinction, however, between this case as regards the relation between the obstruction and the loss suffered by the respondent company, and all the other compensation cases in which, as far as I have seen, the principle has been held to be operative. As I view the facts there is no warrant for holding that any loss has fallen upon the

respondent company through any direct effect upon the value of its property of these obstructions as obstructions, because, in other words, of any interference with the public right of passage occasioned by them; and it may be added that the learned arbitrator has in substance found, I think, and I should find without hesitation that there is no invasion of the respondent company's right of access, the private right that is to say incidental to its ownership.

The depreciation in value for which compensation is awarded is occasioned by the fact that the presence of such conveniences makes the property less desirable from the point of view o possible purchasers and lessees, and therefore diminishes its selling and letting value. Does the circumstance that the loss is not due to the obstructions as such affect the application of the principle? If an illegal act causes damage to an individual, which is particular damage, that is to say, which affects him particularly over and above any harm it may cause to the public generally, and that damage is the natural and probable consequence of the act, reparation for such damage is, I think, recoverable, and I do not see why the law breaker should escape this consequence because of the fact that the injurious results (the natural and probable results) of his concrete illegal act are not connected by any causal relation with the particular circumstances giving the act its specific illegal character. The point has been dealt with in *Campbell* v. *Paddington*, [1911] 1 K.B. 869, in which it was held that an erection in a highway, unlawful as an obstruction to the public right of passage which also interfered with the view from the plaintiff's windows and thus deprived her of the opportunity of letting some rooms for the purpose of viewing a procession, was actionable at her suit although she was not specially affected by the obstruction as an obstruction to the right of passage. See also *Griffith* v. *Clay*, [1912] 2 Ch. 291.

But the question arises, is it sufficient that the depreciation should have been the result of something which would have been an actionable public nuisance, but for the statutory authority? That it should be actionable is a condition, but is it sufficient? Lord Cairns' words in *McCarthy's* case, L.R. 7 H.L. 243, at p. 252, have frequently been quoted:—

In the observations I am about to make to your Lordships, I propose entirely to accept the test which has been applied both in this House and

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elsewhere, as to the proper meaning of those words as giving a right to compensation, namely, that the proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the work had not been authorized by Act of Parliament.

Lord Hatherley's language is to the same effect at p. 260 and in *McCarthy's* case, the decision of the Exchequer Chamber in *Chamberlain's* case, 2 B. & S. 605, 617, 121 E.R. 1197, 1202, and the decision of the Court of Common Pleas in *Beckett* v. *Midland R. Co.*, L.R. 3 C.P. 82, are explicitly approved in which it was held that depreciation in value caused by an obstruction giving a right of action by reason of such depreciation would afford a sufficient ground for compensation. Certain earlier cases, notably *Caledonian R. Co.* v. *Ogilvy*, 2 Macq. 229, in which a claim for damages occasioned by a railway crossing at highway level was disallowed, are explained on the ground that no depreciation of value or other injurious effects upon the claimant's property was shewn.

A difficulty, however, may seem to arise from the language of the Lord Chancellor (Lord Cairns) and of Lord Chelmsford in *McCarthy's* case, and the application made of that language by this court in *The King* v. *McArthur*, 34 Can. S.C.R. 570. Lord Cairns appears to have accepted, although it may be doubted whether he intended to lay it down finally as a "definition," the test proposed in the form of a "definition" by Mr. Thesiger in argument. Lord Cairns formulates that test at p. 253 in these words:—

> Mr. Thesiger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject, was this that where by the construction of works there is physical interference with any right, public or private, which the owners or occupiers of property are by right entitled to make use of, in connection with such property, and which right gives an additional value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value.

Lord Chelmsford restates the "test" in slightly different language at p. 256. Now there is a fallacy in applying this "test" where the claim is for damages caused by maintenance and user as distinguished from construction simply. In *McCarthy's* case, L.R. 7 H.L. 243, their Lordships were applying the 68th section of the Lands Clauses Consolidation Act, which comes into operation only where property is injuriously affected by the "execution of the works." And in view of the decision

of the House in *Brand's* case, L.R. 4 H.L. 171, all their observations were, of course, directed to a discussion of the point raised by a claim for the injurious affecting of property as the result of the physical construction. It is too obvious for argument that a claim for compensation for damages caused by vibration, in the working of a railway for example, is not within the purview of the language quoted. This being the proper construction of the language, it may no doubt have been rightly applied by this court in *McArthur's* case, 34 Can. S.C.R. 570, on the assumption upon which that decision proceeded, namely, that the statute under which compensation was claimed, had no application to the injurious consequences of user as distinguished from construction.

It is proper at this stage to notice an argument of counsel for respondents, which was to the following effect: Assuming sec. 437 to have no application to cases in which no property is taken, and no property is injuriously affected by construction, the depreciation in value ought, nevertheless, in part, on the evidence to be attributed to the existence of the obstruction to the right of passage occasioned by the openings in the surface of the highway independently of their connection with the conveniences; and that the compensation clause having once "attached," even though no land was taken, compensation must be assessed for the whole of the resulting damage arising from use as well as from construction.

I have already said that in my view the premises fail on the facts; but assuming the premises the conclusion is, I think, to say the very least, extremely doubtful. Sec. 437 gives compensation for "any damage necessarily resulting from the exercise of such powers," "such powers" being those in the exercise of which land has been "entered upon, taken or used," or by the exercise of which land has been "injuriously affected. If "injuriously affected by the exercise of any of its powers" contemplates powers of construction only, then it must follow that where compensation is claimed for injuriously affecting lands it must be shewn that this results from construction. That seems necessarily involved in the acceptance of the interpretation of the statute put forward on behalf of the respondent. That interpretation given, there is no foothold for a claim in respect of damages occasioned by user.

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Counsel for respondents' contention, moreover, is founded on certain English decisions, which, when closely examined, are seen to be *non ad rem*. I have already mentioned that in the *Cowper-Essex* case, 14 App. Cas. 153, their Lordships had to apply secs. 49 and 63 of the Lands Clauses Consolidation Act. The language of those clauses is discussed above and the effect of them noted in their application to circumstances such as those their Lordships had before them in the *Cowper-Essex* case, where part of a landowner's property is severed from the rest. Their Lordships followed the decision in the *Duke of Buccleuch's* case, L.R. 5 H.L. 418, where the majority of the Law Lords proceeded on the ground that land had been taken. The right of access to the river, moreover, along the whole of the river front, was invaded and access destroyed, and I should not be disposed to think that this was distinguishable from the taking of land, the right of access being not an easement, but one of the rights *jure naturæ* incidental to ownership. *Lyon* v. *Fishmonger's Co.*, 1 App. Cas. 662; *Kensit* v. *Great Eastern R. Co.*, 27 Ch. D. 122; *North Shore R. Co.* v. *Pion*, 14 App. Cas. 612, at 621. See Lord Cairns' judgment in the *Duke of Buccleuch's* case, at p. 462. *In re Tilbury*, 24 Q.B.D. 326, is a case which seemed at first sight to support the contention, and the language used by the Lords Justices is very broad. At p. 333, for example, Lopes, L.J., says:—

> That principle I understand to be, that when the compensation clauses of the statute attach, the party who is injuriously affected is to be entitled to recover full compensation for all damage in respect of the deterioration in value of his property.

When, however, one considers what their Lordships had to decide, and what their Lordships did decide, one sees that they were only dealing with the case in which property is injuriously affected by construction. The ground of the claim was that certain buildings constructed by the railway company injuriously affected the claimant's property in the obstruction of certain ancient lights, and that this obstruction, which, but for the statutory powers of the railway company, would have been unlawful and actionable, at the same time had the effect of interrupting the access of light to windows in respect of which the claimant had acquired no easement of light. Their Lordships applied and construed sec. 16 of the Railway Clauses Consolida-

tion Act, 1845, in relation to these facts. I have already pointed out that under the decision in *Brand's* case, L.R. 4 H.L. 171, the proviso to that section requiring the promoters "to make full satisfaction . . . for all damage . . . sustained by reason of the exercise of such powers" applies only where the damage is sustained in consequence of construction as distinguished from user, and this is the section which their Lordships applied. The damage for which compensation was claimed was in its entirety attributable to construction.

There is, I think, no decision under the Railway Clauses Act or under the Lands Clauses Act in which it is held, or in which it is laid down that where land is not taken compensation can be recovered for damages arising from the injurious affecting of it by subsequent user as distinguished from construction; that no doubt is because there is nothing in the provisions of those Acts to give support to such a claim. There is one circumstance, moreover, which tells very powerfully against any such view, In *Brand's* case, a claim was made, and allowed for damages for interrupting the access of light and air, and if the contention I am considering were sound, that would have afforded a basis for a claim to compensation for damage caused by vibration, which was disallowed. The point was not discussed by the Law Lords, and not referred to in argument, but attention had been called to it in the judgment of Montague Smith, J., L.R. 2 Q.B. 223, and though perhaps as Lord Blackburn afterwards observed, the decision of the Law Lords cannot be regarded as concluding the point, it is at least clear that Sir Roundell Palmer who appeared unsuccessfully for the respondent (and probably Lord Cairns, who thought the respondent ought to succeed), regarded the point as of no consequence.

I now come to the last point upon which Mr. Hellmuth, I think, chiefly relies, and that is that on the hypothesis upon which the respondent's case rests, the action of the municipality in providing and maintaining the conveniences exceeded any authority conferred by the Municipal Act, and that consequently no right to compensation arises. I concur with the view advanced by Mr. Hellmuth, that if the municipal by-law was beyond the powers of the council no right to compensation under the statute would arise; but I have not sufficiently considered

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the provisions of the Municipal Act in relation to the procedure in compensation cases to enable me to form an opinion whether such an objection (postulating as this does an abuse of the powers of the council) could properly be taken as this objection was taken for the first time after the evidence had all been heard.

I am satisfied that there is nothing before us to justify the conclusion that the council exceeded their powers. Mr. Hellmuth's point is that the appellant municipality could not validly exercise its authority in relation to the providing of public lavatories in such a way as to create a nuisance prejudicially affecting private property.

Now there is a sense in which that proposition is perfectly sound. The municipality must exercise this power in a proper manner, that is to say, it must not by acts of collateral negligence, by improper construction, for example, create a nuisance, and for a nuisance occasioned by such negligence, the municipality is undoubtedly responsible in an action for damages and that is the proper remedy. But the respondent company does not claim compensation for anything of the kind. It claims compensation for damages arising from the existence of these conveniences, and from concomitants of them which are inevitable, and from the harmful consequences necessarily resulting from the lavatories being where they are placed. It is argued that the municipality can have no authority under the statute to place such a convenience in such a situation as to produce such injurious consequences to a private individual. I think that proposition is not well founded. The authorities relied upon are *Vernon* v. *St. James*, 16 Ch. D. 449; *Metropolitan Asylum Dist.* v. *Hill*, 6 App. Cas. 193. These cases have been fully dealt with in a judgment of Lord Macnaghten, speaking for the Judicial Committee in *East Fremantle* v. *Annois*, [1902] A.C. 213, which enunciates clearly and succinctly the principle upon which such questions must be decided, namely, by ascertaining the answer to the question: What is the proper construction of the statute from which the power is derived?

The question is then—Has the legislature endowed the council with authority to select a site for such conveniences, subject to the obligation to pay compensation where private rights of property are injuriously affected? Municipal councils

invested with very large powers must be presumed to act not only with due regard to the public interest, but with due consideration for individual rights and interests in such matters. But the question is: Is a discretion committed to the council which enables it to select a site where private property will inevitably be damaged when it deems the public interest so to require?

"An Act of Parliament," said Bowen, L.J., in *Truman* v. *London, Brighton and South Coast R. Co.*, 29 Ch. D. 89, at p. 108, may authorize a nuisance, and if it does so, then the nuisance which it authorizes may be lawfully committed. But the authority given by the Act may be an authority which falls short of authorizing a nuisance.

It may be an authority to do certain works provided that they can be done without causing a nuisance, and whether the authority falls within that category is again a question of construction. Again the authority given by Parliament may be to carry out the works without a nuisance, if they can be so carried out, but in the last resort to authorize a nuisance if it is necessary for the construction of the works.

Nobody would deny that the municipality has authority to expropriate land for the purpose of establishing lavatories; therefore the scheme of the Act is certainly not to require the municipality, in the exercise of this power, to refrain from interfering with private rights; it contemplates, on the contrary, interference with private rights, subject, of course, to paying compensation. But in my judgment, to accept the view advanced by the municipality would nullify the utility of this power.

I will not elaborate the point; my conclusion is that where private rights are affected the compensation clause attaches. This is not to say that the municipal council may act in a wholly fantastic manner passing, for example, a by-law which "reasonable persons, acting in good faith, could not sanction;" *Slattery* v. *Naylor*, 13 App. Cas. 446. For such conduct the law affords ample remedy.

For these reasons I have come to the conclusion that the conditions of the claimant's right to compensation under the compensation clause of the "Municipal Act" construed by the light of the relevant judicial decisions, are fulfilled, and that the main appeal should therefore be dismissed.

As to the cross-appeal, it involves questions of fact only, and upon these questions the arbitrator's findings have been affirmed by the Appellate Division, and ought not therefore to be dis-

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turbed in this court unless it is quite clear that they are founded upon some specific mistake. That has not been shewn.

ANGLIN, J.:—The facts are so fully set out, and the authorities so thoroughly discussed in the judgment of my brothers, Davies and Duff, which I have had the advantage of reading, and in those of the learned judges of the Appellate Division, 29 D.L.R. 618, 36 O.L.R. 189, that it seems quite unnecessary to do more than state the conclusions, I have reached, and to indicate the grounds on which they are based.

The crucial questions appear to me to be these:—

1. Is the construction and maintenance of a public lavatory, which would otherwise be within the authorization of sec. 552 (1) of the Municipal Act, 1903, or sec. 406 (8) of the Municipal Act, 1913 (identical provisions), excluded therefrom because it entails conditions which, if not so authorized, would amount to a nuisance?

2. Are the lands of the respondent company "injuriously affected" by the exercise of the powers conferred on the appellant municipality within the meaning of sec. 437 of the Municipal Act, 1903, or sec. 325 of the Municipal Act, 1913? I regard both these provisions as substantially the same, but I agree with my brother Duff that the Act of 1903 governs, the works having been constructed before July 1, 1913.

3. Do the powers, for damages occasioned by the exercise of which compensation is thereby provided, include the maintenance, in the sense of carrying on or conducting public lavatories or are they confined to the original providing (i.e., the construction) of them and subsequent maintenance merely in the sense of repairs or betterments?

(1) I entertain no doubt whatever that the fact that the existence of a public lavatory causes conditions which would at common law amount to a nuisance, if those conditions are a necessary concomitant of its erection and maintenance, whether it is constructed on expropriated lands or on the city streets, does not exclude it from the authorization of the statute. In specifically authorizing the construction and maintenance of public lavatories, and providing for compensation for resultant injury the legislature contemplated that such conditions, productive of damage to adjacent private properties, might ensue.

The city is entrusted with a discretion as to the location of such lavatories, and its judgment, honestly exercised, is not subject to curial control or review. The causing of damage which is not a necessary result of the exercise of the statutory power—which due care in its exercise would avoid—is not within the statutory authority. It is an excess or abuse of the power; and damage so caused is not a subject for compensation, but for action. But the construction and maintenance of a lavatory, with all proper precautions to avoid unnecessary injury is authorized by the statute, even though it should entail conditions which would, if not so authorized, amount to an indictable or actionable nuisance. The statute substitutes money compensation for some of the benefits and advantages of and incidental to ownership of property, in so far as it is "injuriously affected" by the exercise of the corporate powers.

(2) The construction of the words "injuriously affected" as applied to lands in compensation Acts, is too well established to admit of controversy. It imports an affection of the lands themselves (apart from any particular use to which they may be put or any personal inconvenience suffered by the owner) entailing appreciable damage. It also implies an *injuria* known to the law, *i.e.*, the doing of an act which, if not authorized by the statute, would be actionable—that the loss sustained must not be *damnum absque injuria*. Once an actionable injury is established, however, all the damage sustained in consequence of the exercise of the statutory power is to be compensated for. Thus, if the *injuria* consists in the blocking of lights to the enjoyment of which the land-owner has a legal right, prescriptive or contractual, he is entitled to compensation for interference with other existing lights to the enjoyment of which he has not a legal title. *The Tilbury* case, 24 Q.B.D. 326; *Horton* v. *Colwyn Bay*, [1908] 1 K.B. 327, at 341; *Griffiths* v. *Clay*, [1912] 2 Ch. 291.

Moreover, if the act done be illegal (as Masten, J., has, to me at least, satisfactorily demonstrated, the erection of the lavatory in question, but for the statutory authorization, would have been, because of the partial obstruction of the highway involved) damages which are its natural and probable consequences, may be recovered, although no actual damage can be shewn attributable to the feature of the act which renders it illegal, or, but for the

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statutory authorization, would have made it so. *Campbell* v. *Paddington*, [1911] 1 K.B. 869, cited by my brother Duff, illustrates this phase of the law. I agree that the affirmance of the judgment in appeal involves the acceptance of the principle of the *Paddington* case.

(3) I have no doubt that the word "maintain" in sec. 552 (1) of the Act of 1903, is used in the sense of "carry on" and that the power conferred was not merely to erect lavatories, and keep them in repair, but to conduct and operate them as municipal enterprises, *Fletcher* v. *Birkenhead*, [1906] 1 K.B. 605, at 610-11; [1907] 1 K.B. 205, at 213, 216-17, 218, seems to me to be very much in point.

In dealing with sec. 437 of the Municipal Act, 1903, we are not embarrassed by the restrictive effect of a heading of a fasciculus of sections such as led to the decisions in *Brand's* case, L.R. 4 H.L. 171, and the series of English cases following it. The language of section 437 is obviously wide enough to cover compensation for injury due to user as well as to erection, once it is established that carrying on or conducting the lavatory is an exercise of the statutory power conferred by the word "maintain," as I have no doubt that it is. My brother Duff has clearly pointed out the distinction between the construction placed by the English courts on sec. 68 of the Lands Clauses Consolidation Act and secs. 6 and 16 of the Railway Clauses Consolidation Act, and that given to secs. 49 and 63 of the former Act, and the grounds on which that distinction rests. I agree in his conclusion that the construction of sec. 552 (1) and sec. 437 of the Ontario Municipal Act, 1903, is governed by the decisions on secs. 49 and 63 of the Lands Clauses Consolidation Act. There is nothing in the Municipal Act which requires a more restricted application of sec. 437 than its language *ex facie* calls for.

Compensation for damages due to user having been expressly provided for by the statute, and injurious affection, resulting from an act illegal but for statutory authorization, having been shewn, nothing more, in my opinion, is required to establish the claimant's right to recover.

I have not overlooked the argument made on behalf of the appellant, based on the fact that title to the land occupied by the highway is now vested in the city under the Municipal Act,

1913. When the lavatory was built, however, and the respondent's right to compensation accrued, the title was in the Crown, and the appellant cannot invoke the Act of 1913, which is not made retrospective. But, although the title to the soil under Parliament St. is now vested in the city, having regard to the trust upon which it is held, it cannot, in my opinion, be lawfully used without statutory authority as a site for a lavatory. The lavatory was not erected, and is not maintained, under any such pretended common law right of proprietorship, but in the exercise of the powers conferred by the statute; and for injury to land sustained as the result of the exercise of those powers, the legislature has given the right to compensation.

I am, for these reasons, of the opinion that the award as to the item of $9,000, no complaint having been made as to the quantum, should be sustained.

As to the item of $1,200 allowed for damage due to seepage, I find no evidence in the record of any negligence in the planning or construction of the works, such as would be an abuse of the statutory powers or without the protection they afford. It may be that by additional works (Riddell, J., suggests a coat of waterproof cement on the walls of the claimant's shop), the seepage complained of could have been prevented. But the municipality's failure to undertake such additional works did not render it liable to an action for damages. The injury caused by the seepage seems to have "necessarily resulted" from the exercise of the statutory powers of the municipal corporation within the meaning of sec. 437. On this branch of the case I agree with the views expressed by Masten, J.

No case was made for increasing the amount of the award as claimed by the cross-appeal. Indeed, any error in the assessment of compensation would seem to me to be clearly in favour of the claimant. A more moderate award might have been accepted without appeal. The allowance of excessive compensation in cases such as this is calculated to discourage the undertaking of important public improvements.

BRODEUR, J.:—I concur in the dismissal of the appeal. Brodeur, J.

Appeal dismissed.

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. November 12, 1917.

HIGHWAYS (§ IV A—132)—OBJECT FRIGHTENING HORSES—LIABILITY—INDEPENDENT CONTRACTOR.

The negligence of a contractor for the repair of a highway, in leaving a scraper upon the roadway, and thereby causing a horse to run away, is not ascribable to the municipality for which the contractor is doing the repairs, even though the scraper belongs to the municipality, and is loaned to the contractor.

[See also *Smith* v. *Montreal* (Que.) 37 D.L.R. 159.]

Statement

APPEAL by plaintiff from the judgment of Macdonald, J., dismissing the action. Affirmed.

A. E. Hoskin, K.C., for appellant.

H. J. Symington, K.C., and *F. L. Davis*, for respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—One of the grounds upon which the plaintiff bases his claim for relief is that the road where the accident happened is not of the width required by s. 622 of the Municipal Act. It seems to me that the trial judge disposed of this matter against the plaintiff upon the facts, and I see no reason to reverse this finding.

The other ground upon which the plaintiff claims a right to recover is not so easily disposed of. The defendants owned the scraper which frightened the horse, and expected and intended it to be used by contractors who got contracts from them to do work on the highways. The plaintiff's horse was frightened by it, and it is shewn by the evidence that other horses were frightened by it also, and from the evidence I would infer that when standing on the road with its handles up in the air, as it was when the accident happened, it would be likely to frighten ordinary horses travelling on the highway.

A contractor was employed by the defendants to repair a culvert in a highway which intersected at right angles the road upon which the plaintiff's horse was travelling, which culvert was only 15 feet distant from the centre of the travelled portion of that road.

The scraper was brought by the contractor to the place where the work was to be done, and was left upon the graded portion of the highway, upon which the deceased was afterwards driving, and I gather from the evidence and from the finding of the judge that it was left not upon, but near the actual travelled line of the graded or elevated portion of the road, which elevated portion was 29 ft. wide.

It is clear that the defendants had no notice previous to the accident that the scraper was in that locality. Indeed, it had only been placed there an hour or two before the accident. The scraper was brought there for the purpose of being used in hauling earth to cover the framework of the culvert, and to complete the graded approaches, and this work was in fact as much a repair of the road in question as of the intersecting road.

The scraper, as above stated, was the property of the defendants, procured and kept by them for use by their contractor upon highways, and I infer from the evidence that by the terms of the contract, this contractor was entitled and authorised to use this scraper in this work on the highways.

The scraper when left with the handles up in the air was likely to frighten horses, and was, when left upon the highway, a danger to those travelling in carriages.

By s. 620 of the Municipal Act, the defendants have "jurisdiction" over this highway, and by s. 624 they are bound to keep it in repair. S. 625 creates a liability in case of damages caused by non-repair.

It was the defendants' duty, therefore, to repair this road, and in causing this culvert to be repaired, they were simply performing a statutory duty, but they must so discharge this duty as not to endanger the safety of the travelling public. Rigby, L.J., in *Hardaker* v. *Idle*, [1896] 1 Q.B. 335, at 351, states the law as follows:—

> If they had done the work by the hands of their servants it cannot be doubted that it would have been their duty to use all reasonable skill and care to prevent damage to any persons arising from their operations,

and further on he adds:—

> No one can get rid of such a duty by imposing it upon an independent contractor.

Lindley, L.J., in the same case at 340 states:—

> There is nothing to prevent them from employing a contractor, to do their work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people whatever that duty may be.

In *McIntosh* v. *Simcoe*, 15 D.L.R. 731, 5 O.W.N. 793, Meredith, C.J., in giving the judgment of the court, held that as it was contemplated by the council that a machine would be used by the contractor which would probably frighten horses, the municipality was liable for the acts of the contractor in using such a machine.

It is stated in 21 Hals. at 474, that an employer cannot divest

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himself from liability for negligence of an independent contractor where the work contracted to be done "is from its nature likely to cause danger to others unless precautions are taken to prevent such danger."

The duty of the municipality in making repairs and their liability where a contractor is employed as set forth in various authorities is to my mind well set forth in Denton on Municipal Negligence at 225, where he states: "Upon all municipalities the duty has been cast (whether by statute or at common law makes no difference) to keep their highways in a state of repair reasonably safe for ordinary traffic, and one can hardly imagine a case where a contractor is employed in the construction, alteration or repair of highways, in which there is not likely to be danger caused to persons using the highway, unless precautions are taken. It seems then to be of little practical importance, so far as accidents upon highways are concerned, whether the contractor is or is not independent within the meaning of the rule, for before a municipal corporation can contract itself out of liability for a defect in the highway, it must be shewn that the work which gives rise to the defect was not from its nature likely to cause danger to persons using the street."

There are two cases in Ontario, *Colquhoun* v. *Fullerton*, 11 D.L.R. 469, 28 O.L.R. 102 and *O'Neil* v. *Windham*, 24 A.R. (Ont.) 341, upon this branch of the law, the former of which was referred to in the judgment of Macdonald, J., and although he might have decided this case perhaps without relying upon that decision, I feel called upon to state that in Manitoba I do not think we should be influenced by these decisions. Those cases were apparently decided in favour of municipalities, because of former decisions in Ontario, indeed at least one judge in each court so stated.

An implement belonging to the defendants, likely in some conditions to frighten horses was used by their consent on the street. It was carelessly used by a contractor doing work, which the defendants by statute were bound to perform. The defendants apparently took no care to prevent negligence by the contractors. He was negligent, and this negligence caused the accident.

I think the defendants are liable, and I would assess the damages at $3,000. The judgment should be set aside, and a

judgment for the plaintiff entered for that amount with costs of the trial and of this appeal.

PERDUE, J.A.:—This is an action brought by a son of his deceased mother, Agnes Lottine, to recover damages on behalf of himself, his father, brothers and sister, occasioned to them by the death of the said Agnes Lottine, who was killed in an accident which took place on a public highway of the defendant municipality. The action is brought under the Act respecting Compensation to Families of Persons killed by Accident, R.S.M. 1913, c. 36.

On July 21, 1915, the deceased was riding in a buggy on the highway in question with her young daughter, a girl then between 14 and 15 years of age. The girl was driving the horse. The horse became frightened at a scraper that had been left on the side of the road, shied and turned around, upsetting the buggy and throwing the occupants out. The deceased was thrown into a ditch along the highway partially filled with water. The horse fell upon the woman's head and chest, pinning her down in the water and smothering her to death.

The plaintiff claims that the death of the deceased was caused by the negligence of the defendant, which negligence is put upon three grounds, which were dealt with in the argument in the following order: 1. That the defendant had failed to comply with the provisions of s. 622 of the Municipal Act, R.S.M. 1913, c. 133, in that "the faggot or raised portions of the road" were not 16 ft. across the top; 2. That the defendant was guilty of negligence in leaving the scraper on the road allowance. 3. That there was negligence in the construction of the road and adjoining ditches at the point in question and that it was not at the time safe for travel.

I agree with the finding of the trial judge that the plaintiff must fail upon the first ground. S. 622 of the Municipal Act is as follows: "All faggot or raised portions of road are to be at least 16 ft. wide across the top."

The road in question was slightly over 29 ft. wide from ditch to ditch. In the centre there was a flat surface 12 ft. wide upon which the ordinary travel took place. On each side the road sloped down to the ditch, the strip on the west side of the 12 ft. in the centre being 10 ft. 3 inches wide, with a slope of 2 ft. 6 in. to the edge of the ditch; and the strip on the east side being 7 ft. 3 in., with a slope of 2 ft. 6 in. from the central part to the ditch.

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The road at the point where the accident occurred ran over a muskeg or swamp and all of the road between the ditches had been built up and raised above the natural level of the ground. One of the witnesses, called by the plaintiff, who lives on this road about a quarter of a mile away from the place where the accident took place, stated that the whole 29 ft. from ditch to ditch was firm and solid and fit to be travelled upon, and that the road was at the time in good repair. The trial judge finds that although the central portion is more substantial than the rest of the road the sides are in good condition. The whole raised portion of the road from ditch to ditch consisted of clay and, as I infer from the evidence, the only reason why the central part was harder and better than the sides was because it had been more travelled upon. The accident was not due to the narrowness of the central strip. Even if the central strip had been 16 ft. wide, instead of 12, it would not have prevented the accident. The plaintiff must fail upon the first ground.

Upon the second ground there are findings of fact made by the trial judge which are fully supported by the evidence, and with which I completely agree. He finds that the scraper did not obstruct the actual travelled portion of the highway. The scraper was the property of the defendant municipality. When contracts were let for work on highways the municipality permitted the use of its scrapers upon the work. The scraper in question had been in use by one Hockin at a point some miles distant from the place of the accident, and, when he had finished with it, it was taken by one Griffith and left where it was when the accident took place. Griffith's brother had a contract with defendants to repair a culvert over a ditch on the side of the road near where the scraper was left, and Griffith had left the scraper there at his brother's request to be used on the contract. The scraper was placed there about one hour before the accident occurred. The judge also finds as follows:—

> Griffith had no contract with the municipality and had no authority from anyone connected with it for the moving of the scraper, nor did anyone connected with the municipality have any knowledge of its whereabouts at the time of the accident. The scraper was taken by Griffith from Hawkins (Hockin) at the request of his (Griffith's) brother, who had a contract with the municipality at the crossroads near the scene of the accident.

The point at which the scraper was left was about 50 yards from the place where the horse took fright, as it was approaching

that point, and upset the buggy. The scraper was a two-wheeled one intended to be drawn by a pair of horses. The scraper part had not been laid flat on the ground, but was tilted so that the handles stuck up in the air, constituting in that position an object likely to frighten a horse.

Sections 624-625 of the Municipal Act, R.S.M. 1913, c. 133, declare the duties of a municipality to keep the public roads in the municipality in repair, and its liability for non-repair. Can it be said that the leaving of the scraper upon the road did, in the circumstances of this case, constitute a default in keeping the road in repair? There was no obstruction of the road. The accident was caused by the horse taking fright at the object. The municipality, as the evidence shews and the judge finds, had no knowledge that the scraper had been placed where it was, and the brief space of time that elapsed between the placing of it and the occurrence of the accident preclude any imputation of notice to the municipality.

Several carefully considered decisions of the highest courts in Ontario have declared that the obligation to keep in repair does not include the duty of keeping a public road free from objects which, while they do not impede travel upon the road, may nevertheless frighten horses.

In *Maxwell* v. *Township of Clarke*, 4 A.R. (Ont.) 460, a pile of wood had been thrown upon one side of the road, some of it being upon the bed of the road. The plaintiff's horse shied in passing the wood, threw him off and injured him. It was held that the defendants were not guilty of a breach of the statutory duty to "keep in repair." This decision followed and was largely based upon *Hixon* v. *Lowell*, 13 Gray, 59, and *Kingsbury* v. *Dedham*, 13 Allen, 186. In the *Kingsbury* case Bigelow, C.J., pointed out the impossibility of keeping a highway at all times clear of objects that may get upon it, and cause horses to take fright; that a piece of white paper, a dark patch, a tuft of hay, or similar objects on the road which the highest diligence could not prevent or reasonably remove might frighten horses and render the municipality liable for damages.

Maxwell v. *Clarke* was followed by the Court of Appeal in *O'Neil* v. *Windham*, 24 A.R. (Ont.) 341, and in the recent case of *Colquhoun* v. *Township of Fullerton*, 28 O.L.R. 102. In the last

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mentioned case the plaintiff was driving along the road on a dark night, and, to avoid a pool of water on the road, turned to one side close to a milk stand erected on the highway close to the travelled portion. The horse shied at the milk stand, broke its leg and had to be destroyed. The stand had been erected some 2 or 3 weeks before the accident, without the knowledge or consent of the municipality, which was not aware of the existence of the stand. It was held that the municipality was not liable.

Section 623 of the Municipal Act of this province is not found in the Ontario Act, but that section does not create any greater liability at the suit of an injured party than that which existed under the common law. A person who places a nuisance on the highway is responsible at common law to an action by a person suffering special damage: Pollock on Torts, 8th ed. 403; *Wilkins* v. *Day*, 12 Q.B.D. 110. In the case last cited the defendant had left a roller on the side of a highway in such a position as to frighten horses. See collection of cases in 12 Ruling Cases, pp. 567-568. The action is against the person responsible for the nuisance.

In so far as the duties and obligations of municipalities in respect of public roads are concerned, there is no substantial difference between the Ontario and the Manitoba statute. I think this court would not be justified in departing from the line of decisions followed for so long a period in the Ontario courts. In my opinion the defendant cannot be held liable for non-repair of the highway.

Mr. Hoskin strongly urged that the plaintiff was entitled to recover against the defendant on the ground that it had let a contract to Griffith to repair the culvert; that the use of the scraper had been permitted by the defendant; that it had been placed where it was at the time of the accident by the authority of the defendant, and in doing the work of the defendant, and that the defence that it had employed an independent contractor was not available to protect the defendant.

In support of this contention he relied on the following cases: *Kirk* v. *City of Toronto*, 8 O.L.R. 730; *Penny* v. *Wimbledon District Council*, [1898] 2 Q.B. 212, in appeal, [1899] 2 Q.B. 72; *McIntosh* v. *County of Simcoe*, 15 D.L.R. 731; *Keech* v. *Smith's Fall's*, 15 O.L.R. 300; *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392.

The principle which underlies the decisions in the above cases is that stated by Bruce, J., in *Penny* v. *Wimbledon*, *supra*, at p. 217, in these words:—

> When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor.

This statement of the law is founded upon the judgment in *Pickard* v. *Smith*, 10 C.B.N.S. 470, and was fully approved by the Court of Appeal: See, [1899] 2 Q.B. 72. Upon this principle it is clear that if the culvert in question in this case had been left, by the negligence of the contractor, open and unprotected and an accident had been caused thereby, the municipality would be liable. In the cases relied upon by plaintiff's counsel, we find that the accident in each case arose directly from the performance of the work in question, and that the danger to be guarded against was one which might be contemplated by the defendant and that it was incident to the nature of the work.

But the principle above stated is in all cases to be applied subject to a qualification which is thus expressed in *Pickard* v. *Smith:* "Unquestionably, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable." In *Hole* v. *Sittingbourne & Sheerness R. Co.*, 6 H. & N. 488, Wilde, B., stated the qualification as follows: "The distinction appears to me to be that, when the work is being done under a contract, if an accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is in perfectly performed, there the employer must be taken to have authorized the act, and is responsible for it."

In *Penny* v. *Wimbledon*, in appeal, [1899] 2 Q.B. 72, A. L. Smith, L.J., after quoting with approval the passage I have

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quoted from the judgment of Bruce, J., in the court below, proceeded to say: "I agree with this entirely, but would add as an exception the case of mere casual or collateral acts of negligence, such as that given as an illustration during the argument—a workman employed on the work negligently leaving a pickaxe, or such like, in the road." In the same case Romer, L.J., said in reference to the rule stated by Bruce, J.: "I desire to point out that accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand, and do not come within this rule." In our own court, effect was given to this exception in *Romaniuk* v. *Grand Trunk Pacific R. Co.*, 20 D.L.R. 301, 24 Man. L.R. 797.

Now, in the present case the danger to be apprehended and guarded against in the performance of the work was that which might arise from the construction of the culvert itself, such as failure to provide means whereby persons travelling on the highway would be warned or guarded against driving or falling into it while it was open or incomplete. The scraper in its ordinary position was a harmless object and one not likely to frighten horses. That it was placed in the position it was in with the body of it tilted up and the handles sticking up in the air, presenting an appearance that might cause a horse to shy, was the act, and the unauthorized act, of the man Griffith, who placed it where it was. The municipality had no knowledge of this act. It was something not contemplated or anticipated, something which could not be guarded against by the municipality. It was a casual or collateral act of negligence on the part of the person who placed the scraper in the place and position it was in. The case is exactly on a par with the illustration given by Smith, L.J.—a workman negligently leaving a pickaxe on the road. If one of the men employed on the work had carelessly left his coat lying on the road and a horse while being driven past had shied at the coat and caused an accident, could the municipality be held liable? Or, if the scraper had been placed in proper position, without being tilted up, and one of the workmen had hung his coat upon it giving it an appearance which frightened the horse, would the municipality be responsible for the accident? The fact that the scraper belonged to the defendant does not appear to me to affect the question. There was no knowledge on the part of the municipality that the scraper

was being used on the contract, and there was no express authority to use it. If defendant is liable for the negligence of the contractor or his agent in leaving the scraper in the place and position in which it was left, it would be liable also if the machine was the property of the contractor.

The authorities upon which the plaintiff relies to establish the point under discussion were cases in which the accident was a direct outcome of some negligence in the actual performance of the work. Thus, in *Kirk* v. *City of Toronto*, the defendant allowed a contractor to use a steam roller on an intersecting street, without proper precautions, although the defendant's officials were aware that the machine was likely to frighten horses, and the accident was caused by a horse becoming frightened at the roller and injuring the plaintiff.

In *Penny* v. *Wimbledon*, the contractor employed by the district council to make good a highway, left on the road a heap of soil and grass, unlighted and unprotected. The plaintiff walking on the road after dark fell over the heap and was injured. The district council was held liable.

In *McIntosh* v. *County of Simcoe*, a township corporation had employed a contractor to lay a cement sidewalk. It permitted the contractor to place and use a cement mixer on the highway, and it was in the contemplation of the parties that he should so use it. Proper precautions were not taken to prevent horses from becoming frightened at the machine while in operation. The plaintiff's horse was frightened by it; ran away and was injured. The Court of Appeal held the corporation liable.

In *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392, defendant had employed a plumber to solder tubes containing defendant's telephone wires, which were placed in a trench under the level of the pavement of a street. By the negligence of the plumber a lamp used by him on the work exploded and injured the plaintiff who was passing along the highway. It was held that the company could not avoid liability under the defence of "independent contractor," because it is the duty of a person who is causing dangerous works to be executed in proximity to a highway, to see that they are properly carried out so as not to occasion damage to persons passing by on the highway.

In the above cases the negligence arose from the actual performance of the work and was incident to the nature of the work.

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The accident which happened in the present case, and which was attended by such fatal and lamentable consequences, arose from something which could not have been foreseen or guarded against by the officers or servants of the defendant, something which was not incidental to the performance of the work itself. It was merely a casual act of negligence on the part of a person who left the scraper in the place and position it was in.

In regard to the third point argued by Hoskin, I would say that the evidence amply supports the finding of the trial judge, that the road was in good condition at the time of the accident. The swampy nature of the ground over which the road was constructed, necessitated ditches along the sides to carry off the water, and there was no negligence shewn in the construction of the road or the ditches. The accident was not in its inception due to any defect in the design or construction of the road.

I have the greatest sympathy for the family of the deceased, but I cannot, upon the facts and on the law, as I conceive it to be, find that the defendant was responsible for the deplorable accident which caused the death of the deceased.

I would dismiss the appeal.

Cameron, J.A.

CAMERON, J.A.:—Sections 624 and 625 of our Municipal Act, R.S.M. c. 133, provide as follows:—

624. Every public road, street, bridge and highway, and every portion thereof, shall be kept in repair by the municipality within which it lies.

625. Subject to the provisions of the next succeeding section, if a municipality makes default in keeping in repair that portion of a public road, street, bridge or highway on which work has been performed or public improvements made by the municipality, it shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default.

These provisions are to be found in substance in the Ontario Municipal Act, s. 460, c. 192, R.S.O. 1914. In New Brunswick, Nova Scotia and British Columbia we find no similar provisions. In England the liability of municipal corporations is, as under the common law, modified in certain cases by statutory provisions, none of which appear to impose a direct liability to pay damages, as is the case here and in Ontario. As to the state of the law in England where the liability may depend on the question of misfeasance or nonfeasance, see Denton, Municipal Negligence, p. 12.

In the United States decisions on the question of the liability of municipal corporations for defective and unsafe streets and

roads vary under the considerations and in the circumstances set out in Dillon on Municipal Corporations, s. 1687, *et seq.* In the New England States, there being held to be no common law obligation upon towns (as that term is used in New England, Dillon, par. 840) to respond for negligence of duty in respect of highways, the legislature of each of those States has imposed on towns the duty to keep the highways in repair, so as to be safe and convenient for travellers, and has given in terms, to persons injured by neglect to discharge this duty, an action against the town.

In Dillon, s. 1691, note, the substance of the various New England statutes is given. In Massachusetts the liability is modified by the requirement that the town must have reasonable notice of the defect or that it might have had notice by the exercise of proper care and diligence, and that the defect could have been prevented by reasonable care. Rhode Island has substantially the same provision. In Vermont, Connecticut and New Hampshire the obligation is absolute without any such or any similar modification. In Maine the town must have twenty-four hours' notice of the defect. The essentials of a recovery under the Maine statutes are clearly and concisely stated by Clifford, J., as quoted in Dillon, note to section 1691.

It is clear that under the New England statutes the right of action arises on a breach of the statute causing damage. It is the breach of the duty imposed by statute that gives rise to the action, and the question of negligence does not enter into consideration of the liability. This view finds support in the statement of Rigby, L.J., in *Groves* v *Wimborne*, [1898] 2 Q.B. 402, at 412:—

> Where an absolute duty is imposed upon a person by statute, it is not necessary in order to make him liable for breach of that duty to shew negligence. Whether there be negligence or not, he is responsible *quâcunque via* for non-performance of the duty.

The right of action under our Act, therefore, is based on a breach of the statutory duty, and when damage arises from that breach, it follows that, when a plaintiff has proved damage occasioned by reason of a road not being kept in repair, that is an end of the case so far as fixing the civil responsibility of the municipality is concerned, unless, it may be, the injured person has been himself the author of his or her own wrong.

If the obligation and liability are absolute, as under the provisions of our Act, they seem to me to be beyond question, what

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room is there for any defence, that, while it is true that the road was defective and unsafe, whereby the damage complained of was caused, nevertheless, it, the municipality, employed a contractor to do certain work on the road, and that it was the contractor and not the municipality that caused the road to be defective and dangerous, and, therefore, the municipality is relieved of all responsibility for damages?

In *Groves* v. *Wimborne*, *supra*, where the damage was occasioned by breach of a statutory duty, the defence of the accident being due to the negligence of a fellow servant was rejected. Smith, L.J., says, p. 410: "There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of the statutory duty on to the shoulders of another person." And if he cannot shift it by employing a servant, can he do it by employing a contractor? It would be strange if he could, as it is impossible from this standpoint to draw any distinction based on principle or common sense between these two instrumentalities.

Lord Halsbury says in *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392, at 398—

> The telephone company, so authorised to interfere with a public highway, are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of their works.

And this, it must be remembered, in the absence of any such statutory obligation as that before us.

There is nothing in the statute that permits a municipality to diminish or avoid its obligation or liability by the employment of an intermediate agent or otherwise, and there is given the court no power to amend or alter the statute in any respect. There is no doubt that in some jurisdictions the courts have made modifications of the absolute provisions of similar legislation, such modifications as are to be found in the express statutory provisions of some of the New England States, which I have pointed out. It may be that the Ontario decisions were influenced by the view which was expressed by Harrison, C.J., in *Castor* v. *Uxbridge*, 39 U.C.Q.B. 113, at 126, that

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The action is based on negligence. There cannot in such a case be negligence unless there be knowledge or means of knowledge.

But that case was decided some time before *Groves* v. *Wimborne, supra*. The terms of our statute are positive and distinct, contain no justification for any modifications of liability, such as are set out in some of the New England provisions alluded to, and do not warrant the courts in altering their plain meaning. I confess I can see no reason why we should not take the sections of the Act as they are and as they read, and leave any amendments of them to the legislature in its discretion, though if the convenience and safety of the public are to be the main consideration, I can see no object in making any alteration.

Cameron, J.A.

That the scraper in question was an obstruction on the highway in contravention of the statute is fully supported by numerous authorities to be found in the Canadian Municipal Manual, edited by Sir William Meredith, p. 611 *et seq.* and by Dillon on Municipal Corporations, p. 1687 *et seq.*, particularly s. 1702, note. The fact that the municipality seeks to evade its responsibility on the ground that the presence of the scraper on the road was the act of a contractor is an admission in some degree that it was an obstruction rendering the road defective and unsafe.

In my humble judgment, the conclusion is that the plaintiff's case has been established. I would set aside the judgment for the defendant and enter judgment for the plaintiff for $3,000 damages.

HAGGART, J.A.:—I would dismiss the appeal.

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Appeal dismissed; court divided.

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UNION STEAMSHIP Co. v. THE "WAKENA."

Exchequer Court of Canada, Audette, J. October 31, 1917.

COLLISION (§ I—3)—*Rule of road—Narrow channel—Fog.*] —Appeal from a judgment of the Local Judge of the British Columbia Admiralty District, 35 D.L.R. 644. Reversed.

F. E. Meredith, K.C., and *A. R. Holden*, K.C., for appellants; *Aimé Geoffrion*, K.C., for respondent.

AUDETTE, J.:—This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District pronounced on March 22, 1917.

I may say that I approach the determination of this case with

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some diffidence, inasmuch as it is an appeal from the decision of a judge whose learning and experience in such cases are everywhere acknowledged. To state this much is to recognize the wisdom and justice of Lord Langdale's observation in *Ward* v. *Painter* (1839), 2 Beav., 85 viz.:—

> A solemn decision of a competent judge is by no means to be disregarded, and I ought not to overrule it without being clearly satisfied in my own mind that the decision is erroneous.

In reaching my conclusions upon the facts in this case I have had the assistance of Captain Demers, a gentleman of high standing and of experience in nautical matters, who sat with me as assessor, and I am pleased to know that his views as such assessor are in accord with my findings.

This is an action arising out of a collision which took place shortly after midnight, on the morning of February 25, 1916, viz., 12.08 a.m., between the steamship "Venture" (579 registered tons, 182 ft. length, 32 ft. beam) and the gasoline barge "Wakena" (316 registered tons, 116.5 ft. length, 25.7 ft. beam) in Burrard Inlet, in the Province of British Columbia, and near the first narrows, inside of Prospect Bluff.

Both vessels were inward bound for Vancouver harbour.

It is common ground that the collision happened in a narrow channel: *The King* v. *The Despatch*, 28 D.L.R. 42, at 45, 46, 22 B.C.R. 496, and that the weather was perfectly calm but foggy at the time of the collision.

From the testimony of Captain Park, Master of the "Venture," it would appear that at about 11.15 o'clock on the evening of February 24, 1916, the "Venture" came past Point Atkinson, about 5 miles west of the Narrows. After passing Point Atkinson the captain states that it cleared up nicely and he could see "clear up to Prospect Bluff," where he observed a vessel going into the Narrows. The "Venture" was then going full speed, which was maintained until about a mile from the Narrows, when the fog shut down thick, and she then went on a "slow" bell. He kept his ship at "slow" for a while, stopped "and one thing and another," coming to Prospect Bluff, until he got into a good position off the light-house, and before coming there he put on half-speed owing to the tide running out. When well inside of Prospect Bluff he put her on slow-speed again, while his fog-whistle was kept blowing at proper intervals. Before going into

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the Narrows, at Prospect Bluff, he heard a gasoline whistle, from the "Wakena," right over on the north Vancouver side and this whistle was kept on being sounded by her. This fog-whistle was on the port bow of the "Venture" and kept broadening as they were coming in. When the "Venture" came up to the water-works, the boat that had been blowing over on the north Vancouver side seemed to those on board the "Venture" to be coming closer; and all of a sudden her mast-head light came out on the port bow of the "Venture," and immediately afterwards the captain saw her green side-light only about 60 ft. away from the "Venture." Then he put his helm hard aport, both engines full steam astern, when, he says, the "Wakena" struck her abreast of the fore-hatch, head on, which swung the head of his ship in towards the south shore.

The lights on board the "Venture" were in perfect order. She had two men on the look-out, and the first officer was down on the fore-deck, while the captain stood on the bridge by the telegraph doing the signalling. Moreover, there was a man at the wheel. She was proceeding at a "moderate speed" allowing her to keep her headway in a falling tide: *The "Campania,"* 9 Asp. M.C. 177.

Now, the captain of the "Wakena" states that when he took the Narrows he picked up the light on Prospect Bluff, the fog having not set very thick at the time; and that he ran his course right for Brockton Point by his compass, leaving Prospect at full speed. After running her thus for about ten minutes, he slowed her down to half speed with the object of picking up the bell at Brockton. The fog was pretty thick by that time. He ran her at half-speed for a short while and then ran full speed for five minutes, slowed down again,—ran very slow for a little while, and then stopped her. The first thing he then knew, he says, "we fetched over against the dolphins on the north shore." He then says he backed her away from the dolphins, and that brought the *stern in shore*.

From the pilot-house of the "Wakena," where the captain was at that time, he could not, on account of the noise from her engine, hear the whistle of a steamer for any distance. When the "Wakena" thus fetched over against the dolphins on the north shore, Glasscock, the mate, who was then in bed, was called up

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by the captain, as he puts it, "*in a case of emergency* to keep a look-out"—it was foggy weather—"to help the master." The mate says he told the captain where he thought they were,—it was not the regular place. The stern was touching bottom and her bow was headed south. The captain gave the signal to go ahead and she moved very slowly past the dolphins. Then the mate says he heard a fog-whistle, which he located on the *starboard* bow, and reported it to the captain; and before the collision he heard several short toots,—he heard the whistle several times at regular intervals before the collision took place. The "Wakena," the mate says, was moving slowly at the time of the collision, but he had no definite means of knowing how fast; and adds that from the dolphins he would have run the "Wakena" *far enough to get off from the shore, "on a falling tide, line her up in the channel,"* and that "if they had *not gone so far over to the south there would have been no collision.*" It was not necessary to run to the southern danger line of the fairway. To these statements I will refer hereafter.

Coming back to the evidence of the captain of the "Wakena" he says, that up to the time he started to get away from the dolphins, on the north shore, he had not heard any whistle or heard any report of any whistle. That may be quite true, and yet does not displace the fact that signals were actually given which ought to have been heard either by him or by some one on board the "Wakena." As far as the captain is concerned, we have it in evidence that, on account of the noise of the engine, he could not hear the whistle when he was in the wheel-house; and if the signals from the "Venture" were not heard on the "Wakena," through the want of a proper look-out, it cannot be invoked as an excuse. Now, it was at the time he fetched his vessel on the north shore, near the dolphins, that he called out for the mate whose summary version we have above. The captain says, after they left the dolphins the mate reported to me a boat was *coming in the Narrows*, and he added, "That is some boat coming in, look-out." Then the captain stopped and listened, put his head out of the pilot house to enable him to hear, "to try and locate that," and then he heard the whistle whereby he could tell she was coming.

It is well to note here that the evidence discloses that the first whistle he heard was the one reported by the mate when they

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were leaving the dolphins. The evidence does not shew whether or not there was any look-out on the fore-deck before the mate came up; and if no fog-whistle had been reported to the captain, who was inside the pilot-house where he could not hear, it must have been because there was no look-out, or if there was one he was manifestly not attending to his duty.

In a moment the headlights of each ship suddenly loomed in the fog, the vessels being about 60 ft. away from one another. Danger signals were given and both vessels reversed full-speed astern and the collision took place—the "Wakena" coming across the Narrows with her bow at a slight angle to the east, striking the "Venture" a glancing blow, but end on.

Speaking of the compass on board the "Wakena" the captain says it was not magnetic, and he could not say when it had been last corrected. He was further asked in that respect and answered, as follows (p. 186):—

"Q. Have you any idea how much out your compass was? A. Why in some courses is *probably* a quarter of a point, and another course is half a point.

"Q. And you ventured to come into the Narrows on a foggy night, where you can't pick up the echo, and you have a compass that you don't know how far it is out, on that course? A. That is because you see in a few trips if you steer the same course, I had my course, steered the same course that she always goes in. She goes in on the E. by S."

Now it must be found that the "Venture," properly equipped, travelling by her compass entered the narrow channel and pursued her course therein with proper seamanship; that she was going at slow speed at the time of the accident, going through the water at a speed about equal to the pace of a man walking leisurely, at 2½ to 3 knots. She was going in against an ebb tide estimated at 1½ to 2 knots by witness Tollefsen, and at 1½ knots by Captain Park. I therefore find that the "Venture" complied with Art. 16, and was going at a "moderate speed," and that "as far as the circumstances of the case admit" (having to travel against a tide which would have thrown the vessel to a close shore had he not kept her under way) she was manoeuvering with proper seamanship. She was travelling, being an in-going vessel, on the starboard side of the narrow channel, on the southern

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danger line of the fairway, as she should do, and that she had every reason to believe the signals given by the "Wakena" on the north side of this narrow channel were from an out-going vessel on her proper course.

Now let us examine the course of the "Wakena" after she found herself on the wrong side of the channel. Did she proceed properly to extricate herself from that position? That brings us to an inquiry into the cause of the collision, and the negligence or fault from which the collision resulted.

It was held in *The "Cape Breton,"* 9 Can. Ex. 116, and 36 Can. S.C.R. 579, that if a steamer is following a course which may possibly appear unusual to other steamers, although she is justified by special reasons, she does so at her own risk and *ought to signal her intentions, for the others have the right to assume that she will conform her course to the ordinary rules.* See also *The "Lancashire,"* 2 Asp. M.C. 202.

Counsel for the defendant contends that the "Wakena" had a right to be on the north shore,—that may be true in the abstract; but as an in-going vessel in a narrow channel (Art. 25) she must be held to blame for the very grave fault of navigating on the wrong side of the channel, 37 American Law Review, 865. All of that, indeed, seems to be but one link in the long chain of mismanagement on board of the "Wakena" in the course followed by her before the accident. She had an unreliable compass, and the captain thought that because he had gone up the Narrows before in clear weather, he could still do so in the fog with such a compass and moreover he does not impress me as if he really did understand his compass. Had he a proper compass he did not use it properly; had he an unreliable compass he was negligent in navigating with it under such circumstances. From the time he went by Prospect Bluff on the south shore to the time he fetched up aground on the north shore, his vessel seems to have gone all over the points of the compass. Had the captain fallen asleep at the wheel? Then the first whistle he says he heard from the "Venture" is the one noted by the mate who was called on deck when the "Wakena" was on the north shore among the dolphins. From the reading of the evidence the view has impressed itself upon me that Captain Anderson did not know much about the deviation of his compass, which seems to be the

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principal factor in placing his vessel next to the dolphins on the wrong side of the channel, and his testimony does not convey the impression that he was a reliable navigator.

While the "Venture" had a right to assume with a fog-whistle on her port bow and broadening there, that such whistle was from a vessel going out of the Narrows on the north shore, her proper side of the channel, the "Wakena" had warning from the blasts of the "Venture" that the latter was coming up on the south shore. The "Wakena" knew she was off her course and she had to navigate with extra caution, and with proper signals and keep out of the path of this inbound vessel properly signalled to her as an incoming vessel.

All of these facts, coupled with the want of evidence establishing a proper look-out, although perhaps the latter did not contribute to the accident, lead to the presumption that there was also careless management of the vessel before the accident, before she fetched up aground on the north shore; and that from the time the vessel left the dolphins on the north shore, her manoeuvring was also marked with the same carelessness and want of good seamanship. Is not the management of the "Wakena" before she found herself on the north shore enlightening as to her management thereafter?

Moreover, as put by one of the nautical experts:—

A. Yes, If I heard the regular navigation whistle of a steamer, fog signal, going in or out, and the tide easy, I would go—I would consider it safe to go in, because I would look on it as only being a parallel course could be steered there in the Narrows, that is, South 74, East, or North 74 West would be the courses out and in. I would not expect any other course except in a parallel course with my own, going out or in at the Narrows.

And also:—

We expect that the vessel going either way and steering a parallel course with your own, and no other.

A nautical expert heard on behalf of the "Wakena," gives the following testimony:—

Q. Now as a navigator coming in at the Narrows, would you be thinking for a moment that you would find a boat crossing, a steamer crossing right from the Stanley Park shore to the south? A. Oh, I wouldn't.

Q. You would never expect that would you? A. It would be a pretty hard thing to assume, but——

Q. A pretty rank thing to assume, wouldn't it? A. No, I wouldn't want to assume that a boat was coming "right across."

His reckless and careless manœuvring up to the time she went

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aground on the north shore implies a continuance of similar poor seamanship from that time on to the collision. Applying the decision in the case of *The "Cape Breton"* (*ubi supra*) she followed an unusual course—she had transgressed Art. 25—and she had at *her own risk* and with proper signals, under the circumstances, to right herself back into the fairway or middle of the channel: *The "Glengariff,"* 10 Asp. M.C. 103, [1905] P. 106. The blundering navigation which took her to the north shore without proper signals did not justify her in becoming a menace to the safety of other vessels navigating these Narrows, and she did not become excused from the responsibility involved in such manoeuvring because, through such want of seamanship, she had lost her way for a time before she went aground on the north shore.

Therefore, the "Wakena" having found herself on the wrong side of a narrow channel, Art. 25, came within the provisions of Art. 15 (*e*), being *"a vessel under way unable to manoeuvre"* as required by these rules, and should, under the circumstances of being on the wrong side of the channel and travelling across the channel, *"instead of the signals prescribed in sub-divisions (a) and (c)"* of Art. 15, *"at intervals of not more than 2 minutes, sound three blasts in succession*, viz., *one prolonged blast, followed by two short blasts."* Now, had the "Wakena" given such signals when crossing over from north to south, the "Venture" which was under perfect management would have understood the position and would not have been misled in taking the "Wakena" for an outgoing vessel on the north side and would have guided herself accordingly.

If the contention be correct no fault should be found in the manner the "Wakena" was trying to extricate herself from a false position, she should at least have notified the other vessels navigating in the Narrows.

Then the collision took place on the southern danger line of the fairway. If the "Wakena" was leaving the north shore to come on the proper side of the channel, there was no necessity for her to follow her course right across to the other shore of the channel and, to ascertain she was there, by going aground on the south shore. When in the fairway or middle channel after leaving the north shore she should have lined up the fairway and followed a parallel course to that of the "Venture," and before endeavour-

ing to get beyond the southern danger line of the fairway. Had she followed this reasonable course, the collision would not have taken place.

And what does the mate of the "Wakena" say, when asked what was the proper navigation to get away from the dolphins to the proper channel? He says, "We had to get back into mid-channel to get on our course." A manoeuvre he could very well have executed with a proper compass. Then he says: "I would run into the channel far enough to get off from the shore on a falling tide and I would line up into the channel," and the "Wakena" would not have collided with the "Venture" had she not gone so far over.

Again, from the mouth of Erasmus Johnson, a nautical expert, with an experience of 20 years running in and out of Vancouver, heard on behalf of the "Wakena," we find an actual condemnation of the latter's course. He says, he "should not think there was any difficulty after the 'Wakena' had picked up the lights at Prospect Bluff to take her course for Brockton." Then he is asked:—

Q. Well, having got over among the dolphins, supposing you were navigating her, coming from there for some reason or other—you know where the dolphins are? A. Yes.

Q. And you know the depth of the water in front of them? A Yes, I know.

Q. Now suppose you got over there with a boat such as the "Wakena," a flat bottomed boat, and you wanted to get into Vancouver. A. Yes.

Q. In a dense fog? A. Yes.

Q. —and you started to go out? A. Yes.

Q. Your boat is stern to the shore and you are headed out in the channel and just as you start you hear a boat coming in on the starboard side of the channel, as a careful navigator would it be careful navigation to run your boat straight across channel? Would you think of doing it? A. Well, I would *line her* up for her course going in.

Q. Yes, you would line her up but you wouldn't go across channel would you? A. Not if I could help it.

Q. Well, you could help it you know, there would be nothing to take you across. All you would have to do would be to run your boat out from the shore far enough to get into deep water, wouldn't it? A. Yes.

Q. And then when you got into deep water, now captain, what would you have done, hearing a boat going in, what would you have done? A. Well, I would—

Q. I want to shorten it. A. If you have got the position coming west—

THE COURT:—What? A. I would try to locate her coming in, that is by the sound of the position.

Q. You would try to locate her? A. Yes, and then steer my course for the Narrows you know, providing for the way that was running.

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MR. MACNEILL:—Q. You would be turned round the same direction as the approaching boat was running? A. Yes, providing she was going in . . .

MR. MCLELLAN:—Q. What did you mean, captain, by lining the boat up? A. Well, shaping my course for—suppose I was going in, you know, I would shape my course—I would line her up for Brockton Point.

Q. Yes, to get on your course? A. To get on my course, yes, that is the idea.

All of this evidence, taken from the testimony of witnesses brought in by the defendant ship goes to show that while the "Wakena" (admitting she was going slow—not against the tide but across—was leaving the north shore, where she should not be as an ingoing vessel), had no reason, if properly managed, to go right across the whole fairway to pick up her courses again; but had only with the help of her compass to get into the fairway and line up. Moreover, having heard the whistle of the "Venture" on her starboard bow (a vessel coming up on the south, from the very place towards which the "Wakena" was manoeuvring) and thus being apprised of an approaching vessel (she being herself on a wrong course) had reason to take her to be an incoming vessel on her right course, and had no excuse or justification in pursuing her own course towards such incoming vessel, and should at least have lined up in the fairway until she had ascertained from the whistle of the "Venture" that the latter had gone by. Therefore, it must be found: 1. That the "Wakena," as an ingoing vessel, was to blame for being on the wrong side of the channel. 2. Whether the captain of the "Wakena" had a reliable compass, and did not use it properly; or whether he had an unreliable compass, in either case he was guilty of negligence in navigating as he did, in a narrow channel in foggy weather.

3. That, being an ingoing vessel on the wrong side of the channel, the "Wakena" became unable to navigate as required by Art. 25; she had to signal under the provisions of Art. 15 (*e*) her course across the channel, because otherwise the vessels navigating the Narrows had a right to assume that she would conform to the ordinary rules, and to take her for an out-going vessel, on the north or starboard side of the channel. She had to right herself at her own risk. *The "Cape Breton,"* 9 Can. Ex. 116, 36 Can. S.C.R. 579.

4. That it was unnecessary for the "Wakena" to run across this narrow channel so far as the ordinary southern danger line thereof, a course which would perhaps have taken her aground again, but on the south shore.

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5. That the captain of the "Wakena" exhibited careless seamanship in persisting in running the "Wakena" across the channel and towards the signals and whistles of an incoming vessel on her proper side of the channel, and failing to line up his own vessel, under compass, in the fairway until the whistles or blasts of the "Venture" would have carried the information that the latter had gone by, allowing the "Wakena" to then take a parallel course or to follow in the wake of the "Venture."

From mismanagement and want of proper seamanship in her course from the dolphins to the time of the collision, as above set forth, the "Wakena" became the sole cause of the accident and is solely to blame. Therefore the appeal is allowed with costs. *Appeal allowed.*

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CALGARY MILLING CO v. TROMANHAUSER.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ. June 21, 1917.

PRINCIPAL AND SURETY (§ II B—12)—*Discharge of surety—Payments—Authorization—Building contract—Bond—Terms.*]—Appeal by plaintiffs from a judgment of Hyndman, J., insofar as it dismissed their action against the defendants' American Surety Co. of New York. Reversed.

A. M. Sinclair, and *J. B. Roberts*, for appellant.

D. S. Moffatt, for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—On July 18, 1910, the plaintiffs, as owners, entered into a contract with the defendants Tromanhauser and Mooers as contractors for the construction of a grain elevator for the price of $65,000.

In compliance with a provision of the contract a bond for $30,000 guaranteeing the contractors' performance of the contract was obtained from the said Surety Co. which is dated August 10, 1910.

The contractors did not complete the building and the owners finished it and brought action against all the defendants claiming damages of $30,000. The trial Judge gave judgment against the contractors, directing a reference to ascertain the damage suffered except that for delay which he assessed at $10,000. He dismissed the action against the Surety Co. on the ground that

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they had been released by reason of the plaintiffs having made payments not authorized by the contract.

Par. 14 of the contract provides for the payment of the $65,000, the contract price, as follows:—

(1) All wages for labour done and performed in and about the works from the commencement of operations until such time as the contractors furnish the bond hereinafter provided upon production of the time sheets and of wages accounts duly certified and approved by the agent of the owner; (2) The sum of $5,000 to the contractors upon production of the bond hereinafter provided; (3) on and after the production of the bond hereinafter provided all wages for labour done and performed and sums paid for materials supplied upon production of the time sheets and wages accounts and vouchers duly certified as aforesaid.

Provided that the total amount so paid by the owner during the progress of the work as aforesaid shall not exceed a sum equal to 80% of the amount of work done and materials furnished on the premises at the contract price. And the contractors hereby agree that the owner shall be and is hereby authorized to retain out of the moneys payable to the contractors under this agreement the sum of 20% of the amount of the contract and to expend the same in the manner following, namely:—To retain such 20% until 31 days after the completion of the works and to pay thereout the claims of all persons who have done work or furnished material in the execution of any part of this contract to or for the contractors and in repairing the said works or finishing any work left unfinished by the contractors.

Par. 15 provides that the owner "may hold and retain the sum above mentioned", presumably the 20%, as a guarantee that the work has been faithfully performed and as indemnity against claims.

Par. 16 provides that the final payment shall be made 31 days after completion and that all payments shall be made upon completion and that all payments shall be made upon the written certificate of Wm. Henderson or some other agent of the owner that the payments are due, and that before the issue of any certificate but the first the contractors shall, if required, produce evidence that the cost of materials and wages has been paid.

The bond which was given pursuant to the contract contains a clause declaring that the obligee shall faithfully perform all the terms of the contract and shall retain the proportions of the value of the work, etc., authorized by the contract until its complete performance.

Something over $3,000 was paid, being the amount in full for wages certified, before the bond was given, $5,000 was then paid and when the next accounts were presented the contractors

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asked for payment in full. The owners having doubt as to whether to pay in full submitted the matter to the Surety Co. for their opinion.

The manager replied stating that "after carefully reading over the contract our company is of opinion that payments to be made to the contractors should be on an 80% basis, that is, 20% of every payment should be retained until the final completion and acceptance of the work."

The plaintiffs did in fact follow that course and paid only 80% of the certified accounts.

The building proceeded, but financial difficulties presented themselves and the contractors applied to one Prince, the vice-president of the plaintiffs, for a loan of $5,000 to enable them to proceed with the work. The money was advanced on October 11, 1910, and an assignment taken of that amount of the moneys under the contract "to be payable by the said The Calgary Milling Company, Ltd., on the completion of the said elevator and the furnishing of vouchers, etc., as provided in said contract." A notice of this assignment was produced at the trial, but it was not shewn that it had been served upon or come to the notice of the plaintiffs' manager, but it was clear that he knew of the advance and of an assignment having been made out of the moneys under the contract at or about the time it was made. Matters then proceeded for a few weeks when early in November the contractors dissolved partnership and Mooers assigned his interest in the contract to his ex-partner who notified the plaintiffs who in their turn notified the Surety Co. Soon Tromanhauser needed further financial assistance and he obtained an advance from one Kerr, another director of the plaintiffs, of $3,500, giving therefor an assignment of that amount "out of the moneys due and owing to me or accruing due and owing to me by the said Calgary Milling Co."

This took place on November 12 and furnished only a very temporary relief, and on November 26 Tromanhauser notified the plaintiffs that he was unable to proceed owing to not having sufficient funds to finance the remainder of the work and suggesting that they proceed with the construction under clause 6 of the contract and indicating a willingness to remain on the work and give what assistance he could. On the 28th a copy of Troman-

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hauser's letter was sent to the Surety Co. with a notification that the plaintiffs had "taken over the completion of the elevator." Almost at once after this owing to weather the work was stopped for the winter and on December 2nd the Surety Co. was so advised by the plaintiffs.

As the time for completion of the work and for taking action on the bond required to be extended negotations were had during the winter with the Surety Co. and a satisfactory extension granted and in March a formal agreement entered into by all the parties which is dated 23rd March. In April Tromanhauser started in to work again, but was unable to pay the first account for wages. Plaintiffs notified the Surety Co. of the fact and also that they would not pay without Surety Co.'s authorization, the 80% having already been paid out. No reply having been received, a few days later the Surety Co. was asked if they desired to take over the work, as the bond authorized, or would consent to plaintiffs doing so under the contract. Then for the first time the Surety Co. claimed to be released from all liability, the general solicitor on April 25 replying: "As we understand matters Calgary Milling Co. released us from all liability and self took over the work last November." Tromanhauser on the same day formally notified the plaintiffs that he was unable to proceed. They notified the Surety Co. and stated that they were proceeding, but that the Surety Co. could take over the work any time within 30 days. The plaintiffs proceeded and completed the work.

The last payment made to the contractors was on November 17, 1910, upon accounts presented for $2,471, and $1,590 or $4,061 in all. 80% of that amount would have been $3,248.80, but there had been advanced under the contract at that time $41,517 and the plaintiffs' manager, naturally desirous of protecting the two directors in respect of their advances of $5,000 and $3,500, declined to pay the full amount of $3,248.80 and paid only $1,982.92 which was sufficient with the amount already paid and the amount of loans to make up $52,000 which was 80% of the contract price, the maximum amount which under the bond the plaintiffs were authorized to pay. The moneys were not then actually paid to Prince and Kerr, but were appropriated by the manager to the payments of their loans.

In this it is contended that the plaintiffs did what they had no

right to do and thereby discharged the sureties. Tromanhauser says he was financially embarrassed by not receiving this $8,500 which the Surety Co. claim he was entitled to receive before the 80% limit would be reached.

What the legal effect of the plaintiffs' act in respect to this sum was need not be considered unless their act was one which, as regards the Surety Co., they had no right to do. It is necessary, therefore, to consider somewhat particularly what the rights were.

As pointed out, it is provided by the bond that the plaintiffs shall observe the terms of the contract and shall retain the proportion of money which they are entitled to retain.

In my opinion much depends upon the proper construction of the terms of the contract as to the manner of payment. As already indicated the contractors claimed that by the terms of the contract they were entitled to receive the full amounts of the accounts presented until 80% of the total contract price had been paid when, of course, all payments would stop till completion. The owners, desirous of having the approval of the Surety Co., submitted the matter to them with the result I have mentioned, the latter company not in terms expressing any opinion of the proper interpretation of the contract, but merely stating what they thought the plaintiffs ought to do.

It is apparent that any rule of guidance in the interpretation of an ambiguous term of a contract founded on the subsequent interpretation by the parties has no application here, for the parties to the contract were the owners and the contractors and the owners plainly put no interpretation of their own upon it while the contractors as clearly interpreted it differently from the manner in which it was acted upon.

In my opinion, there is only one reasonable interpretation to be put upon it and that is the one which the contractors contended for. It seems to me perfectly plain except for the expression in the proviso in which the moneys are expreseed in terms of a proportion of the work and material, a not unusual confusion in such documents, but it provides for payment not for a part of the work and material, but for all of it with the limitation in the proviso and that limitation expressly applies only to the total amount paid. It follows that the plaintiffs had a right,

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under the terms of the contract, to pay to the contractors the full amount of the bills presented and certified. A reference to the evidence of the plaintiff's manager, and of the defendant Mooers, and of the defendant Tromanhauser, with the exhibit, leaves no doubt that after the payment of the $5,000 upon production of the bond, all payments were made upon accounts for work or material duly approved by the plaintiff's agent Henderson, to the extent only of 80% of such accounts. Leaving out the last accounts presented on the 17th of November the sums paid in this way amounted to $33,028.78. This sum being 80% only of the certified accounts it follows that 20% or one-fourth of that amount, viz., $8,232.19, represented by certified accounts still remained unpaid. On the 17th November certified accounts to the amount of $4,061 were presented on which only $1,982.82 was paid leaving on this account a balance unpaid of $2,078.18 or a total amount represented by certified accounts still unpaid of $10,310.37. It is clear that if the view I have expressed is correct the plaintiffs were at liberty under the terms of the contract to pay out to the contractors or their order any part of this sum so long as they did not exceed the 80%.

They then appropriated and subsequently in January and February paid out $8,500 of this which was within the 80%. The only question then is, was this appropriation and payment one to the contractors or upon their order?

In the case of each assignment there was an order from the contractors upon the plaintiffs. In the case of the Kerr assignment there is an order on the plaintiffs dated November 12, 1910, which follows the exact order of the assignment directing payment of the $3,500 "out of the moneys now due and owing or accruing due and owing." In the case of the Prince claim there is an order likewise which also bears the same date as the date of the assignment, viz., Oct. 11, 1910, but it is not in the same terms as the assignment—it is a direction to pay the $5,000 with interest "out of the last money payable to me by you in respect of 80% of the contract price," etc. The assignment was of moneys payable upon completion of the building. It is apparent, however, from what I have said that the payment which the plaintiffs are authorized to make may be made to the contractors. An assignment, therefore, which could only be for

the purpose of protecting the assignee against other claimants is of no importance in this aspect. It is sworn, however, by Tromanhauser that this order was not given until the following summer and then only at the urgent solicitation of the plaintiffs' manager. The latter denies this specifically and emphatically and states that his impression is that he got it when the amount was paid. The learned trial Judge has found that "Tromanhauser borrowed from one Prince, a director of the company, the sum of $5,000 and gave as security an order on the plaintiff for that amount, to be paid out of the moneys coming in the contract." As this is the only order there is any evidence of I take that as, impliedly, a finding that the order was given at the time of the advance. If not so intended my opinion would be that that would be the proper conclusion to draw from the evidence.

The plaintiffs then had, when they appropriated and when they paid these sums, orders from the contractors which authorized them to make such appropriation and payment and they were, therefore, within their rights under the contract.

There was some discussion as to whether it was intended that these assignments should be in respect of the 80% or of the remaining 20%. The trial Judge was of opinion that it was in respect to the 20%, but says he does not consider it material. It was evidently not considered material as neither Kerr nor Prince was called as a witness, and I am of opinion that the intention as between the contractors and their assignees could be of no consequence in this regard unless communicated to the plaintiffs so as to make their payments a disregard of the contractors' orders. In my opinion, the evidence does not warrant any conclusion that such was the case.

Then it is said that the plaintiffs sent incorrect statements to the Surety Co. It is apparent that if the refusal of the plaintiffs to pay the $8,500 to the contractors released the Surety Co. the sending of incorrect statements after could have been of no consequence, and if it did not it is hard to see how the sending of an incorrect statement could have that effect. There is no provision of the agreement or the bond requiring the plaintiffs to furnish statements to the Surety Co. When the negotiations for an extension of the time under the bond were pending the

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Surety Co. applied to the contractors for information as to the amounts paid and subsequently applied to the plaintiffs. Both sent the particulars on the same day. They are practically identical except that in the statement of the plaintiffs the $5,000 and $3,500 are shewn as payments made on the days when the respective loans were made to the contractors, while in the statement furnished by the contractors the same amounts are shewn with the same dates, but not as payments received, but as amounts to be paid out of the final 20%. There is nothing false about either. They represent probably the honest, but different understandings of the parties, and as the Surety Co. received them both at approximately the same time they could not have been misled and I am quite at a loss to understand how in any event they could have been prejudiced.

The ground upon which the Surety Co. first claimed to be released was by reason of what they said was a taking over of the contract by the plaintiffs but, in my opinion, this position is quite untenable.

There appears to be some doubt as to what was the exact effect of what took place when, about the end of November, Tromanhauser notified the plaintiffs that he could proceed on further, but assuming it to be a taking over of the contract as the Surety Co. contend and as the plaintiffs notified them, the plaintiffs were, I think, quite within their rights. The contract specifically provides for just such an emergency in just that way, and though the bond provides that upon default by the contractors which shall be notified to the Surety Co. the latter shall have the right within 30 days "to proceed or procure others to proceed with the performance of such contract." It also provides that the owners shall perform their part of the contract and the Surety Co. might perhaps have cause for complaint if the owners neglected to take proper steps in case of an abandonment under such circumstances as might mean a loss unless the property were taken charge of at once. There is, moreover, nothing inconsistent between the two provisions. The owners have the right on certain conditions to take charge and control of the work and thereby prevent loss as far as possible. Having done so there is nothing in that fact which would prevent the Surety Co. from exercising their option within thirty days, of themselves

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taking the control and management out of the hands of the owners.

I see no answer, therefore, in this ground.

Then it is said that the plaintiffs consented to the assignment of the contract from the firm to one of the partners without the approval of the Surety Co. The answer to that appears to me to be that it is not the fact. The plaintiffs at once notified the Surety Co. of the change upon its being notified to them. They bound themselves in no way, however, to the substitution of one partner for the firm both of whom as far as the evidence indicates still remained liable upon the contract and both of whom have been held liable by the judgment of the trial Judge. They had no control over the acts of the partners as between themselves and they did nothing to release either.

I think I have expressly or impliedly dealt with all the defences of the Surety Co. raised by the pleadings and argued before us and for the reasons given, without considering others advanced which may be equally good, I am of opinion that they all fail and that the judgment dismissing the action as against them is consequently wrong and I would therefore allow the appeal with costs and direct that the plaintiffs have judgment against the Surety Co., with costs.

The trial Judge has fixed the damages for delay in completion at $10,000. By the terms of the bond the maximum liability of the Surety Co. on this branch is limited to 10% of the penalty, or $3,000. The judgment therefore against them should be for $3,000 for this branch with a reference as directed by the trial Judge in respect to the judgment against the other defendants to ascertain the other damage suffered by the contractors' default, being the difference between the contract price and the actual and proper cost in excess of that sum. Upon report the proper judgment can be directed by a Judge which will, of course, not exceed $30,000, the penalty of the bond. *Appeal allowed.*

October 1, 1917—An application was made for leave to appeal, to the Privy Council, under rules 2(A) and 5 of the order-in-council dated January 10, 1910. The plaintiff opposed the application on the grounds (a) that the judgment is not a final judgment and (b) that the matter in dispute in the appeal is not of the value of £1,000 sterling or upwards.

The Court decided that on the proper construction of the rules, the judgment is a final judgment within the meaning of the rules, and that the matter in dispute in the appeal is of the value of £1,000 sterling or upwards.

Leave to appeal granted.

B. C.

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Re CANADIAN HOME INVESTMENT Co.

British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher and McPhillips, JJ.A. August 15, 1917.

SET-OFF AND COUNTERCLAIM (§ I C—15)—*Debts—Trust fund—Winding-up Act.*]—Appeal by liquidator from an order of Hunter, C.J.B.C. Affirmed.

C. W. St. John, for liquidator.

G. R. Long, for Alpha Mortgage Co.

MACDONALD, C.J.A.:—The Loan Reserve Fund is by the contract between the appellant and its customer set apart for a particular purpose. As there is no evidence that the character of the relationship between the appellant and the customer in respect of the fund had been changed before the date of the winding-up order there can be no set-off now of the debt which the respondent owes the appellant against the fund held by the liquidator of the appellant impressed as it is with the trusts created by the contracts of which the respondent is now the holder: *Re Pollitt; Ex p. Minor*, [1893] 1 Q.B. 175, 455; *Re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567.

I would therefore dismiss the appeal.

GALLIHER, J.A.—I agree with the Chief Justice in dismissing the appeal.

MCPHILLIPS, J.A. (dissenting):—In my opinion the set-off as ordered by Murphy, J., in his order of September 19, 1916, made in the Supreme Court, should be allowed, and that it be so directed in the winding-up proceedings, and that the order of Hunter, C.J.B.C., appealed against be set aside, being, with great respect to the Chief Justice, entirely unable to accept the view at which he arrived. I can only assume that the Chief Justice, although viewing the rights as between the companies as being legally mutual were not equitably mutual (*see Re Whitehouse & Co.* (1878), 9 Ch. D. 595, per Jessel, M.R., at p. 597; 25 Hals. 487). Upon the facts it is clear that the case *is* one of mutual debts as between the two companies, and why should not set-off be allowed? I cannot at all agree that, upon the facts, it can be said that it is not a debt that is asked to be set-off; that it is a trust,—a right merely to an accounting; further, the right of action is now merged in the judgment debt, and plainly it is a case of mutual debts. The right of set-off is that conferred by the Rules of the Supreme

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Court (see O. 19, r. 3; 25 Hals. 487). That the winding-up proceedings (both companies are in the course of being wound up) constitutes no alteration of position is apparent when s. 71 of the Winding-up Act is looked at (R.S.C. 1906, c. 144).

Sovereign Life Assurance Co. v. *Dodd*, [1892] 2 Q.B. 573, is a case which is peculiarly in point, as it has features similar to the present case; and the fact that the Bankruptcy Act, 1883 (Imp.), is considered does not affect the force of the decision or its application to the present case. Here the contention is, as it was in that case, that moneys due by the one company to the other should be set-off against the advances, *i.e.*, the moneys loaned by the one company to the other. Set-off, as by statute originally given in 1792 (2 Geo. II., c. 22) and re-enacted in 1735 (8 Geo. II., c. 24), was the right as to mutual debts, to have them set against each other, pleaded in bar or given in evidence, notwithstanding that the debts might be deemed in law to be of a different nature. It is interesting when considering the present appeal to note the decision arrived at by Astbury, J., *In Re National General Insurance Co.*, [1917] 1 Ch. 628, referred to in 37 C.L.T., at pp. 614, 615.

It would be highly inequitable upon all the facts of the present case to deny the right of set-off. Further, in my opinion, there is the clear legal right of set-off. The appeal should be allowed.

Appeal dismissed.

UNION BANK v. GOURLEY.

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C. A.

Manitoba Court of Appeal, Howell, C.J.M., and Perdue, Cameron and Haggart, JJ.A. December 20, 1916.

COMPANIES (§ V F—263)—*Liability for unpaid stock—Illegality as defence—Estoppel.*]—Appeal from the judgment of Macdonald, J., 31 D.L.R. 565, in an action for balance due on unpaid stock. Affirmed.

H. J. Symington, and *H. E. Swift*, for defendant-appellant.

C. P. Wilson, and *W. C. Hamilton*, for respondent.

HOWELL, C.J.M., in delivering the judgment of the court, said that the case was within the old estoppel cases of *Montefiori* v. *Montefiori*, 1 Black. W. 363 [96 E.R. 203], and *Gale* v. *Lindo*, 1 Vern. 475, [23 E.R. 601], at all events the case of *Dominion Bank* v. *Ewing*, 35 Can. S.C.R. 133, would prevent the defendant from

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denying that he was a shareholder who owed on unpaid stock the sum of $2,500. The extent to which a director was estopped from denying liability for calls was also discussed in *Stone* v. *Great Western Co.*, 41 Ill. 85. *Appeal dismissed.*

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S. C.

TOWN OF MORSE v. LYONE.

Saskatchewan Supreme Court, Elwood, J. August 2, 1917.

GARNISHMENT (§ I C—18)—*Future rent, as debt owing or accruing due.*]—Garnishee summons to attach rent.

A. L. MacLean, for plaintiff; *D. A. McNiven*, for claimant.

ELWOOD, J.:—The debt sought to be attached by garnishee summons in this matter is rent, not due at the time of the service of the garnishee summons but accruing due thereafter.

In the case of *Barnett* v. *Eastman*, 67 L.J.Q.B. 517, it was held that rent cannot, before it is payable, be attached under a garnishee order as a debt owing or accruing due.

See *Webb* v. *Stenton*, 11 Q.B.D. 518, at 523, and observations on it by Prendergast, J., in *MacPherson Fruit Co.* v. *Hayden*, 2 W.L.R. 427, at 429.

It seems to me that the case at bar comes squarely within what is laid down in the above cases, and it might very well happen under the lease that no future rent might ever become payable; in fact, the lease itself, on the face of it, contains provisions for termination of the lease and for non-payment of rent under certain circumstances. It, therefore, cannot be said that the "time for payment of the rent will certainly arrive."

In view of the conclusion I have come to, it is unnecessary for me to deal with the various other points raised on the argument before me.

The result will be that the claim of the claimant to the money sought to be attached will be allowed. The claimant will have the costs of the claim and of the application before the master and before me. *Judgment for claimant.*

GOUSICK v. CANADIAN PACIFIC R. Co.

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, Haggart and Fullerton, JJ.A. November 12, 1917.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT.

An injury to an employee while proceeding to his work sustained at a place adjacent to the road ordinarily used by employees, is not one "arising out of or in the course of employment" within the meaning of the Workmen's Compensation Act, R.S.M. 1913, c. 209.

Statement.

APPEAL by plaintiff from an award under the Workmen's Compensation Act, by Cumberland, Co. Ct. J. Affirmed.

D. Campbell and *G. Elliott*, for appellant.

L. J. Reycraft and *W. B. Powell*, for respondent.

Perdue, J.A.

PERDUE, J.A.:—This is an arbitration under the Workmen's Compensation Act, R.S.M. 1913, c. 209. His Honour Judge Cumberland, who made the award, held that the respondent, the railway company, was not liable to pay compensation in respect of the accident and death of the deceased.

The claim is made by Annie Gousick, the widow of Joseph Gousick, who was killed on October 2, 1916. The deceased was at the time of his death a section labourer in the employ of the respondents, at Brandon. Deceased lived north of the Assiniboine River, and in order to get to his work he was in the habit of crossing the river by the First St. bridge to and along the overhead bridge to the "ramp," which slopes from the bridge to the ground on the west side. After reaching the ground he would go easterly to a point underneath the bridge where he would find a wagon road and follow this easterly under the bridge, proceeding across First St on the ground level along the respondents' right-of-way to the tool house some 250 yards east of First St. As the judge finds, this was not the only way of going to the tool house, but was the shortest and most convenient, and was the one ordinarily used by the workmen, and others living in the neighbourhood. The wagon road was not a public highway, but a road used by vehicles of respondents and of laundrymen, tradesmen etc., having business with the company or its employees in the east yard. It extended from that yard to somewhere up town.

A line of poles carrying the Brandon Electric Light Co.'s electric transmission wire runs north and south about 8 ft. west from the eastern limit of First St. The transmission line above

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mentioned crosses over the respondents' telegraph wires at a point about 10 ft. north of the wagon road.

The work of the deceased commenced at 7 o'clock in the morning, and it was his duty to be at the tool house at that hour. On the morning of the accident the deceased left home at 6. 0 o'clock and was seen by a fellow-workman passing underneath the bridge at 6 or 7 minutes before 7 o'clock. A minute or two afterwards the workman saw him in a standing position at a point about 18 ft. north of the wagon road with his upraised hand grasping or in contact with a wire. When reached he was dead. The wire with which he had been in contact was the electric transmission wire of the Electric Light Co., which had broken further north and had fallen across respondents' telegraph wire, and sagged towards the ground.

The judge finds that the death of the deceased was caused by his coming in contact with the electric wire and that he would not have come in contact with the wire if he had kept on the wagon road. The judge also finds that there was nothing in the evidence or in the probabilities of the case to indicate that the purpose of the deceased in leaving the road and going to the spot where he was killed was in any way connected with his employment.

Many cases were cited on the argument shewing sets of facts in which the courts have held that the Act applied or did not apply. The later and more authoritative decisions have pointed out the danger of attempting to argue by analogy from one set of facts to another, and that each case depends upon its own circumstances. See *John Stewart & Son* v. *Longhurst*, [1917] A.C. 249, 257, 258; and *Walters* v. *Staveley Coal Co.*, 105 L.T. 119, both being decisions of the House of Lords. I do not, therefore, consider that a discussion of all the cases cited to the court is necessary, especially in view of the fact that by reason of the change in the law, few, if any, other decisions under the statute applicable to this case, will come before this court for review. See 6 Geo. V. c. 125.

In *Walters* v. *Staveley Coal Co.*, decided in the House of Lords in 1911, the rule to be applied in considering cases under the Act is thus stated by Lord Loreburn:— "In applying this Act, one has to look at the words of the Act itself, and see if the injury by the accident falls within the words of the Act. Did it arise out of the employment, and did it arise in the course of the employment?

Other cases are only useful as illustrations of the way in which those words are applied and nothing, I think, is more fruitless than to attempt to argue by analogy from one set of facts to another set of facts."

The facts in the *Walters* case were as follows:—a miner, proceeding to his work along a footpath prepared by the employers for the workmen's convenience, slipped on some steps at a point about a mile away from the place of employment, and was injured. There was evidence that the employers knew the steps were not safe. The steps were on the employers' ground. It was held by the House of Lords that the accident did not arise out of or in the course of the employment. It appeared that there was another but more circuitous road by which the applicant could go to his work, and the pathway provided a short cut which it was optional to the workmen to take or not. There was no contract or obligation on his part, direct or indirect, that he should use the footpath.

In *John Stewart & Son* v. *Longhurst, supra*, a carpenter, who was employed in repairing a barge lying in a dock, after finishing his day's work, started on a dark night to walk along the quay to the dock gates, but fell off the quay and was drowned. The dock was private property and was not open to the public, but the man's employers and their workmen had leave to pass through the dock on their way to and from the barge. It was held that inasmuch as the man was on the dock premises solely by virtue of his contract of service, the accident arose out of and in the course of the employment. This case was much relied upon by the present appellant. The *ratio decidendi* adopted by Lord Finlay, L.C., and agreed to by the other members of the court is as follows:—

> The present case belongs to a class of cases where the thing on which the workmen is employed is lying in a dock or other open space to which he obtains access only for the purpose of his work. Actual ownership or control by the employer of the spot where the accident occurred is not essential. The workman comes there to and from his work, and he may be regarded as in the course of his employment while passing through the dock or other open space to and from the spot where his work actually lies. Such passage is within the contemplation of both parties to the contract as necessarily incidental to it, p. 253.

All the judges appear to agree in the view that, because the workman had no legal right to be upon the dock except by virtue of his employment, which conferred upon him the right to traverse the dock in going to and returning from his work, he might be

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regarded as in the course of his employment while passing through the dock to and from the spot where his work actually lay, and that the passage was within the contemplation of both parties to the contract, as necessarily incidental to it.

It is pointed out in the last mentioned decision, that "the case would be different if the workman was, at the time of the accident, on the public highway on his way to or from his work" and that "his employment cannot be considered as having begun if he is merely in transit in the public street or road to or from his employer's premises." See pages 252-253. The dock gates were in fact considered in the circumstances of the case as the entrance to and the exit from the premises of the employer.

Now, turning to the present case, we find that the deceased had reached the wagon road which led to the tool house of the defendants. If, as the County Court Judge finds, he had followed the wagon road he would not have met with the accident. For some unknown reason he left the road, and went to the point where he came in contact with the wire, about 18 or 19 ft. north of the road. This point was not on defendants' land. It was within the limits of First St. on the ground below the bridge and north of defendants' right-of-way. First St., at that point, is vested in the city corporation. There is no evidence to shew that the deceased had, at any point, gone that morning upon the premises of the defendants. The wagon road even where it passed over defendants' land east of the bridge was open to any persons who might have business at the defendants' yards. Although this was the usual, most direct and safest way for deceased to get to the tool house where his employment would begin, there was another route to the same point, and the deceased was not obliged to go by the wagon road. It was entirely optional with him to choose that route. Upon this point the analogy between the present case and *Walters* v. *Staveley Coal Co.*, *supra*, is close. But the main ground, in my opinion, on which the applicant in this case must fail, is that the deceased, for some unexplained reason, left the wagon road where he was safe, and went to the place where he came in contact with the live wire. The suggestion of the applicant's counsel is that the deceased may have seen the broken electric transmission wire hanging across the defendants' telegraph wires, and in the interest of his employers' he tried to remove it.

There is not a tittle of evidence to support this suggestion. The break in the transmission wire was north of where the deceased came in contact with it. To seize it at the point he did and pull upon it could not possibly do any good to defendants' property. To do so would rather tend to bring the live wire in closer contact with the defendants' telegraph wire.

I think the decision of the County Court Judge should be affirmed and that the appeal should be dismissed.

Perdue, J.A.

HOWELL, C.J.M., and HAGGART, J.A., concurred.

Howell, C.J.M.
Haggart, J.A.

CAMERON, J.A.:—The judge held that Gousick's death was due to contact with the transmission wire and that there would have been no contact had he kept to the road.

Cameron, J.A.

Why was Gousick away from the road at the time of the accident? After discussing various hypotheses the judge says that he is inclined to think Gousick saw something on the ground or in the grass which excited his curiosity and that he went to see what it was, and at the moment he reached the spot where he was killed the wire broke and fell on him. This he adopts as a more likely explanation than any other suggested and he holds that in any event there is nothing in the evidence to shew that the purpose for which he left the road was connected with his employment. This is the real ground on which the judge proceeds in refusing compensation, viz., that the applicant has failed to shew that the deceased left the road and went where he did when he was killed for the purposes connected with his employment.

The contention that if this accident had occurred on the road, it arose out of and in the course of the employment, appeals to me as not unreasonable. The road used by the deceased was, from the time it left the ramp, in reality a private way used by the railway company and those having business with it. It is true that at first it went over private property, but we must assume that this was with the consent of the owner. It also traversed First St., but that street, though not formally closed, was not used by the public. After crossing First St. it was wholly upon the railway company's land. We have here the finding of the County Court Judge that the road taken by the deceased was the shortest, most convenient and safest way for him to take. I refer to *Fox* v. *Rees*, [1916] 115 L.T. 358, a decision of the Court of Appeal. Also to *Stewart* v. *Longhurst*, [1917] A.C. 249. There is such a

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multiplicity of decisions upon these cases arising from the inevitably varying facts and circumstances surrounding them that limits must be imposed on the citation of authorities.

But, supposing we assume that, if the accident had taken place directly on the road, it would have been within the ambit of the deceased's employment, what effect upon the situation has the fact that the deceased met with the accident at a distance of 18 or 19 ft. north of the road as found by the County Court Judge? Evidently, had he not been so far north, the accident would not have occurred, as the County Court Judge finds. The question arises for what purpose was the deceased where he was. Was he there for some purpose of his own or for purposes of the company? The County Court judge was inclined to think he was there for a purpose of his own. Counsel for the applicant argued that he might have been there for purposes of the company, for example, to take care of the fallen transmission wire, knowing it to be a dangerous object, in the company's interest, or to take an easier road for himself, leaving the rough tracks of the road to step more easily along on the grassy parts adjoining the road, a matter which would be reasonably incidental to his employment. There is no evidence to shew why deceased left the road. For all that appears he may have gone for some purpose that was, or that he thought was, in the company's interest, or he may have done so solely for his own purposes.

The burden, and the whole burden of proving the conditions essential to the obtaining an award of compensation rests upon the applicant and nobody else, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him. In my opinion the evidence in the present case is quite consistent with the view that the accident happened in consequence of something which did not arise out of the employment. There seems to be no presumption in favour of one view rather than of another, and that is precisely the position that was dealt with by the House of Lords in *Wakelin* v. *London & S.W. R. Co.*; per Lord Collins in *Pomfret* v. *Lancashire & Yorkshire Ry. Co.* [1903] 2 K.B. 718.

And further he says at p. 726:—

There being no such presumption as that suggested (viz., that the deceased man had behaved with due care), the onus in the present case is upon the applicant to shew that the accident arose out of, as well as in the course of, the employment of the deceased.

In *McDonald* v. *Owners S.S. Banana*, [1908] 2 K.B. 926, a donkeyman, returning from shore to his ship fell off the gangway

and was killed. No evidence was adduced to shew the purpose for which he had gone on shore. It was held the applicant had failed to shew the accident had arisen out of and in the course of the deceased's employment.

In *Bender* v. *Owners of S.S. Zent*, [1909] 2 K.B. 41, the chief cook and baker was lost overboard when the weather was fine, ship steady, and there was a four-foot rail and bulwark all round. It was held there was no evidence to enable the court to draw an inference that the accident arose out of and in the course of the employment.

The *Banana* and *Zent* cases were followed in *Marshall* v. *Owners S.S. Wild Rose*, [1909] 2 K.B. 46, affirmed, [1910] A.C. 486, Lord Loreburn and Lord James of Hereford dissenting, because of the peculiar nature of a sailor's employment.

In *Dyhouse* v. *Great Western R. Co.*, 6 B.W.C.C. 691, an engine-driver got down from his engine, leaving the stoker in charge. The stoker went to look for him and found him dead. The County Court Judge refused to adopt any of the theories put forward by the stoker to account for his absence, but he held that the onus of proving that the driver got down to do anything but what was in the course of his employment was, under the circumstances, upon the employers. But the Court of Appeal (109 L.T. 193) held otherwise, that the onus was on the dependants to prove the accident arose out of and in the course of the employment and this had not been discharged. Swinfen Eady, L.J., says: "The onus is on the applicant . . . even where on account of the death of the workman, as in this case, it is more difficult for them to do so than if he had lived."

Now in this case before us I can make in my own mind a number of suggestions of reasons why the deceased left the road and came into contact with the wire. But in the absence of any directing evidence to lay hold of, I feel that I am groping in the dark and that, after all, any such suggestion is and must be mere conjecture or surmise. As a matter of law, on the authorities there is clearly no presumption in favour of the applicant. In the result I agree with the conclusion of the County Court Judge that the applicant has not satisfied the onus cast on her by the statute in that she has failed to shew that the accident did arise out of and in the course of the deceased's employment. I feel bound to say that I come to this conclusion with regret.

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Fullerton, J.A.

FULLERTON, J.A.:—The County Court Judge held that there was nothing in the evidence or in the probabilities of the case to indicate that Gousick's purpose in leaving the road and going to the spot where he was killed was in any way connected with his employment, and therefore in his opinion the accident did not arise out of his employment.

The onus was clearly upon the appellant to shew that the accident both arose out of and happened in the course of his employment. The County Court Judge has found that the wagon road was the shortest and most convenient and the safest way Gousick could go, and that he and other workmen used it continuously. He was killed at a point 18 or 19 ft. north of it. There is nothing to shew why he left the road and went to the point where he was killed.

It was suggested by counsel for the appellant that Gousick saw the broken wire and thought that it was his duty to remove it. Apart from the question as to whether or not it was any part of his duty to interfere with broken wires, as to which there is practically no evidence, there were no facts proved from which the inference suggested could be drawn, or any inference as to how he came in contact with the wire.

The accident happened on First St., which is a public highway. The point was raised before the County Court Judge, but left undecided by him, that when an accident happens to a workman while on a public highway proceeding to his work there can be no liability under the Act.

No case was cited by counsel, nor have I been able to find one, in which an accident happening to a workman on a public highway has given rise to liability under the Act. There are, however, numerous *dicta* to the effect that no liability can arise in such a case.

In *Longhurst* v. *John Stewart*, [1916] 2 K.B. 803, Lord Cozens-Hardy, M.R., at p. 805, lays down the following proposition:—

> The employment of a workman does not begin until he has left a public road, and it does not end until he has reached a public road. While on the road he is exercising his right as a member of the public, and not any right arising out of his contract of employment.

This case was appealed to the House of Lords, and is reported on appeal in [1917] A.C. 249.

Lord Finlay, L.J., said at p. 252:—

> The case would be different if the workman was at the time of the accident on the public highway on his way to or from his work. His employment cannot

be considered as having begun if he is merely in transit on the public street or road.

It was contended for the appellant that First St. at the point where the accident happened is not a "public street or road" within the meaning of the above *dicta*, because it is not used as such by the public, the overhead bridge having taken the place of the street level for traffic purposes.

I cannot see that the fact that the public has ceased to use this particular portion of the street makes it any less a public street.

The respondent raised the further point that even if the accident had occurred at a point on the wagon road immediately east of First St., there could be no liability.

It is perfectly clear that a man may be "in the course of his employment" before he has absolutely begun to work. The difficulty is the courts have carefully refrained from laying down any definite tests by which to decide when a man does begin to be "in the course of his employment."

In *Hoskins* v. *Lancaster*, 26 T.L.R. 612, Atkin, K.C., who appeared for the employer, was arguing that the applicant was not entitled to succeed merely because he was at the time of the accident upon the land of his employers. Farwell, L.J., interrupted counsel and said: "We are agreed that the fact that the workman is on the land of the employer is not the test when the employment begins." Cozens-Hardy, M.R., in delivering judgment, said:—

> It must not, however, be assumed that the protection of the Act extends to workmen on any part of their employer's land, whatever the distance away from the workman's actual work; each case must depend upon its own facts as to the reasonable interval of time and space during which the employment lasts.

Kennedy, L.J., said:—

> There must be a reasonable margin of space having regard to all the circumstances. It is not a sufficient test that the workman should be on the premises of the employer; but it may be sufficient that he is in such a state of proximity as may be treated as a reasonable margin in point of space. It is impossible to lay down any definite limit as the circumstances of each case must necessarily differ.

In *Gilmour* v. *Dorman*, 105 L.T. 54, a workman was accustomed to go to his work by a footpath which ran on vacant land belonging to his employer, and afterwards along a railway line, to the factory where he was employed. While on his way to work he was injured by slipping on some ice on the vacant land, a quarter

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of a mile from the place where he had to work. The County Court Judge who heard the case held that as the man was on the premises of his employers at the time and was on his way to work he was constructively in the employment at the time and the accident accordingly arose in the course of the employment.

The Court of Appeal reversed the decision of the County Court Judge. Cozens-Hardy, M.R., said:—

I cannot regard the case as in any way different from the case where a man slips on the ice on a public road, a quarter of a mile from his employers' works. It has been repeatedly held that a man is not entitled to the protection of the Act when on his way from his home to the works. There may be some difficulty in ascertaining precisely where a man's employment begins. Generally speaking, the factory gate or yard indicates the boundary.

Walters v. *Staveley Coal Co.*, 105 L.T. 119. In this case a miner, proceeding to his work along a footpath prepared by the employers for the workmen's convenience, slipped on some steps at a point about a mile away from the place of employment. There was evidence that the employers knew the steps were not safe. It was held by the County Court Judge who heard the case that the accident did not arise in the course of the employment.

The Court of Appeal affirmed his award, and the House of Lords dismissed an appeal from the Court of Appeal.

Lord Robson, said:—

The appellant attempted to found an argument upon the ground that there have been cases in which accidents have been held to have occurred in the course of the employment when they occurred at some point or other, or in some circumstances which come within the contract of employment. Now, without saying whether or not it is a sound general principle that accidents which occur at some place which comes within, or in the exercise of some privilege that comes within, the contract of employment, arise in the course of the employment, it is sufficient to point out here that the right to use the particular pathway was no part of the contract of employment. It was a license given by the employer to the men who were coming to their work, but he cannot be said to have contracted that he would always give that license. It was revocable at any moment, and without reference to the conditions of any contract.

Cumberland, C.C.J., dealing with the point under discussion, said:—

It seems to me that while an employer is bound to give reasonable means of access and exit to his workmen (see *Webber* v. *Wansborough Paper Co.*, [1915] A.C. 51, 56) I would hardly be justified in holding one liable in a case like this, where the accident happened at such a distance from the actual place of work and so far outside the ordinary hazard of the employment, even though it had happened on the roadway and just east instead of just west of the boundary line between the respondent's right of way and First St.

He then refers to *Walters* v. *Staveley*, the authority of which he thinks is considerably shaken by the judgment of Cozens-Hardy, M.R., in *Longhurst* v. *John Stewart & Son*, [1916] 2 K.B. 803, where he lays down the following proposition which he says is established by the authorities, (b):—

When a workman is on the employer's land he would be a trespasser but for the contract of employment, and he is within the protection of the Act although the accident may happen when he is not actually at work, but is only going to or returning from his work.

Since the decision of the County Court Judge was given the report of the appeal from the Court of Appeal to the House of Lords in the *Longhurst* case has come to hand, [1917] A.C. 249.

Lord Dunedin, at p. 257, referring to the proposition laid down by Cozens-Hardy, M.R., in the Court of Appeal, said:

. . . I am therefore bound to say as I do, with great deference to a most learned judge who has specially illumined this branch of the law, that I think that proposition (b) in the judgment of the Master of the Rolls is too absolutely put. It is not a universal rule, although the authorities he refers to are cases where the control of the premises afforded, with the other circumstances of the case, the necessary evidence.

Counsel for the appellant strongly relied upon the case of *Nicol* v. *Young*, 8 B.W.C.C. 395. In that case it was laid down that whenever a workman is actually going to his work upon a road provided by his employer, or recognized or permitted by his employer, and is actually within the premises, an accident befalling him is one "arising out of and in the course of the employment." This case, however, is a decision of the Scotch Court of Sessions and is not in line with the English authorities.

I think the appeal fails and should be dismissed with costs.

Appeal dismissed.

MAGRATH v. COLLINS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. October 29, 1917.

PRINCIPAL AND AGENT (§ II—8)—LIABILITY FOR AGENT'S REPRESENTATIONS —SALE OF LAND.

A principal is bound by the representation and inducements made by his agent, within the scope of the agency, while negotiating a sale of land for him, even though they be unauthorized, unless they are disaffirmed by the principal as soon as known to him.

APPEAL by defendant from the judgment of Hyndman, J., in an action for specific performance of an agreement for the sale of land. Reversed.

Statement.

S. B. Woods, K.C., for appellant; *J. E. Wallbridge*, K.C., for respondent.

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MAGRATH v. COLLINS.

Stuart, J.

HARVEY, C.J., concurred with STUART, J.

STUART, J.:—A person who employs an agent to secure a binding contract for him with a third party is not lightly to be relieved from the obligation of a promise, guarantee, or stipulation, which his agent has made in order to induce that third party to enter into the contract with his principal even though there was no specific authority for his act, and even though the inducing stipulation or guarantee was not inserted in the formal contract and was not directly brought to the notice of the principal.

The legislature of this province has, in one instance at least, recognized the justice of this view. By s. 4 of c. 15 of 1913 (2nd sess.) it was enacted that "notwithstanding anything contained in any agreement to the contrary the vendor shall be responsible for all representations made by his agent or agents during the negotiations of sale etc." Unfortunately this Act applies only to sales of farm machinery.

The fact is, however, that the plaintiffs employed Orser individually and also the company of which he was manager and of which they were directors and in which they held a two-thirds' interest to negotiate the sale of the property in question.

Notwithstanding the special wording of the separate document signed by Orser in the name of the Edmonton Real Estate Co., Ltd., I am convinced by a reading of the whole evidence that it was given by Orser and his company as an inducement to Collins to enter into the contract of purchase and therefore as agent or agents for the plaintiff; that is, to say the least, while he was acting as agent for the plaintiffs. I do not think it can be said that it was given merely to induce Collins to entrust the property with Orser and his company for re-sale. It was asked for by Collins before he sent the money and long before he signed the contract. Moreover, Orser had given to two of the persons, who were really purchasers and for whom Collins was to the knowledge of all parties only a trustee, a previous letter dated March 11, in which he said, "I hereby agree that there will be no further call on Mrs. E. Elkin and Mrs. E. Burrows for further money on block 12, Bellevue Addition Syndicate. (Sd.) Bruce R. Orser."

It was said that the plaintiffs gave no authority to Orser to make such a stipulation. No doubt the evidence to shew such authority is weak. But there is some evidence tending to shew that

Magrath told Orser that he could "go the limit" in recommending the property. However that may be, I think a specific authority was not in the circumstances essential. It is said that the plaintiffs had no notice of what Orser had done, but Orser was their agent and *he* knew what he had done. Was it not Orser's duty to the plaintiffs to communicate his knowledge to them? I think it was. And the principle is that notice to an agent is notice to his principal whenever the agent is bound by his duty to his principal to communicate the notice to him. See *Whitney* v. *Great Northern Insurance Co.*, 32 D.L.R. 756, at 760. While this may not be sufficient in all cases to bind the principal finally, it is I think sufficient to burden him with the alternative of avowing or disavowing as soon as actual knowledge comes to him. And there was one very substantial piece of evidence shewing actual knowledge at a very early stage. Orser said that shortly after his return to Edmonton he said to the plaintiff Holgate: "Are you aware of the fact that I guaranteed this here stuff?" This of course was after the main contract had been signed. But it was sufficient in my opinion to bring to the notice of the plaintiffs that their agent in order to secure the contract from Collins had given a guarantee of some kind. I think it was then their duty to enquire at once as to the nature of their agent's act and when they found, as they would certainly have found upon enquiry, that the defendant had been induced by their agent to enter into the contract by means of the assurance given him in the document in question it was then their duty either to disavow the contract and return the money paid or to affirm it with the added condition. Not having disavowed it they must be taken to have affirmed it with the condition attached and by that condition I think they are now bound.

It seems to me, moreover, that the case of *Robson* v. *Roy*, 35 D.L.R. 485, really has some bearing on this case. There the purchaser was induced to enter into the contract by a representation of the vendor's agent that a certain clause meant a certain thing in law. The vendor was held bound to take the contract in that sense. Here the vendor's agent did not indeed represent that the contract, which contained a similar clause to that in question in *Robson* v. *Roy*, meant a certain thing but he guaranteed in writing beforehand, and as an inducement, that the contract

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would be given a certain limited effect of a similar nature. Of course the principle is somewhat different. In *Robson* v. *Roy* it was a question as to what was understood to be the meaning of a certain clause in the contract. Here we have an antecedent stipulation in writing to the effect that, whatever might be contained in the contract to the contrary, the purchaser would have a very limited personal liability.

But it seems to me that there is just as much reason to hold the principal to his agent's act in the one case as in the other.

The subsequent letters of Collins are no doubt against him, but, in my opinion, they were written in ignorance of the true legal situation and they should not prejudice his case.

I think the appeal should be allowed with costs and the judgment below amended so as to confine the plaintiffs to their rights against the property itself and the defendants should have the costs of the action except such as would have been properly incurred in an action asking for a judgment for the sale of the lands, which would go no further, of course, than the statement of claim, that is, the initiation of the suit and as of a motion for judgment which should be allowed to the plaintiff and set off against the defendant's costs. The statement of claim asks for a sale and the plaintiffs are entitled to that.

Beck, J.

BECK, J.:—The action was for specific performance (including a claim for a personal order on the covenant) of an agreement dated March 22, 1913, between Magrath Hart & Co. (a firm of whom the partners were Magrath and Holgate) as vendors, and the defendant as purchaser, of a number of lots and portions of blocks in a subdivision in Edmonton known as Bellevue Addition. The price was $33,000, payable $11,000 down and the balance in 3 equal payments on September 22, March 22 and September 22, following, with interest at 7% per annum.

At the time of the trial the title to the property had been transferred from Magrath Hart & Co. (the partnership composed of Magrath and Holgate) to Magrath Hart Limited (a joint stock company of which the shareholders were Magrath and his wife, and Holgate and his wife) as trustees for the vendors, so as, to quote Magrath's words, "to make sure that they (the purchasers) would get title"; and again, to quote Magrath, "We changed our partnership to a limited company." I make this last quotation as

I think it has some bearing upon the position which, I think, Magrath and Holgate must accept with regard to another limited company, the Edmonton Real Estate Co., Ltd., the sole shareholders in which were Magrath, Holgate and Orser, each holding one-third of the entire capital stock of the nominal amount of $75,000, and of which Magrath and Holgate were directors and Orser managing director.

Magrath was in Toronto. Orser met him there. As the result of conversations it was arranged that Orser, as representing the Edmonton Real Estate Co., Ltd., should try and "syndicate" the property in question, that is, get together a number of people who together would purchase the property. Magrath had, very shortly before this, placed the property in the hands of Burrows. Orser hearing of this from Burrows went to Magrath and asked him why he had not told him that he wanted to sell the property, and Magrath suggested that Orser and Burrows might work together, and this was ultimately arranged, the Edmonton Real Estate Co. to sell and some arrangement for a division of the commission being made between Orser and Burrows.

Orser accordingly went to Trenton and saw Collins, who was his brother-in-law. Burrows had already arranged with two lady relatives, Mrs. Burrows and Mrs. Elkin, that they should put in $1,000 each. Orser in conjunction with Collins procured others to enter the syndicate so as to raise in all the necessary down payment of $11,000 less a certain amount which Orser was entitled to deduct for commission and which was divided in different proportions between Orser, Collins and Burrows. The syndicate agreement is dated February 19, 1913. The balance of the $11,000 was paid by Collins on March 22, 1913, by cheque to the "Edmonton Real Estate Co. which Orser endorsed "Edmonton Real Estate Company, Ltd., per B.R. Orser" and sent to Magrath Hart & Co. who cashed it.

On the same day as Collins gave this cheque to Orser, Orser signed the following document:—

In connection with syndicate formed for the purchase of block 12 Bellevue Addition in City of Edmonton for $33,000 of which the first payment of $11,000 has been paid. It is understood that I will have this block surveyed and subdivided and look after sale of same—will also agree to finance the undertaking from this date and relieve the syndicate from any further payments in connection with same regardless of any agreement which you as treasurer of the syndicate have signed or agreed to pay. It is understood that we ("I"

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changed to "we") have the authority of the syndicate to dispose of this property to the best advantage. Each proposition will be submitted to you before closing and will be subject to your approval. Edmonton Real Estate Co., Ltd. Per B. R. Orser.

The decision in the case turns upon the operation of the foregoing document (which I shall call the collateral agreement) or of the real agreement or understanding in consequence of which it was signed and upon the question whether the collateral agreement was made with the authorisation of the plaintiffs.

McDonald, one of the syndicate, confirms Collins' evidence. He said that he did not know who was the owner of the property; that Orser said that Magrath was president of the company and that whatever he (Orser) did was all right; that he would not have put a dollar into the project if Orser had not said that they would not have to put in another cent.

Weeks, another member of the syndicate, says substantially the same thing.

Burrows says that Orser was to sell through the Edmonton Real Estate Co., and that Magrath said in the presence of himself and Orser that there would be only one payment, and he (Burrows) would not have got his relatives to put in the $2,000 otherwise.

Magrath denies absolutely making any statement to the effect that no payment but the first would be called for.

Orser denies that he had any authority from Magrath to agree that no payment but the first would be required to be made.

So we have the evidence of Collins, McDonald and Weeks that Orser told them in effect that he had the authority of Magrath to make the agreement represented by the collateral agreement. We have also Burrows' distinct evidence that Magrath gave such authority. We have Orser, while directly denying that he had such authority, being compelled to admit that he gave Collins and his associates to understand that Magrath had given him authority to go as far as he liked in recommending the property, and inferentially he asserts that his statements to Collins and his associates were true.

All this certainly is sufficient to establish the authorisation of Magrath to the Edmonton Real Estate Co., Ltd., as the agent of himself and his co-owner Holgate to enter into the collateral agreement. Looking at all the circumstances disclosed by the evidence and considering the probabilities I think this evidence

should outweigh the denial of Magrath. It is a well recognised principle of law that if a principal authorises an agent in ambiguous language the authority of the agent extends to whatever may fairly be taken to be the meaning of the authority—both to authorise the agent and to bind the principal to third parties. The application of this principle may leave room for reconciling Magrath's evidence with the facts while still rendering him and his co-owner liable for the act of their agent.

Assuming then this to be the fact, the case as it stands is that the entire agreement between the plaintiffs and the defendant is represented by two documents, (1) the agreement of sale and purchase made between the parties directly, and(2) the collateral agreement made between the defendant and the duly authorised agent of the plaintiffs expressly providing that one of the terms of the agreement of sale and purchase was to be ineffective. There is no reason why an entire agreement should not be so constituted (*Eaton* v. *Crooks*, 3 A.L.R. 1) and I know of no legal principle which prevents the collateral agreement from being effective against the unmentioned principal, though the agent doubtless be also liable alternatively (see 2 Ruling Cases 456). It must be very carefully observed that the collateral agreement is not a mere guaranty or independent agreement. It contains on its face a distinct express reference to a term of the main agreement and modifies it.

In this view the plaintiff is not entitled to a personal order against the defendant Collins on the covenant for payment contained in the agreement, but subject to this is entitled to specific performance of the agreement.

As to the question of title I think the view of the learned trial judge and his directions founded thereon should not be interfered with.

The defendant by a counterclaim sought to recover back the down payment of $11,000. In the view I have expressed it is clear that this claim is not maintainable.

In the result, therefore, there should be a judgment for the plaintiff for the specific performance with a declaration that the defendant is not liable on his covenant for payment and that no order shall be made against him based thereon. I agree with the disposition of costs proposed by my brother Stuart.

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Walsh, J.

WALSH, J. (dissenting):—I am unable to agree with the view that my brother Beck takes of the Edmonton Real Estate Co.'s letter of March 22, 1913. I think that it is not an agreement collateral to the main contract but is an independent agreement between the company and the defendant for the re-sale of this land by the company as agent for the defendant, by the terms of which the plaintiffs are in no sense bound. This letter was composed by the defendant and its language may therefore be regarded as fairly describing his idea of it. It is an undertaking on the part of the company to have the property subdivided and look after the sale of it, to finance the undertaking and relieve the syndicate from any further payments under its agreement of purchase, upon the understanding which is set out in it that the company is to have the authority to dispose of the property but that each offer made for it must be submitted to the defendant and be subject to his approval. I think that the whole scheme of this letter was to bind to its terms the company as the defendant's selling agent, and that the agreement contained in it to relieve the defendant from any further payments under his contract with the plaintiff had its origin in what was practically an indemnity by the company against his liability for the balance of the purchase money or a guarantee by it that it would make re-sales of this land so that the deferred payments of the purchase-money due by the defendant would be thereby taken care of. This view is strengthened by the defendant's letter of August 1, 1913, to the plaintiff, in which he says:—

> As you are aware this lot was purchased from the Edmonton Real Estate Co., and the members of the syndicate here hold an agreement from the above company to the effect that regardless of any agreement made with you they will survey and subdivide the lot and look after the sale of same. They also agree to finance the undertaking from the date of purchase and relieve the syndicate from any further payments in connection with the property. It was understood and agreed that before the second payment came due they would sell sufficient land to take care of this payment.

This letter marks a plain distinction in the mind of the writer between the plaintiffs and the company which is emphasised by its concluding paragraph, which is as follows:—

> None of the members of the syndicate which I represent are able or willing to pay any more money at present on this property and if you have been at fault in the matter I shall be obliged if you will kindly arrange to have the second payment extended for at least 6 months to enable our representative in Edmonton to dispose of sufficient property to meet same.

This letter was written in less than 5 months after the agreement was made and in anticipation of the maturity of the first of the deferred payments which became due on September 22, 1913. It clearly points to an admitted liability to make that payment as between the plaintiffs and the defendant with the latter's recourse against the company under its agreement. I quote this letter as the best evidence of what was in the opinion of the defendant himself the real reason for and the meaning of this agreement with the company for it was written when the facts were fresh in his memory and no trouble had arisen or was even apprehended. This view is strengthened by the references made to the question by the defendant in his subsequent letters to the plaintiffs. On December 26, 1913, he wrote:—

> I have already advised you that we have an undertaking from the Edmonton Real Estate Co., through whom these lots were purchased, guaranteeing to take care of all payments in connection with the purchase of this land . . . (though he does go on to refer to the purchase of the property) with the distinct understanding that no further payments would be required.

He wrote again on February 25, 1914:—

> I do not wish to enter an action against the Edmonton Real Estate Co. but if you sue me I will be obliged to take action against them.

These letters confirm the opinion which I formed from the wording of the document that it was signed by the company and accepted by the defendant not *qua* agent for the plaintiffs but *qua* agent for the defendant on the proposed re-sale of the property, so that it in no sense binds the plaintiffs.

Apart from this document the agreement or representation or condition upon which the defendant relies is founded upon what verbally took place between the parties in the negotiations which resulted in the making of the agreement. The defendant says it was a term of this verbal arrangement that he and his associates were not to be called upon to pay more than the initial cash payment of $11,000. This is put forward as a material representation, which, in view of the plaintiffs' present attempt to compel payment by the defendant personally of the balance of the purchase-money, not only entitles him to escape all further liability under the contract, but to repayment as well of the $11,000 paid, or in other words, to rescission of the contract. He certainly is not entitled to any such relief as that. His fullest remedy, if he is entitled to any, must be to have his personal liability limited as he says the agreement was that it should be.

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I am of the opinion, however, that it is not competent for the defendant to set up this antecedent verbal agreement in defeasance of his written contract. The result of these verbal negotiations was reduced to writing and the defendant by the written contract under his hand and seal covenanted with the plaintiffs to pay the full amount of the purchase-money with interest at the times and in the manner therein set out. In *Henderson* v. *Arthur*, [1907] 1 K.B. 10, the defendant was sued upon a covenant in a lease for payment of the rent. The defence which he attempted to set up was that there was an agreement antecedent to the lease in point of time by which the parties agreed that instead of payment in advance of said quarter's rent in cash as specified in the lease the lessor should be satisfied by the lessee giving in respect thereof bills at three months. The Court of Appeal unanimously held that such an agreement could not be set up. The judgment of Collins, M.R., so completely covers this case that I will not attempt to add anything to it.

With much regret I find myself unable to agree with the result which my brother Beck has reached and, agreeing with him as I do on the question of title, I would dismiss the appeal with costs.

Appeal allowed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

CONTRACTS (§ I D—45)—DRUNKENNESS—VOID OR VOIDABLE—REPUDIATION —RATIFICATION.

The contract of a drunken person with one who knows of the drunken condition is not void but voidable, and repudiation to be effective must be within a reasonable time.

[11 A.L.R. 26, reversed.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 11 A.L.R. 26, reversing the judgment of the trial judge, by which the plaintiff's action was maintained with costs. Reversed.

Symington, K.C., for appellant; *Chrysler*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—There appears to have been considerable divergence of opinion in the courts at different times as to the validity of a contract entered into by a man whilst in a state of intoxication. This is pointed out in a note to the case in the House of Lords of *Butler* v. *Mulvihill*, 1 Bligh 137.

The law as laid down in the Co. Litt. 247*a* is that

as to a person who, by his own vicious act, depriveth himself of his memory and understanding, as he that is drunk—that kind of *non compos mentis* shall give no privilege or benefit to him or his heirs.

But in *Cooke & Clayworth*, 18 Ves. 12, at p. 16, the Master of the Rolls said he apprehended that a deed obtained from a man in such extreme state of intoxication as to deprive him of his reason would be invalid at law. This was followed in other cases. However, I think the law must be taken now to be as laid down in *Matthews* v. *Baxter*, L.R. 8 Ex. 132, that the contract of a drunken man is not void but voidable only.

What is only voidable and not void cannot be held as invalid until it has been rescinded. It is not enough to avoid the contract, that nothing is done to affirm it, it must be disaffirmed. In *Deposit Life Assurance Co.* v. *Ayscough*, 6 E. & B. 761, the defence was that the contract was induced by fraud and Lord Campbell, C.J., said:—

It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded. There is nothing on this record to shew that the defendant has avoided the contract by which he became a shareholder. He had a right, if he pleased, notwithstanding the fraud, to keep the shares and receive the dividends; and he may have intended to do so. The plea, therefore, should go further, and shew, not only that he was induced to become a shareholder through fraud, but that on discovering the fraud he disaffirmed the transfer of the shares to him. In *Newry and Enniskillen R' Co.* v. *Coombe*, 3 Ex. 565, the plea was infancy, and that the defendant, whilst an infant, disaffirmed the transfer. It was held that, if the defendant, after coming of age, affirmed the transfer, that would be a matter for replication, and need not be negatived in the plea; but there, the plea shewed the transfer void, unless an affirmative act were done to render it valid; here it shews the transfer valid, unless an act was done to avoid it.

In *Oakes* v. *Turquand*, L.R. 2 H.L. 325, which was also a case of fraud, it was held that a party defrauded may rescind the contract, but he must do so within a reasonable time.

The courts can look with no favour on the defence of incapacity through drunkenness, and will certainly extend to the defendant in such case no greater privilege than to one induced to enter into the contract through fraud.

The respondent, if he meant to avail himself of the privilege allowed him by the law of avoiding the contract by pleading "his own vicious act," was bound to disaffirm and to do so promptly. The fact is that he did nothing for more than a month. He was not entitled to wait and see whether the price of wheat went up or down, and disaffirm or affirm the contract accordingly.

The appeal should be allowed with costs.

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Davies, J.

DAVIES, J.:—Ever since the case of *Matthews* v. *Baxter*, L.R. 8 Ex. 132, in 1873 was decided, the law has been settled that the contract of a man too drunk to know what he was about when entering into it, is voidable and not void, and therefore capable of ratification by him when he becomes sober.

Such a contract is on the same footing as a contract made by a person of unsound mind, whose mental incapacity, in order to avoid the contract, must be known to the other of the contracting parties. *Imperial Loan Co.* v. *Stone*, [1892] 1 Q.B. 599.

In the case before us the respondent entered into a contract with the appellants for the sale to them of a quantity of wheat for future delivery at a certain price, and it was found by the trial judge as a fact that, when he did so, he was drunk to the knowledge of the agent with whom he made the contract in the sense of not being capable of fully appreciating the transaction.

The question on this appeal therefore was whether he had elected not to repudiate the contract within a reasonable time after he became sober and had full knowledge of his contract.

The contract being voidable only and full knowledge of its nature and terms, and that he had entered into it being brought home to him the day after he entered into it when he was perfectly sober, he was bound, in my opinion, within a reasonable time thereafter to repudiate it if he desired to do so, or at any rate if he delayed making any election with regard to it to do so at his peril if such delay causes loss or damage to the other party.

The contract was one relating to the sale of grain, a commodity varying in price from day to day, and this necessarily constitutes an important element in determining what would be an unreasonable time for him to wait before attempting to repudiate. He had knowledge on the third or fourth of October, some days after he entered into the contract, that the plaintiffs considered the contract a good and binding one. He knew all about wheat, its varying price in the market, and what a speculative contract he had entered into.

Later in the month of October he was again advised by the plaintiffs as to the shipment of the grain he had agreed to sell. He took no action for delivery, evidently awaiting to see what the market price would be. If the price of grain fell, he stood to win by holding to the contract. If it rose in price he stood to

lose. He waited till November 6, when the price had gone up substantially, and then he took his first step towards repudiating.

In my opinion, looking to the speculative character of the article he had agreed to sell and deliver at a future date, he was then too late. By his continued silence during the whole month of October, and up to November 6, he must, in my opinion, under the facts as proved, be taken to have affirmed the contract originally voidable. If the market had fallen I cannot entertain a doubt that he would have elected to affirm and claim the price his contract called for. He waited an unreasonable time under the circumstances before repudiating, and will be held therefore to have affirmed.

But it is contended that the defendant, having been found to have entered into the contract while drunk, with the knowledge of the plaintiffs' agent, the contract must be held to have been obtained by fraud and had not been affirmed.

In cases of contracts obtained by fraud it was held by the Exchequer Chamber in *Clough* v. *London and North Western R. Co.*, L.R. 7 Ex. 26, at 35, that "the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? . . . We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind."

Now I cannot doubt in this case that even if it was held that defendant's conduct up to the time of the sale by the plaintiffs did not amount to an election one way or the other the consequence of his delay seriously affected and prejudiced the plaintiffs, who, in the ordinary course of business, sold the grain which the defendant had agreed to sell, and deliver to them, at a loss which they now seek to recover, and that this consequence of defendant's delay precluded him from afterwards exercising his right to rescind.

I would allow the appeal with costs here, and in the court appealed from, and restore the judgment of the trial judge.

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Idington, J.

IDINGTON, J.:—I think this appeal should be allowed with costs.

The condition of the respondent, when he signed the agreement of September 30, to sell appellant his wheat, was such (to the knowledge of the latter's agent) as to entitle him upon the receipt of the appellant's confirmation thereof, to repudiate the contract.

The contract bound appellant from the moment respondent received that confirmation and he alone having the option, could not hold the other an unreasonable length of time in such suspensory condition.

There is ample authority that lapse of time with full knowledge of the facts such as the trial judge has found herein that the respondent had, may furnish such evidence of acquiescence on the part of him entitled to repudiate a voidable contract as an election not to exercise his option and deprive him thereof.

Each case must be determined upon a due consideration of what is reasonable in the circumstances.

The argument that there must be some affirmation or ratification communicated to the other party by him having such an option, seems to be quite untenable.

If the surrounding facts and circumstances are such as render prompt repudiation a duty resting upon him who desires to exercise his option in such a case then an unreasonable length of time taken to communicate his decision when there is nothing in the case excusing him from doing so, binds the court, I think, in law, to hold him to have determined to abide by his contract.

I think, in this case, no fair minded man could have refrained from responding to the confirmation received, and read when sober, unless upon the hypothesis that he had decided not to exercise his option.

A month's consideration was far more than necessary, and but for the rising market, I suspect the respondent never would have had any hesitation, and would not have needed the appellant's letter of October 20, reminding him of his duty.

Why did he not answer that communication? Was it because he felt he could sell for a higher price? Possibly in fact he did and realized a handsome profit exceeding appellant's loss. Fair dealing between men is what I think the law aims at in such cases as this.

To infer acquiescence from respondent's failure early in October, upon reading the communication of appellant, to exercise his option, proceeds upon that view.

Unfortunately the development of the law upon the subject has been of that misleading character, that though great lawyers held that a contract by a man so drunk as to be incapable of understanding what he was about was void, as shewn (in 1845) by *Gore* v. *Gibson*, 13 M. & W. 623, and earlier cases yet in *Molton* v. *Camroux*, 4 Ex. 17, the results of a contract with a lunatic were treated differently and then (1873) in *Matthews* v. *Baxter*, L.R. 8 Ex. 132, on a demurrer to a replication which affirmed that after the defendant became sober, and able to transact business, he ratified and confirmed the contract, the replication was held good and the learned judges tried to explain away the prior judicial expressions relative to the like contract, and held it was only voidable at the option of the drunken man.

I have assumed this latter decision to express the law as existing now, but that is very far from supporting the proposition, seemingly assumed below, that some overt act of ratification communicating to the other party to the contract the decision or election of the drunken man is necessary.

All that was decided in *Matthews* v. *Baxter*, *supra*, was that actual ratification as pleaded was a good answer. It did not decide the converse that ratification was necessary.

It simply implies that as you cannot ratify a void contract, it must be now held as result of the decision that the contract of a drunken man is not void, but merely voidable. And to avoid it repudiation is necessary.

And hence it must be treated as other voidable contracts of a like nature in law. The cases of fraud which enable one party to a contract to repudiate it are analogous, and in such cases the necessity for exercising the right of repudiation within a reasonable time after discovery of the fraud has been many times affirmed.

There so frequently occur circumstances excusing delay that no other rule can be laid down than to insist upon a reasonable course of conduct and that implies regard for the rights of others.

To maintain the judgment appealed from herein, would enable the drunken man to practise in such like cases the grossest fraud with impunity.

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To bind him, as I submit the law requires, to repudiate if he desire within a reasonable time on discovery protects both and promotes fair dealing.

A due observance of such principles requires the allowance of this appeal.

DUFF, J. (dissenting):—After a good deal of doubt on the question whether the respondent is entitled to succeed for the reasons stated in the judgment of McCarthy, J., with which Stuart, J., concurred, I have come to the conclusion that those reasons ought to be given effect to, and, although I think the appeal fails on other grounds which do not depend upon those reasons, I think it is right to state the fact of my concurrence in them. Voidable, as applied to contracts, is not unambiguous. Among common lawyers it is used indifferently to express the fact that a contract or transaction *ex facie* valid, which somebody, nevertheless, is entitled, at his option, to treat as not binding, is in truth valid until the person so entitled has done what amounts in law to an election to treat it as null; and to express the fact that a contract or transaction *ex facie* subsisting is, *vis à vis* one of the apparent parties to it, of no legal effect until he does something which amounts to an election on his part to adopt it as binding upon him or to enforce it against somebody else.

And, therefore, when it is said that a contract between a person of unsound mind or drunk and being in such a condition as not to appreciate what he is doing, and another who knows his condition, is voidable at the option of the former, the statement is ambiguous. The rule of the Roman law appears to have been that where incapacity arising from infancy or unsoundness of mind existed, there was no contract of which the law could take notice because of the absence of *assensus*.

The course of development in the English law of the rule governing the rights of a person entering into a contract or going through the form of entering into a contract while insane is very clearly traced in the judgment of Fry, L.J., in *Imperial Loan Co.* v. *Stone*, [1892] 1 Q.B. 549. Under the old rule the incapable person was, by law, precluded from setting up his incapacity in answer to an action on the so-called contract. Under the modern rule this disability is removed where it is

shewn that the other party had at the time of the transaction knowledge of the incapacity of the other.

The rule thus stated is consistent with two diverse theories concerning the true juridical character of the act or acts upon which the action is based. The law may regard the seeming contract as having no legal effect as against the party having the right to deny its validity until such party ratifies it, but as becoming, on such ratification, a binding contract. On the other hand, what occurred may be treated as a contract capable of being invalidated at the option of the person entitled to dispute it, but valid unless and until rescinded by him.

There is no decision which authoritatively sanctions either of these two conflicting theories to the exclusion of the other. The more logical view would appear to be, however, that, there being an absence of capacity to assent and consequently no assent, there is no contract at all until assent is supplied by something amounting to ratification. This view is not inconsistent with that branch of the rule which enables the temporarily incapable person, once he has recovered his capacity, to hold the other party to the apparent bargain, because this may be regarded as a just consequence of the unconsciencious conduct of the latter in attempting to bring about a contract with a person knowing him to be incapable of understanding what he was doing, and indeed this is the plight in which, as a general rule, a person contracting with an infant finds himself or may find himself, though ignorant of the fact of non-age and having no reason to suspect it. The language of the judges who decided *Matthews* v. *Baxter*, L.R. 8 Ex. 132, as well as the language of text writers (see, *e.g.*, Anson on Contracts, p. 151), points to this as the more generally held theory.

The distinction is plain, of course, between cases where there is no consent because of no capacity to consent and cases in which there is true consent, but consent brought about by such means or arising under such circumstances as to entitle one of the parties to disaffirm the transaction; and in the case, it may be observed, of the temporary lunatic or the drunkard, the above-mentioned considerations have even greater force than in the case of the infant, for in the former cases absence of assent is a fact, the incapacity is an incapacity in fact, while in the case of the infant

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there may be and in most instances there is, no doubt, a real assent in fact. In *Oakes* v. *Turquand*, L.R. 2 H.L. 325, at 375, the judgment of Lord Colonsay points to the distinction existing between the force of the word voidable as applied to contracts entered into by a person *sui juris* but procured by fraud and as applied, on the other hand, to the contracts of incapable persons.

It is no answer to this to say that the law regards as actual fraud the conduct of a person who procures a seeming contract from a drunken person or a person temporarily insane, to such a degree as not to know the nature or effect of the transaction he is purporting to take part in. It has been held, and, in my judgment, rightly held, that conduct such as that of the agent of the appellant company disclosed by the evidence before us is fraud in fact—and fraud indeed of a very odious kind—not in contemplation of law merely. The argument presented on behalf of the appellant company is that because the conduct of the other party in acting with knowledge of the incapacity of the person sought to be charged is an essential element in the latter's defence, therefore the transaction, which in fact never was a contract, because the hypothesis is that there never was any assent in fact, must be treated in law as belonging to the class of true contracts resting upon an actual *assensus ad idem*, but capable of disaffirmance by reason of fraud. But what justification can there be for erecting this fiction of assent? I can see no reason for it and there is certainly no authority for it. On the other hand, the view which has found acceptance in the court below can be rested on grounds which are simplicity itself—the knowledge possessed by the capable person of the other's incapacity entitles the temporarily incapable person to set up the temporary incapacity and at the same time precludes the capable party from denying that there was a contract in fact if the other, after he has recovered his capacity, chooses to affirm it. That is a view which appears to be consonant not only with sound theory but with justice and convenience as well.

But I propose to consider the appellant company's rights upon the hypothesis also that the so-called contract of the drunkard or of the person temporarily insane falls within the other class of voidable contracts, namely, contracts which are capable of being disaffirmed by one of the parties, but until disaffirmed are valid. On behalf of the appellant company it is contended

that the so-called contract of a drunkard, the other party having knowledge of his condition, are binding upon the drunkard unless disaffirmed by him, and that the rules governing this right of disaffirmance are the same as those which govern the right to rescind a contract on the ground that it was obtained by fraudulent misrepresentation, and I shall consider the grounds upon which the appeal is based on that hypothesis.

The respondent, it is said, first in fact elected to affirm the contract, and secondly, by his conduct, precluded himself from disaffirming the contract, because (*a*) he delayed his disaffirmance for an unreasonable time, (*b*) by his conduct he led the appellant company reasonably to believe that he intended to affirm the contract, upon which belief they acted to their prejudice, (*c*) by reason of his delay the position of the appellant company was prejudicially affected in a substantial degree.

These contentions raise questions of law and of fact. First, as to the law. The common law doctrine on the subject is explained and discussed in several cases. I shall refer in particular to the judgments of the Exchequer Chamber in *Clough* v. *London and North-Western R. Co.*, L.R. 7 Ex. 26; *Morrison* v. *Universal Marine Ins. Co.*, L.R. 8 Ex. 197, which must be read with the judgment of Lord Blackburn in *Scarf* v. *Jardine*, 7 App. Cas. 345, at 361; the judgment of the Privy Council in *United Shoe Machinery Co.* v. *Brunet*, [1909] A.C. 330; and the judgments of the Law Lords in *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273. I shall deal first with the contention that the proper conclusion from the evidence is that the respondent, before the action was brought, elected to affirm the so-called contract.

Election is something more than the mere mental operation; choice in itself is not sufficient, as Lord Blackburn said in *Scarf* v. *Jardine*, at 360 and 361. The choice must be expressed by words or by unequivocal act. "The determination of a man's election shall be by express words or by act:" *Clough* v. *London and North-Western R. Co.*, *supra*, at p. 34; "act" is explained in the same judgment to mean unequivocal act, and in *Scarf* v. *Jardine*, *supra*, at p. 361, Lord Blackburn explains unequivocal act to mean: "An act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way."

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Election, therefore, involves the determination to adopt a given course and the manifestation of that determination by words or by act "under circumstances which bind" the person alleged to have made his election (*Clough* v. *London and North-Western R. Co.*, L.R. 7 Ex. 26, at 35). Lord Blackburn does indeed say, in his judgment in *Scarf* v. *Jardine*, 7 App. Cas. 345, at 361, that,

> whether he intended it or not if he has done an unequivocal act . . . the fact of his having done the unequivocal act to the knowledge of the persons concerned is an election.

On the other hand, the Court of Exchequer Chamber, in *Morrison* v. *Universal Marine Ins. Co.*, L.R. 8 Ex. 197, at 207, held that

> if there really was no election, it is wholly immaterial whether the plaintiff understood or had a right to understand the conduct of the defendant as amounting to an election unless under that belief he altered his position.

It appears that this was not the view of Bramwell, B., see *Croft* v. *Lumley*, 6 H.L. Cas. 672, at 705, and *Morrison's* case, at 206, or, as already intimated, of Lord Blackburn. In the view I take of this appeal it will not be necessary to consider whether the opinion expressed by the Exchequer Chamber in *Morrison's* case on this point is part of the *ratio decidendi* and binding upon us because the appellant company has quite failed to shew either words or anything which in any view could be described as an unequivocal act evidencing the existence of a determination on part of the respondent to affirm the contract.

The conduct of the respondent relevant to the point now under discussion—was there in fact an election to affirm—may be briefly described: The so-called contract is found in a document signed by the respondent and witnessed by the appellant company's agent Simpson, on September 30, by which the respondent undertook to sell certain wheat to the appellant company. The document was signed in duplicate, one of the duplicates being handed to the respondent by the agent and afterwards discovered by himself or his wife in his pockets. The document does not in itself evidence a contract because it contains no evidence of assent on part of the appellant company; that, however, was supplied some days after the appellant had recovered from his spree by a letter from the appellant company, which in fact was the first communication to the respondent, so far as the evidence shews, of any declaration on behalf of the appellant

company that they were contracting with him to purchase what he was promising to sell. The respondent took no steps to carry out the contract. On October 20 (the wheat had been sold for October delivery) the appellant company wrote him saying that he was probably too late for October delivery, and was too late in fact unless the cars were already *en route*, and suggested that the sale should be transferred to November delivery. The respondent made no reply. In the meantime the respondent had learned of the fact that he had signed some paper while he was in a state of drunkenness, but there is no evidence to shew when he learned (and there was no cross-examination on the point) that his state of drunkenness was of such a character as to make it apparent to the appellant company's agent that he was unable to understand what he was about.

I pause here to point out that the appellant company down to the conclusion of the trial insisted, in the first place, that the respondent was capable of understanding what he was about, and, in the second place, if he was not, that the agent Simpson believed and properly believed that he was not incapable of transacting business. In these circumstances it was strictly incumbent upon the appellant company to ascertain by cross-examination of the respondent when he became aware of the fact essential to his right of rescission that Simpson, the appellant's agent, knew he was unfit to transact business; for the appellant company's plea of election cannot succeed unless it is at least shewn and affirmatively shewn that the conduct relied upon as constituting election or evidencing election was pursued in light of precise cognizance by the respondent of the material facts entitling him to disaffirm. *Wilson* v. *Thornbury*, 10 Ch. App. 239; *Jarrett* v. *Kennedy*, 6 C.B. 319, 326, 136 E.R. 1274; *Lachlan* v. *Reynolds*, Kay 52, 69 E.R. 23. I am assuming that knowledge of facts being proved a knowledge of the right to rescind resting on the common law rule above-mentioned may be presumed but knowledge of all the essential facts is necessary, and, in view of the position taken by the appellant company, it was incumbent, as I have said, upon them to shew this essential fact by cross-examination if necessary: see Lord Davey's judgment in *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273, at 295.

Is there, then, evidence of an actual determination by the re-

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spondent not to exercise his right of rescission? This is a question of fact. What must be proved is conduct which clearly establishes that the respondent did in fact determine to affirm the contract after he had learned the material facts entitling him to disaffirm it. The evidence to the effect that he had casually remarked that he had sold his wheat may be rejected (if for no other reason) because it is altogether too vague to be of any value. I shall have something to say presently as to the legal effect of such a casual remark made to a stranger. Nothing remains but delay. Upon that a certain amount of precision is necessary in justice to the respondent. It is quite plain that some time before October 20, that is to say, within 3 weeks after the signing of the so-called contract and probably within 2 weeks after the receipt of the so-called confirmation, and one may reasonably surmise not more than a week or 10 days after the respondent had obtained any kind of definite information as to the circumstances of the signing of the document relied upon by the appellant company (one must at least presume this against the appellant company, on whom the onus of proof lay, and whose counsel deliberately refrained from cross-examining on the point) the respondent had decided not to carry the so-called contract into execution. The appellant company has refrained from giving evidence on the point, although their agent Simpson was called, and it is impossible to suppose that he was not aware of the facts, but the company's own letter of October 20th, is sufficient evidence that, in order to fulfil the terms of the contract (time was, of course, of the essence of it), it was necessary that the respondent should begin his preparatory steps some days, at all events, anterior to that date. "Of course," they say, "you will not be able to make October delivery unless you have the cars on the road now." The tenor of the letter makes it quite plain that the appellant company had no doubt whatever that October delivery would not be made, that is to say, delivery in execution of the contract, and, in the absence of evidence to the contrary, it must be assumed against them that they, through their agent, were perfectly aware that the cars were not *en route* and that the respondent had taken no steps to that end.

In these circumstances it seems to be idle to suggest that there is any proof of an actual determination by the respondent not to rescind. Such period as elapsed from the time when the

respondent became aware, on the receipt of the so-called letter of confirmation, that the appellant company were treating this piece of trickery as a matter of serious business down to the time when he must have known that failure to make preparations would involve default on his part if he was under a binding contract to deliver in October is reasonably accounted for by assuming that his attention was engaged during that period, first, in discovering the facts or endeavouring to discover them and the evidence available to prove them; secondly, in ascertaining what his rights were; and again, in deciding, once having arrived at the conclusion that he could treat the document signed by him as a nullity, whether it would be more favourable to his interests to treat the transaction as binding on him or not.

That he was in fact waiting, before committing himself to affirm or disaffirm, to ascertain the course of the market is one of the contentions put forward on behalf of the appellant company. If he did so, that is, of course, conclusive against anything like election in fact to affirm.

Indeed, where a contract has been procured by fraud and the wrongdoer seeks to fasten the liability upon the person wronged on the ground that he has elected against rescission and where the contract has remained executory, that is to say, where nothing has passed to the person defrauded which it would be his duty to give up on the exercise of his right to rescind, where nothing has been done by the wrongdoer in the execution of the contract, that is to say, nothing which he was bound by the terms of the contract to do, where these conditions are present the instances must be rare in which lapse of time *per se*, however great, would constitute sufficient evidence of an election not to rescind. What is there, in such circumstances, in the conduct of the defrauded person inconsistent with the exercise of his right (when the defrauder seeks the aid of the court to profit by his wrong) to declare that the contract is not binding because it was procured by fraud? *Ex hypothesi*, the defrauder knows that he is not entitled to enforce the contract, and that repudiation is one of the risks he must face. The victim of the fraud is assumed to know that also. Why should the victim not sit down and await attack? Why should it be inferred, from the fact that he has done so, that he has given up his right to repudiate?

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The statement in the judgment of the Exchequer Chamber in *Clough* v. *London and North-Western Ry. Co.*, L.R. 7 Ex. 26, that lapse of time without rescinding will furnish evidence that the victim has determined to affirm the contract was used with reference to the case of a contract in part executed by the delivery of the goods on the one hand and by the payment in part of the price on the other, and I have found no case where it was a question of rescission on the ground of fraud of a contract which has remained wholly executory in which lapse of time alone has actually been held to amount to such evidence of the determination to affirm. I am inclined to think that the law is correctly stated in Spencer Bower's Actionable Misrepresentation, at p. 282, par. 321, in the following terms:—

> Delay, laches, and acquiescence are constantly referred to in connection with proceedings for rescission as if, of themselves, they constituted affirmative defences thereto. This is quite a mistake. And it is a still greater error to use these expressions (as the term "laches" in particular is frequently used) with an underlying suggestion that the representee owes a duty to the representor in the matter, the failure to discharge which renders him guilty of conduct which, of itself, raises a personal equity against him in favour of the representor. The only legal consequence of the representee's inaction is either to furnish some evidence, with other facts, in support of a plea of knowledge or affirmation, against himself, or to give scope for the intervention of the *jus tertii* or of the plea of inability to make specific restitution to the representor; but where the inaction, for however long a period it extends, is not sufficient to constitute such evidence, or where, notwithstanding the lapse of time, no innocent person has in fact acquired rights or interests under the contracts sought to be set aside, and the property to be restored to the representor, as the condition of rescission, can be so restored in the same plight as that in which it was received, the delay, laches, or so-called "aquiescence" goes for nothing—which is tantamount to saying that *per se*, these matters constitute no defence.

It is true that in the treatise on Misrepresentation and Fraud, in Lord Halsbury's collection, of which Spencer Bower is the author, published in 1911, par. 1771, vol. 20, p. 752, it is stated that, with other facts or "even without them, delay, if very great, may constitute evidence of affirmation," but the authorities cited for the proposition are *Clough's* case, L.R. 7 Ex. 26; *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221; and *Aaron's Reefs* case, [1896] A.C. 273; in every one of which the contract had at least in part been executed; and the observations of the Law Lords in the last-mentioned case, and especially the observations of Lord Macnaghten and Lord Davey, seem to indicate that in their opin-

ion where the obligation sued upon had assumed the form of a debt *simpliciter*, the supposed debtor intending to rescind on the ground of fraud was entitled, in the absence of special circumstances, to sit down and await attack, and that consequently no inference could arise against him from failure to take active steps towards repudiation.

It is argued, however, that there are special circumstances here which, added to the respondent's inaction, support the suggested inference. It is said, first, that the respondent must have been aware of the practice of the appellant company making sales against their purchases as soon as the purchases were made and relying upon the purchases to enable them to fulfil their contracts of sale; and, moreover, that the letter of confirmation received a few days after the date of the so-called contract must have apprised the respondent of the fact that the appellant company were in this particular case relying upon the transaction as a genuine purchase. There is no evidence as to the respondent's knowledge, since counsel for the appellant company did not venture to cross-examine him on the point, and it seems an extraordinary thing to ask this court to presume such knowledge in the absence of any suggestion in the evidence. As to the letter of confirmation, here again the cross-examiner was too timid. Counsel for the appellant company suggests in his factum that the respondent must have known, when he received that letter, that the Winnipeg officials of the company were unaware of the trick that had been played upon him. That is a contention which, if it was to be insisted upon, should have been raised at the trial and pressed in cross-examination.

But it is surely extravagant to suggest that any inference can can be founded upon the silence of such a man as this respondent in these circumstances, even granting the assumptions upon which the appellant company's counsel asks us to proceed. The respondent was at least aware of this, that the one person who was acquainted with the material facts was the appellant company's agent Simpson, the material facts, that is to say, not only of the impugned transaction itself, but touching the appellant company's business practice and the risks, if any, they were taking in treating this contract as an enforceable sale, and if we are to speculate as to what was passing in the respondent's mind, with-

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out the benefit of his own explanations, why should we suppose him to have assumed that their agent would not protect the appellant company by giving them full information?

The next subdivision of this topic concerns the question whether, assuming there is some evidence of a determination not to rescind, there is any evidence of expression by word or by act of that intention in such a way as to constitute an election within the meaning of the law. Expression by word there was none, since the casual conversation already referred to cannot be brought within that category. There was no communication to the other party concerned, and it is impossible to affirm that such a vague casual expression uttered in such circumstances was uttered, to use the language of Bramwell, B., in *Croft* v. *Lumley*, 6 H.L. Cas. 672, "under circumstances which bind him." I have already said sufficient to shew that the respondent's inaction did not fall within Lord Blackburn's definition of unequivocal act in *Scarf* v. *Jardine*, 7 App. Cas. 345, at 361, "An act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way," or within Baron Bramwell's language in the passage quoted in the judgment of the Exchequer Chamber in *Clough's* case, L.R. 7 Ex. 26, with approval: "Act inconsistent with his avoiding."

This much the law makes clear, that the determination of the victim's choice alone does not in itself constitute election. The law does not, as I have already said, take note of subjective events in the stream of consciousness save in relation to or as manifested by some external word or deed. See *Clough's* case, at 34 and 35; *Morrison's* case, L.R. 8 Ex. 197, at 203, 204, 205, and 206. In what circumstances the expression of an actual intention to take one course or the other, adequate in itself, but not communicated to the other party concerned, is sufficient to constitute an election in such case as this does not concern us here. Nor are we concerned with the question suggested by a comparison of the judgment of Lord Blackburn in *Scarf* v. *Jardine*, 7 App. Cas. 345, with the judgment of the court in the Exchequer Chamber in *Morrison's* case, whether (there having been no intention in fact to elect) an election is constituted by an act unequivocal in the sense in which Lord Blackburn used the word in *Scarf* v. *Jardine*, at p. 361, knowledge of which has been communicated to the

wrongdoer; or whether, in addition to that, the wrongdoer must be shewn to have changed his position in consequence of the defrauded party's act, and to have done so reasonably on the faith of the victim having made an election in fact. (See *Morrison's* case.)

I come now to consider whether, under the three alternatives above mentioned, the appellant company have shewn that the respondent has precluded himself from disaffirming.

First, then, has he so precluded himself because he delayed his disaffirmance for an unreasonable time?

The conclusion I come to is that there is no absolute rule of law that a party to a voidable contract entitled to avoid it on the ground that it was procured by fraud will be held to have elected not to do so by reason solely of the lapse of time without disaffirmance so long as the contract remains wholly executory.

I emphasize the fact that I am discussing only those cases where no property has passed, where possession of nothing has been obtained, that is to say, where the party seeking to avoid the contract has acquired nothing which it would be his duty to give up and where the party guilty of the fraud has done nothing in performance of the contract which the contract required him to do. Such cases must, of course, be distinguished from cases where the party defrauded has received some benefit under the contract which it would be his duty to give up on disaffirmance, or where, as in the case of an allotment of shares in a joint stock company, the party defrauded has, by acquiring the shares, at the same time acquired a status involving obligations or potential obligations to third persons.

I ought perhaps to mention that in *Aaron's Reefs* case, [1896] A.C. 273, Lord Watson and Lord Herschell pointed out that the defrauded person was not seeking the aid of the court to rescind the contract; "he is merely resisting its enforcement by the party guilty of the fraud"; and even in cases in which the actual interference of a court of equity is sought, as was laid down in *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218 (I refer to the judgment of Lord Penzance at p. 1231), delay is only material, first, as affording evidence of waiver of the right to rescind because in the circumstances it may imply acquiescence or seem as making it practically unjust to give a remedy.

In the elaborate discussion in *Clough's* case, L.R. 7 Ex. 26, by

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Lord Blackburn, then Blackburn, J., there is no suggestion of the existence of any such rule; and in *Morrison* v. *Universal Marine Ins. Co.*, L.R. 8 Ex. 197, in the Exchequer Chamber (Blackburn, J., being one of the court), it is said, at p. 205:—

> The learned judge further told the jury that they were to consider whether the election was exercised within a reasonable time, telling them that the party to elect must do so within a reasonable time. It is not necessary to consider whether this direction is correct or whether the party entitled to elect may not do so at any time, unless in the meantime he has elected to affirm the contract, or unless the rights of third parties have intervened, or the other party to the contract has altered his position, under the belief that the contract was a subsisting one; for, if the latter be the correct view, the direction of the learned judge was too favourable to the plaintiff, and of course he cannot complain of it.
>
> If indeed it had appeared that in consequence of the delay and of the absence of protests by the defendants, the plaintiff's position had been altered, and he had thereby been induced to believe that the defendants intended to waive their right to avoid the contract of insurance, and had consequently abstained from affecting insurance elsewhere, we should probably have thought that, though there had been in fact no exercise by the defendants of their right of election, the case fell within the view taken in *Clough* v. *L. & N.W. Rly Co.* and that this question ought to have been submitted to the jury. But, in truth, although the plaintiff was examined as a witness on his own behalf, he did not assert that he was induced by the defendant's conduct to think the policy a binding one, and consequently abstained from effecting a fresh policy.

One must not overlook the fact that in *Morrison's* case, as well as in *Clough's* case, the Exchequer Chamber was dealing with a contract which had been in part executed. *In Morrison's* case, indeed, not only had the insurance company received the premium, but, after knowledge of the misrepresentation giving them the right to avoid the contract of insurance, they had actually delivered the policy to the plaintiff and in fact took no step to rescind the contract until after they learned of the loss of the risk.

In *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273, Lord Watson, at 291, Lord Herschell, at 291, Lord Macnaghten, at 293, Lord Davey, at 295, all expressed themselves in a manner which seems hardly consistent with the view that as applicable to executory contracts there is any such rule of law.

Although I think it very doubtful indeed whether cases of equitable election for or against an instrument under which a person is entitled to a benefit, but in circumstances in which the law requires him, if he accepts the benefit, to submit to some disadvantage in order that the instrument may take effect as a

whole—although I think it very doubtful whether such cases and the principles governing them can usefully be applied except with a good deal of circumspection to cases involving the right to rescind a contract on the ground of fraud, still it may be worth while to point out that in such cases neither the right to elect nor the right to put another person to election is forfeited merely by delay in enforcing the right. (*Brice* v. *Brice*, 2 Molloy 21; *Butricke* v. *Broadhurst*, 1 Ves. 171; *Lord Beaulieu* v. *Lord Cardigan*, Amb. 532, 3 Br. P.C. 277; *Spread* v. *Morgan*, 11 H.L. Cas. 588; *Padbury* v. *Clark*, 2 Macn. & G. 298.)

I have said sufficient to shew that, assuming there is such a general rule as that contended for, there was no delay which, according to any standard of reasonableness that could fairly be suggested, could be described as unreasonable.

The next ground upon which it is argued that the respondent is precluded from disaffirming the so-called contract is that by his conduct he led the appellant company reasonably to believe that he intended to affirm the contract and that upon this belief they acted to their prejudice.

I am unable to find any reason for thinking that the appellant company were in any way influenced by what the respondent did. Knowledge of Simpson's fraud must be imputed to the appellant company, or, to put it in another way, the respondent cannot be put in a worse position in relation to the appellant company than he would have been in if the Winnipeg employees of the company had been instantly informed by Simpson of the trick he had played on the respondent. On this assumption the sale which the appellant made against the respondent's purchase in consequence of Simpson's telegram of the 30th must either be regarded as a speculation upon the respondent's probable attitude with reference to the contract or as evidencing a determination to take the risk of fastening the transaction upon the respondent notwithstanding what occurred; and indeed it is sufficiently evident that this latter is the explanation in fact of their conduct after they became aware that Simpson was not shipping his wheat for October delivery.

But a fatal objection to this contention is that in order to maintain that it was incumbent upon the appellant company to shew affirmatively that the respondent's conduct had led them to act in a manner prejudicial to their interests; but their representative

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who gave evidence was not asked by the counsel for the appellant a single question upon the subject. The passage quoted above from the judgment in the Exchequer Chamber in *Morrison's* case, L.R. 8 Ex. 196, plainly indicates the course the appellant's counsel should have taken.

But that is by no means all. It is abundantly evident that there was a considerable correspondence between Simpson and the Winnipeg office. This correspondence is not produced, and we may only guess of the light it would have thrown upon the motives and reasons which actuated the appellant company in not buying again to protect themselves at a time when prices may have been favourable to them; the onus being upon them, they cannot with any shew of plausibility, while withholding these communications, ask a court of justice to infer that what they did was the result of any belief upon the point whether the respondent was likely to affirm or disaffirm the sale which Simpson was trying to fasten upon him.

The next contention is that the respondent by his delay prejudiced the interests of the appellant company.

On the point of fact it seems reasonably clear that the appellant company, if prejudiced at all, was prejudiced by the failure on the part of Simpson to inform them of the real circumstances in which the alleged contract was procured.

The argument is, moreover, demurrable in point of law. It is quite true that in the judgment in *Clough's* case, L.R. 7 Ex. 26, an expression is used which seems to indicate that prejudice owing to delay suffered by the wrong-doer may be a reason for disabling the defrauded person from setting up the fraud. But the expression is *obiter*, and when read in connection with the judgment in *Morrison's* case, *supra*, it is clear that the cases contemplated are those in which the conduct of the defrauded party constitutes an estoppel and those mentioned by Spencer Bower in the treatise on misrepresentation and fraud in Lord Halsbury's collection, namely, those cases in which some property has passed into the hands of the wronged person, some property, that is to say, which could have been restored in specie at the moment it was received, that had been lost, destroyed or affected in such a way as to make specific restitution on part of the victim impossible.

Fry (Specific Performance, p. 369), points out that there is

some ground for thinking that even in such cases the plea may be effective unless the destruction or deterioration of the property is caused by the conduct of the person wronged; and there is some support for this in the observations of the Law Lords in *Adam* v. *Newbigging*, 13 App. Cas. 308.

There is, at all events, so far as I can see, neither authority nor principle in favour of the suggestion that in the case of such a contract as this the defrauded party may lose his right of rescission because the other wrongdoer chooses to make collateral arrangements on the chance that the former will uncomplainingly submit to be victimized.

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ANGLIN, J.:—I doubt whether, upon the evidence in this case, I should have held that the defendant was so drunk when he signed the agreement in question that he was incapable of making a binding contract. But the trial judge has found that he was, and that his condition was known to the plaintiff's representative who procured his signature and we must accept these findings. It follows that the contract so executed was, according to English law, not void, but voidable at the defendant's option. The question presented on this appeal is whether explicit affirmative ratification is necessary to render such a voidable contract unassailable or whether by standing by for an unreasonable length of time, with full knowledge of what he has done, and that the other party assumes the contract to be valid and binding, the erstwhile drunken man does not forego his right to elect to avoid it. The trial judge took the latter view; the Appellate Division of the Supreme Court of Alberta, the former.

Since the voidability of the contract depends not merely upon the intoxication of the party entitled to avoid it, but upon the knowledge of his condition by the other party, who is presumed to have taken advantage of it, the position and the respective rights of the parties are, in my opinion the same as in the case of a contract procured by fraud. The duty of a person entitled to rescind for fraud is to exercise his option to do so promptly when he becomes aware of the circumstances which entitled him to repudiate liability. He cannot with knowledge stand by indefinitely until he has satisfied himself whether it will be to his advantage to repudiate rather than affirm the contract. Especially is this the case where the subject matter is of a highly speculative nature.

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What is a reasonable time must always depend on the circumstances. Here the defendant on the following day acquired full knowledge of the contract which he had executed on September 30. He knew on October 3 or 4 that the plaintiff regarded that contract as subsisting and binding. He knew that wheat was an extremely speculative commodity, its market price varying from day to day. On October 20, he was written to by the plaintiff as to the shipment of his grain, and thus again had express notice that they were relying upon his making delivery according to his contract. Yet it was not until November 6, when the price of wheat had greatly advanced, that he took the first step towards repudiating liability. In my opinion this was entirely too late. By his conduct he had led the plaintiffs to believe that he did not intend to rescind and they had acted on that belief. I think he thus waived his original right to elect to avoid the contract and must be taken to have elected to affirm it, as he undoubtedly would have done had the market price declined instead of advancing. I find nothing in the decision in *Matthews* v. *Baxter*, L.R. 8 Ex. 132, at all inconsistent with the view that failure to repudiate within a reasonable time, where the circumstances are such that, in justice, the right of election should be exercised with promptness, should be deemed tantamount to an express ratification.

I am, with respect, of the opinion that this appeal must be allowed and the judgment of the learned trial judge restored. The plaintiffs are entitled to their costs in this court and in the Appellate Division. *Appeal allowed.*

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PURDY AND HENDERSON Co. v. PARISH OF ST. PATRICK.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. October 30, 1917.

1. RELIGIOUS INSTITUTIONS (§ VII—50)—BUILDING CONTRACT—POWERS OF PRIEST AND BISHOP—CORPORATE SEAL.

An agreement for the erection of a church, entered into by a priest on behalf of the parish, with knowledge thereof by the bishop, will be presumed to have been executed with the authority of the latter, and is binding upon the ecclesiastical corporation; the contract being entered into under proper authority and for the necessary carrying out of its corporate purposes, cannot be attacked for the want of the corporate seal, particularly after the contract had been executed.

2. CONTRACTS (§ IV A—321)—BUILDING CONTRACT—EXTRA—CHANGES—"WRITTEN INSTRUCTIONS."

Changes by way of substitution are not necessarily extras, except in cases where the substitution is of a character which necessarily involves greater expense; the plans may form the "written instructions" required by the agreement to make such changes.

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Stuart, J.

APPEAL by plaintiff from a judgment of Hyndman, J., giving the plaintiff judgment for a portion of its claim, and a cross-appeal by the defendant, in an action on a building contract. Varied.

C. S. Blanchard, for appellant; *E. F. Ryan*, for respondent.

HARVEY, C.J., concurred with Stuart, J.

STUART, J.:—There was some uncertainty as to the exactly proper name of the defendant corporation but any necessary amendments were applied for at the trial and were, I think, properly allowed.

The action is upon an alleged contract for the construction by the plaintiff for the defendant of a church building in Medicine Hat. Two initial questions raised were, (1) whether the contract had been entered into by any person or persons having authority to bind the defendant and (2) whether the contract had been executed in the proper form inasmuch as it was not under seal.

By Ordinance No. 32 of 1895 it was recited that the property of the parishes and missions of the Catholic Church had been under the management of the Catholic Bishop of St. Albert and that the said Bishop "wishing to be assisted in the management of the said property" had for that purpose prayed for the incorporation of the parishes and missions. It was therefore enacted that

> if any parish or mission of the Catholic Church owns or wishes to acquire land for the erection of a church, chapel, parsonage, house, or for a cemetery, or other worship purposes, such parish or mission, from the fact of its canonical erection, shall become a body corporate and politic which shall be represented by his Lordship the Bishop of St. Albert and in case of death or of absence by the administrator of the diocese by his vicar-general or the dean of his clergy and the priest canonically appointed for the administration of such parish or mission with power to associate with them for any period of time two other members or representatives of the said corporation.

It was contended that the true interpretation of this clause is that it was only in the case of the absence or death of the bishop that either the priest or the two associated members would have any authority. Remembering, however, the words of the preamble, which, in cases of ambiguity, may be resorted to as an aid to interpretation, it seems to me to be clear that this is not correct. The real meaning, in my opinion, is that the parish when incorporated is to be represented by the Bishop and the priest and that these two have power to associate with them for any period of time two members of the local corporation. In so far as the statutory law is concerned the bishop and the

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priest stand on an equal footing although of course in the internal economy of the church and under its canonical law their relationship may be entirely different; but with this latter I think we have in this court nothing to do. It is obvious that it is the ordinance which directly effects the incorporation. Once a parish is erected according to the canons of the church the ordinance thereupon operates and makes it a body corporate.

It is also obvious that the bishop would, under such a scheme, be a representative of as many parishes in his diocese as might be "canonically erected." The instrument by which the bishop erected the parish in question was put in evidence and there was no question made of its regularity. It would seem to be also clear that the bishop owing to his general and no doubt superintending position as a representative member of so many local corporations was not intended to be present and acting in so many places at once and it would therefore be natural, as is shewn to have happened in this case, that he should leave a good deal to the local representative.

I do not attach much importance to the clause in the instrument erecting the parish whereby the bishop declares that two members, approved by himself, should act with him and the priest. In view of the words of the ordinance "for any period of time" and the use of the words "associate with them" I think it is clear that the bishop and the priest were given entire discretion both as to the period of time and as to the extent of the association. The instrument of course did not name any particular persons and I think, therefore, it added nothing in this respect which was not already in the ordinance. In the instrument the bishop speaks of himself, the priest and these two members as "a council" and there was a reference to such a body in the evidence. Two such persons are spoken of as having been present with the priest when the proposals for a contract were being verbally discussed but whether they were actually present and authorized the execution of the contract by the priest is not so clear. The inference is at least a fair one from what was said that they knew of its general terms and knew that the priest intended to execute it and that he had executed it whether they were actually present when he did so or not.

The real objection on behalf of the defendant is that the

written contract, at least with the interpretation sought to be put upon it by the plaintiff, was entered into and signed by the priest on its behalf without the authority of the bishop.

The facts are that in the year 1912 the parish had sold an old church site for about $65,000 and it was proposed to use this money in the erection of a new church. Negotiations were entered into by Father Cadoux, the priest, and one Cutter, an architect, acting for the parish, with representatives of the plaintiff and a meeting took place at which these people and the two so called "church wardens," but not the bishop, were present. Then a written contract was drawn up by which the plaintiff agreed to erect the proposed church upon the basis of actual cost plus ten per cent., according to plans and specifications to be prepared by Cutter. The plaintiff company agreed to prepare an estimate of the cost and the defendant was to be at liberty to withdraw if the amount was too large. This contract was signed on February 4, 1913. Plans were prepared and also some portion, but only a portion, of the specifications. The plaintiff by means of the plans and partial specifications and by means of verbal explanations and instructions by Cutter prepared and submitted alternative estimates according to slightly different methods of construction. These estimates were submitted in writing on March 28 and on May 2. Father Cadoux wrote to the plaintiff's representatives stating that, in the defendant's name, he asked the plaintiff to take up the contract for the church according to the agreement of February 4 "the church to be built according to estimate 'A,' changing roof construction to wood or steel, approximate cost $61,572."

The work was then proceeded with, the foundation stone was laid by the Bishop of St. Albert and as much as $51,000 odd paid on account of the construction.

The trial judge found that, upon the proper interpretation of the contract, the estimate and the letter of May 2, the plaintiff had agreed to build the church for the exact sum mentioned. If he is correct in this, which is a matter to be dealt with, the objection as to the authority of Father Cadoux to sign the contract does not really arise, because the bishop in his evidence says that he only assented to the contract on condition that the cost was not to exceed $62,000. If that was the true meaning of the contract it is admitted that he assented to it.

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In my opinion, however, the contract must be taken to have been executed by proper authority even if the plaintiff's contention that its true meaning is that the sum mentioned was only an estimate, be found to be correct. The part taken by the bishop in the matter was described by him on examination for discovery and there was no other evidence in regard to it. Father Cadoux was not at the trial. He had gone to France when the war broke out. The "church wardens" who were in office at the time were not called. The bishop (he had then become Archbishop) stated that an old church site had been sold for about $65,000, that it was then decided to erect another church, that he was consulted about it by Father Cadoux, that he did not go to Medicine Hat but it was done by correspondence, that he first gave his consent to the erection of a new church a few months perhaps before they started building, that he did not see the contract nor sign it, that he "left that to the parish," that he left the details of the contract to Father Cadoux and other members of the parish council, that he saw the plan of the building, that he remembered the contract was to the amount of about $62,000 then, "and it was what I consented to," that he laid the corner stone of the new church, that his consent to the building was confirmed by letter, that Father Cadoux as parish priest was authorized by him to enter into a contract for the erection of a church and that the requirements of the corporation in that respect were satisfied, that the price was not considered by him as a detail, that his consent was not to go beyond $62,000, that he was never asked to give his consent for anything more and he had no chance to discuss the matter or to give his consent any more, that the details of construction and any changes in design and detail were left to the parish council, that everything went smoothly and there was no difficulty as far as he knew and he thought all parties were satisfied and he did not enquire, that he understood the contractor had undertaken to build a church of certain dimensions for $62,000 and that there was no commission to be paid or anything like that.

Although it seems to have been intended to put in evidence the correspondence which passed between Father Cadoux and the archbishop it was not in fact put in. Only some immaterial portions were read by counsel. We are, therefore, in the dark as

to the reason for the misapprehension which the archbishop evidently entertained as to the contents of the contract. From what he said about payment of a commission it is, however, difficult to infer that Father Cadoux explained very fully the contents of the proposed agreement.

Cases like *Bernardin* v. *North Dufferin*, 19 Can. S.C.R. 581, and *Mackay* v. *Toronto*, 39 O.L.R. 34, and nearly, if not quite, all the cases to which those two lead back; deal rather with the formality of the contract. In hardly any of them was there any question that the proper authorities had acted. That point would indeed have come up in *Mackay* v. *Toronto*, if the case had not gone off on the question of formality.

The position here is that a corporation was represented, according to statute, practically by 2 persons. A contract in writing, on behalf of the corporation, was, with the evident knowledge of one of them, entered into by the other. The archbishop knew of the existence of a written contract. He did not ask to see it. He never did see it. But he knew it was to be signed and when it was signed he knew it had been signed. He knew the other contracting party was proceeding to perform its part of it by performing a great deal of very expensive work. He assisted at the commencement of the work by laying the foundation stone. The question then is:—Is this corporation to be allowed in these circumstances to say that the contract had not been entered into by a person having proper authority to do so?

The case which seems to me to come nearest to the present one is *Wilson* v. *West Hartlepool R. Co.*, 2 DeG. J. & S. 475; 46 E.R. 459. In that case the agent of a railway company, who was merely traffic manager and had no authority to sell lands on its behalf, signed a contract to sell to the plaintiff certain land. One of the terms of the contract was that the company should lay down a branch line to the land. The company's surveyor measured the land, the company's engineer laid down the branch line to it, the plaintiff was let into possession and his machinery for certain works he intended to erect there was brought in the company's wagons and deposited there. It was held by Turner, L.J., one of two judges sitting in appeal (and the other judge did not dissent though he had doubts on another ground altogether as to the plaintiff's right to succeed), that although the

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company's agent contracted without sufficient authority the company must be held by its acts to have ratified the contract and that the contract thereby became binding on the company.

So also here, where the contract was clearly within the avowed object and purpose of the corporation as mentioned in the Ordinance of 1895, I think, in view of what occurred, and in view of the admitted knowledge of the archbishop that a written contract had been entered into, of his knowledge that it was being proceeded with and his participation therein to the extent of laying the corner stone, that the corporation cannot now be heard to say that the contract, whatever it properly may be taken to mean, was not entered into by persons having proper authority to do so. And I think this must be so whether Father Cadoux incorrectly reported the words of the contract, or whether he correctly reported them and the archbishop merely interpreted them as the trial judge did, and even if that interpretation should be found to be incorrect. The plaintiff certainly was not responsible for the error, assuming that there was one.

With regard to the absence of the corporate seal I think, when once it is found that the contract was entered into by the proper authority, that this omission is not in this case fatal. The ordinance does not specifically provide that contracts of the corporation must be under seal and therefore the principle of the decision in *Mackay* v. *Toronto*, which followed *Young* v. *Leamington*, 8 App. Cas. 517, does not apply. The instrument by which the bishop canonically erected the parish did indeed contain such a provision, but I can find nothing in the ordinance which would authorize the bishop to make such an enactment, at least so far as outside parties are concerned and aside from the internal and domestic regulation of the church and the corporation.

The true principle as laid down by Wightman, J., in *Clarke* v. *Guardians of Cuckfield Union*, 21 L.J. Q.B. 349, at 354, is this:

> Wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect . . . and orders are given at a board regularly constituted and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created and the work is done, or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods and the benefit, and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and to bind

the rest, the formality of a deed or of affixing a seal were wanting and then say . . . we are not competent to make a parol contract and we avail ourselves of our own disability.

I think this principle is now fully accepted as sound and the defendant did not indeed question this general rule. But it was contended that the conditions to which the principle is applied did not exist in this case.

In my opinion the Ordinance of 1895 discloses plainly the purposes for which the parishes when canonically erected were declared to become *ipso facto* corporations. It was that they might hold real property "for the erection of a church, chapel, parsonage, house or for a cemetery or other worship purposes." I think, therefore, that for the consideration of this case there is nothing in the distinction attempted to be made between a trading and an ecclesiastical corporation.

It was also contended that the conditions as to acceptance and complete execution of the whole consideration for payment were not fulfilled. But in my opinion the words of Wightman, J., practically quoted as they are as authoritative by Halsbury, vol. 8, para. 850, do not in terms say that nothing less will be sufficient than what is there laid down. That judge was speaking no doubt with the facts of the particular case in mind. But it would appear to me to be fairly clear that there may be cases, of which the present is one, where the principle will be the same, though for special reasons arising out of the circumstances the work has not been fully completed. Indeed, the plaintiff in this case only sues for the cost of work which was actually done.

It must be remembered that all we are at present concerned with is the question of initial liability, that is whether the contract at the outset was a binding one. The question of acceptance of work as satisfactory is an entirely different one. It is true that the defendant from the nature of things could not return the church. It had become part of the realty. But I gather this was the case even in the case of *Clarke* v. *Cuckfield Union*, *supra*. Certain water closets had there been erected in a workhouse.

It seems to me that the real principle is that of ratification, or possibly of estoppel. It would really be a fraud upon the plaintiff if the defendant were now allowed to take advantage

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of the absence of a seal. The case of *Wilson* v. *West Hartlepool R. Co.*, *ubi supra*, in fact covers the matter of the absence of a seal as well as the question of the authority of the agent.

Of course the English courts have not gone as far as the American courts in this matter. The Supreme Court of the United States in *Columbia Bank* v. *Patterson*, 7 Cranch 299, 306, said:—

> Wherever a corporation is acting within the scope of the legitimate purpose of its institution all parol contracts made by its authorised agents are express promises of the corporation and all duties imposed on them by law and all benefits conferred at their request raise implied promises for the enforcement of which an action may well lie.

In 10 Cyc., p. 1031, the meaning of this is said to be "that corporations are bound by the parol engagements of their authorized agents acting within the scope of the powers of the corporation whenever an individual would be bound by the engagement of his authorized agent."

Whether we regret or not that our courts have not yet gone so far as to adopt this simple principle it appears to me to be clear that our own authorities go quite far enough for the reasons I have given to establish the binding nature of the contract which is here in question.

With regard to the contention that the Ordinance of 1895 was repealed by the Statute of 1913, c. 32, and that therefore the corporation became non-existent, I agree with the view taken by the trial judge that sec. 7 (48) of the Interpretation Act prevents such a result. S.s. 45 may also be relevant and applicable.

We come next to the question of the proper intrepretation of the contract. The following are the material words of the document:—

> 1. The contractor agrees to construct a church building for the owner . . . to provide and furnish all the materials and perform all the work necessary therefor, as shewn on the drawings and described in the specifications prepared by Cutter, owner's agent, which drawings and specifications shall be identified by the signatures of the parties hereto and shall thereby become part of this agreement.
>
> 2. The contractor also agrees to advise with the owner and owner's agent as engineers and builders to secure the mose suitable and economical materials and details of construction and the most economical methods of operation, also to make a complete working estimate of the cost tof the building before proceeding with the work.
>
> 4. The owner agrees to pay the contractor for all the material and all the labour required in the construction of the building including (certain specified things) all at the actual cost to the contractor plus ten per cent. (10%).

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7. It is also understood and agreed that the working estimate as herein provided shall be made by the contractor and approved by the owner either as made or as amended before the work of construction is begun and in case the estimate as amended or otherwise is not approved the owner shall have the option of terminating this agreement. . . .

8. Should the contractor at any time refuse or neglect to supply the workmen needed or material of the proper quality or fail in any respect to prosecute the work with promptness or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified to by the owners' agent, the owner shall be at liberty after one week's written notice to the contractor, to provide such labour or materials and to deduct the cost thereof from any money due or thereafter to become due to the contractor under this agreement, and if the owner's agent shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work called for under this agreement, and all materials, tools and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor, and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this agreement until the said work shall be wholly finished, at which time if the unpaid balance of the money to be paid him under this contract shall exceed the expenses incurred by the owner in finishing the work, such excess should be paid by the owner to the contractor; but if such expenses should exceed such unpaid balance, the contractor shall pay the difference to the owner.

As before stated, plans were prepared by Cutter as well as partial specifications referring only to the structural and reinforced steel work. The plaintiff's officials, knowing full well that they had not full specifications in writing signed by the parties as provided in the agreement, proceeded to make an estimate based upon what they had and upon mere verbal explanations by Cutter as to what he wanted done. And thereafter followed the letter of May 2 already mentioned in which Father Cadoux used the words "approximate cost $61,572."

The trial judge held that the proper interpretation of the contract was that the plaintiff had agreed to construct the building for the definite sum $61,572.

It seems very hard to reconcile and harmonize the different provisions of the document. The concluding sentences of clause 8 could certainly not be made effective at all unless a certain definite sum were fixed. On the other hand, it is equally difficult to discern how the basis of "cost plus ten per cent" laid down in par. 4 could be adopted or applied at all if a definite sum is taken to have been agreed upon.

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The only reasonable solution that presents itself to my mind is this:—The parties must be taken to have contemplated in the first instance that the contract would be fully and regularly carried out by both parties, that is, that there would be no delay in either the work or the payment for it. In this view clause 8 provides for an exceptional contingency. Leaving it aside, therefore, for the moment it seems to me that it cannot be found from the document that the parties intended that even if everything went smoothly and regularly as I suggest and the work was completely executed and it was found to have cost only, say, $55,000, there would still have been a liability on the defendant to pay $61,572. I think it is clear that the defendant would only in such a case have expected to pay and would have been held bound to pay only the $55,000. In other words, aside from clause 8 it can be accepted I think as correct that the sum of $61,572 was meant *at least* only as a maximum, and not also as a minimum, or in other words, a fixed price.

But was it, further, actually a maximum? Was it really intended that if the contractor actually did the work for less than the sum estimated he should be confined to actual cost and yet if it cost more that he was then confined absolutely to the estimate, or in other words was the estimate a guaranteed maximum?

In my view, taking all the circumstances of the case together and the general terms of the contract, I think the sum mentioned was intended by the parties to be exactly what Father Cadoux called it in his letter, viz.:—the "approximate cost."

When we remember that under clause 2 the plaintiff is put in the position of a trusted adviser of the defendant, that the plaintiff agreed by the very contract itself to make, as a skilled and experienced engineer and builder, a working estimate of the cost of the proposed work, I think the inference ought to be made that it was intended that the defendant should be entitled to act in reliance upon the estimate so made, and that while some excess might be found unavoidable yet it must be within reasonable limits. In other words, the plaintiff was I think entitled to some reasonable margin but was not entitled to claim whatever the work may have turned out to cost no matter how enormous the excess over the estimate might have turned out to be.

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And I reconcile clause 8 with this by pointing out that it was inserted to cover an exceptional case, to be applied not when the contract had been fully and regularly performed, as the parties of course originally intended, but in the naturally *unexpected* case of a breach of the contract, the case where the contractor had fallen down and become unable to fulfil his covenant. For the purposes of such a contingency I think the parties meant to take the sum of $61,572 as the basis of calculation. In such a contingency of course the actual cost of construction by the contractor could not be ascertained. He would not have done the actual construction, and so for the purpose of this exceptional contingency the estimate was taken as the amount which, according to the original natural expectation of the parties, would have been the contract price.

The following statement of what happened is taken from the judgment of the trial judge:—

> Work was begun on or about May 10, 1913. According to the evidence of the plaintiff, very early in its history difficulties arose through lack of funds, and in parts of the months of July and August operations were either wholly or partially suspended on this account, and the plaintiff company claims that by reason of this the work was prolonged into the season of frost, which greatly increased the cost of the work, disorganized gangs of workmen and labourers, and interfered generally with efficiency. Up to February 14, 1914, there had been paid by the defendant corporation on account of the contract the sum of $51,078.67, and accounts had been passed and approved but not paid amounting to an additional sum of $29,312.99, and there were incurred further expenses subsequent to February 14th amounting to $7,615.10, and according to the evidence of the plaintiff company it would still require about $8,000 to finish the work. The cost, therefore, when completed, would amount to about $96,000 instead of $61,572 as originally estimated. On account of defendant's default in payment plaintiffs refused to proceed further with the work.

The plaintiff asks in the action for judgment for the sum of $36,914.68 and interest and for a declaration that it is entitled to a lien upon the land pursuant to the Mechanics Lien Act under which a claim of lien had been filed.

Although the trial judge clearly held that the proper interpretation of the contract was that the plaintiff had agreed to do the work for the amount of the estimate it seems to be very difficult to understand the real meaning of the formal judgment as entered. Par. 6 of the formal judgment says:—

> And this court doth further declare that the plaintiff is entitled to recover from the defendant the cost of the work done and materials supplied

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for the purpose of (a) the work described in the specifications mentioned in the agreement in the pleadings set out; (b) certain extras; (c) certain sand and gravel; (d) certain bells, less the cost of completing the work as described in the said plans and specifications and less the sum of $51,378.67, etc.

In view of the declaration in par. 2 that the contract meant that the work according to the original plans and specifications was to be done for $61,272 it is, I confess, impossible for me to understand what was meant by this clause. It seems to me very obscure. But in view of the facts that the plaintiff appealed and that on the argument it was assumed that the judgment meant $61,272 was the outside limit which the work as originally intended should cost I think we must take it that the parties understood the judgment in that sense.

Taken in that sense I think the judgment did not give the plaintiff quite as much as it was entitled to. For the reasons already given I think the plaintiff was entitled to exceed the amount of the estimate as long as the excess was kept within what might, under all the circumstances of the case, be found to be reasonable.

There were also serious questions involved as to changes in the original specifications and as to extras. It must be carefully observed that these two things are possibly distinct. Changes by way of substitution are not necessarily extras and are only so in the cases where the substitution is that of something which necessarily involves greater expense. A substitution which should not necessarily involve any additional expense cannot properly be called an extra.

I think, therefore, the reference which was directed should be a reference to a proper referee to ascertain and report in the first place what the exact contract was, that is, what it was that the plaintiff exactly undertook to do for the estimated cost of $61,572. This is necessary because the specifications were not completely put into writing. The estimate was based partially upon verbal explanations by Cutter to Marble. It may be somewhat, perhaps very, difficult to arrive at the facts on this point but the parties and the referee must do the best they can. The difficulty is one for which both sides are equally to blame. This report should cover any changes subsequently made which from their nature and from the time at which they were decided upon would not necessarily, that is ought not to, involve any additional expense

unless the contractor were in some way at fault. The referee should then enquire, ascertain and report what ought to be considered, in all the circumstances of the case, and assuming no fault to have occurred on either side, a reasonable margin of increase over the estimated cost of this work. In arriving at this amount the referee should bear in mind that the contractors had agreed as skilled engineers and builders to make an estimate upon which the defendant could with some degree of safety rely. He will be entitled of course to take into consideration the unusual character of the building and to make allowance for any possible contingencies which a reasonably skilful and experienced architect or engineer and builder might not be expected to anticipate and provide for in preparing an estimate upon which he knew his employer proposed to rely. This of course will not open the door to any consideration of the contingencies which in this case did actually occur. The referee is to judge the matter as of the date when the estimate was made and not in the light of any subsequent knowledge. It will also be remembered of course that the estimate *included* the 10% commission.

There next arises the question of extras, that is, of (1) changes or substitutions necessarily involving additional expenses and (2) changes in the form of pure additions which would obviously involve additional expense.

The provision of the contract relating to extras reads as follows:—"if any changes in the plans and specifications shall be required they shall be made by the contractor in accordance with written instructions of the owner's agent."

The trial judge was of opinion that the defendant was liable only for such changes as had been instructed to be done by Cutter in writing and he relied upon the decision in *Lamprell* v. *Billericay Union*, 18 L.J. Ex. 282. In that case, however, it plainly appears that the contract provided that the contractor should not be considered as having authority to make additions without written instructions. But the present contract merely *requires* the contractor to make changes in accordance with written instructions. Had it not been for that clause the defendant could not have forced the plaintiff to make any alterations at all if it had seen fit to refuse. No doubt there might still be a reasonable limit beyond which the contractor might not be required to go. But

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certainly the clause says nothing about the case where the contractor, although not bound to do so, does in fact accede to a verbal request and does make the alteration. There is no word about his not being entitled to be paid in such a case, I think, therefore, this clause in the contract does not stand in the plaintiff's way. This is the view taken in *Diamond* v. *McAnnany*, 16 U.C.C.P. 9, and adopted in Hudson, Building Contracts, 4th ed. vol. 1, p. 458.

The real question is the general one whether the additions ordered were ordered by competent authority sufficient to bind the defendant corporation. The matter is one of some difficulty in the peculiar circumstances of the case. At least it can be said that when the parties were providing in the contract for placing upon the plaintiff an *obligation* to make additions they evidently intended that the owner's agent, that is Cutter, should have authority to represent the owner. But it is a serious question whether the insertion of that clause was sufficient to constitute Cutter the defendant's general agent for the purpose of ordering extras verbally. I have very grave doubt upon that point and I should hesitate to say that Cutter's authority went so far. But practically I think the matter is not important because it is apparent that so far as most of the alterations are concerned they were made in accordance with plans or sketches on paper made by Cutter and handed to the plaintiff's officials. If these plans come within the meaning of the words of par. 6 "in accordance with written instructions from the owner's agent," then the work done in pursuance of them should be allowed.

In *Alberta Building Co.* v. *Calgary*, 16 W.L.R. 443, it was held by Scott, J., and in *Munro* v. *Westville*, 36 N.S.R. 313, by the Supreme Court of Nova Scotia, that plans made by the architect did constitute written instructions. *Myers* v. *Sarl*, 30 L.J. Q.B. 9, 3 El. & El. 306, 121 E.R. 457, might appear at first sight to be a contrary authority, but it will be observed that in that case the contract specifically said that the written instructions must be *under the hand* of the agent. No such words are in the contract here and signature is not specifically provided for. As the clause reads the agent might comply with it by writing instructions and handing them unsigned to the builder. And I think there is no real distinction

between written words and plans made by pen and ink on paper. Very often the plan is the only way to explain what is really meant and is much more intelligible than written words could possibly be.

The trial judge did not express any opinion as to whether he considered the plans to be "instructions in writing" within the meaning of the contract. The formal judgment says nothing of the matter either.

With this intimation to the referee I think he should be directed to ascertain and report upon the cost of all additional or extra work which involved necessarily additional expense and for which written instructions as above interpreted were given.

Upon the other points in the case I think the judgment below should stand, except that while I agree with the trial judge that the plaintiff tacitly acquiesced in the delays caused by financial difficulties, I do not think this acquiescence should deprive the plaintiff of a certain measure of recompense for the additional cost resulting therefrom. The plaintiffs could not well do anything else than acquiesce.

The cost of the sand and gravel and of the installation of the bells as well as the cost to the defendant, of completing the work as originally agreed upon, and this as of the time it was stopped and, without reference to the cost of extras agreed upon but not executed, should also be ascertained by the referee as directed.

In my opinion, it would be better not to refer the matter to the clerk at Medicine Hat but to a specially qualified referee. If the parties cannot agree upon the person to be named in the order they may apply to a single judge to appoint one.

The plaintiff should be entitled to judgment for an amount to be ascertained as follows:—(1) Take first the amount to which the original estimate of $61,572 shall be found to be reasonably subject to increase. (2) The plaintiff should also be entitled to add to this any portion of the actual cost of the work done which was caused by any default, whether by failure to make payment or otherwise, on the part of the defendant in respect of its obligations under the contract but not, of course, anything due to delay or negligence on the part of the plaintiff or for which it was properly responsible. (3) Add to that the fair and proper cost of extras done under written instructions and also the cost of the sand, gravel and bells, plus, of course, ten per cent. as for the

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contractor's profit. Deduct from this the cost of completion, plus the sum already paid the plaintiff, viz., $51,378.67 and plus the sum of $300 allowed on the defendant's counterclaim. For the sum so ascertained and interest thereon at 5 per cent. from the date of the commencement of the second action (which I think is early enough for interest to begin), the plaintiff is to be entitled to move for judgment before a single judge upon the referee's report. That judge will deal with the costs of the action. But as the plaintiff has secured a substantial variation of the judgment below it should have the costs of the appeal.

If there are difficulties surrounding this case and the further proceedings hereby directed I can see no ground for sympathizing with either party. Inexcusable carelessness in business methods on both sides is responsible for nearly all the trouble. A reasonable compromise would still appear to be a sensible thing to attempt to arrive at.

Beck, J.

BECK, J.:—(after setting out the facts and reviewing the evidence)—In my view the proper interpretation of the contract, considered as it must be in the light of all the circumstances surrounding its making, is nearly but not quite that given to it by the trial judge:—(1) The contractors knew that there was available for the work only about $61,000. (2) The contractors agreed that they themselves should make the estimate of cost which was to be the essential foundation of the entire contract; essential foundation, for the contract expressly provided that if the estimate was not satisfactory to the corporation the corporation could say it would not proceed with the work. (3) The contractors submitted an estimate somewhat exceeding $62,000. It was considered and cut down by means of changes in the work and the reduced amount given and accepted as the contractors estimated which they had expressly agreed to make and furnish. (4) An estimate made under such obligations and conditions and for such express purposes is obviously something quite different from what is ordinarily spoken of as an estimate. (5) Even if such a special estimate retains something of the character of an estimate in the sense that it may be expected that the cost of the work may overrun it, the excess of cost must be taken to be limited to a comparatively small percentage. So far as the cost would exceed such small percentage of increase

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the contractors failed in their agreement to make, as was the effect of their agreement, with skill and without negligence an estimate of the cost.

I see no real difficulty in applying clause 8 of the contract to the case of the portion of the work done exceeding by a small percentage its proper proportion of the estimated cost.

As to the question of the necessity for a seal, I think this corporation partakes rather of the nature of a corporation sole than of a corporation aggregate, as commonly constituted; and I think a corporation sole, and such a corporation as this, do not necessitate a seal in order that they may be legally bound.

In the result I agree with my brother Stuart.

WALSH, J., concurred with STUART, J. Walsh, J.

Judgment voided.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

INTERNATIONAL LAW (§ I—3)—FISHING RIGHTS—BOUNDARIES—3 MILE LIMIT —"COAST"—ISLAND.

The term "coast" in the treaty of 1818, by which the United States renounced the right to fish within 3 marine miles of the coast of any British Territory, is not confined to the coast of the mainland, and a United States vessel is therefore liable to seizure for illegal fishing or preparing to fish within 3 marine miles from the shores of an island of the Dominion of Canada situated 15 miles from the mainland.

[See also *Re Quebec Fisheries*, annotated, 35 D.L.R. 1, 26 Que. K.B. 289.]

APPEAL from the judgment of the local judge for the Nova Scotia Admiralty District, of the Exchequer Court of Canada, condemning the appellant schooner to seizure for illegal fishing in Canadian waters. Statement.

Two questions were raised by the appeal. 1. Was the evidence sufficient to establish that the schooner was fishing within the 3 mile limit; and, 2. Is the limit to be measured from the mainland or is fishing within 3 miles from the shore of St. Paul's Island, situate 15 miles from the mainland of Nova Scotia, illegal under the treaty of 1818?

Code, K.C., for appellant; *Newcombe*, K.C., for respondent.

FITZPATRICK, C.J.:—This is an appeal from a judgment of the local Judge in Admiralty decreeing the condemnation and forfeiture of the schooner "John J. Fallon," her tackle, rigging, etc., on the ground that she was fishing or preparing to fish within Fitzpatrick, C.J.

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3 marine miles of the "coasts, bays, creeks, or harbours of Canada," namely, St. Paul's Island, N.S.

There are two questions presented by the evidence: 1. Whether the schooner when arrested was within the 3 mile limit of the coasts of Canada, and, 2. Whether she was fishing at the time. Drysdale, J., found that the vessel was, at the time of the seizure, within the 3 mile limit and no other conclusion is reasonably open upon the evidence. The observations taken by Lieut. McGuirk, checked and found correct by Capt. Webb, of the "Hochelaga," shew the "Fallon" and its dories to have been within the 3 mile belt off of the shore of St. Paul's Island. Capt. Stewart of the government patrol vessel "Canada" also took bearings with an instrument called a pelorus, which measures exact distances, and found that the trawls which had been left in position by the schooner "Fallon" were within the 3 mile limit. But the most conclusive evidence is to be found in the cross-examination of Capt. Oliver, from which I make the following extract:—

Q. Did you take any bearings?—A. No, sir. Q. Did the officer?—A. He said they took bearings aboard his boat. Q. Did he take bearings aboard your ship?—A. He looked at the compass. Q. Did he take the bearings on board your ship?—A. Yes, sir. Q. Did he shew you you were 1¼ miles from the shore?—A. 2¼, I think he told me. I think he told me we were three-quarters of a mile inside the limits; 2¼ miles from shore. Q. If that was correct that you were 2½ miles from shore, could you not by the use of your own compass and instruments have found out you were within the 3 mile limit?—A. I can see how near we are only by the compass, the only instrument we have. Q. If from what the officer said you were only 2¼ miles from the shore, could you by using your compass or bearings have known you were within the 3 mile limit?—A. Yes, sir. Q. The whole trouble arose by not using your compass, if you did, you could have found out?—A. Yes, but I thought we were outside the limit. I had no intention of violating the law.

It is denied, however, that St. Paul's Island is part of the coast of Nova Scotia, notwithstanding that by the statutes of that province it is made part of the County of Victoria. But whatever may be the effect of that legislation, it can scarcely be contended that the territorial waters of Canada do not extend 3 miles seaward from St. Paul's Island. Such a contention would, as pointed out by Mr. Newcombe in his argument, be at variance with the position taken by the State Department at Washington so far as concerns the eastern coast of North America, and with the accepted authorities on international law.

Wharton's International Law Digest, pp. 107-109, quotes from letters from Mr. Bayard to Mr. Manning:—

> The position of the State Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond 3 miles from high water mark and that the seaward boundary of this line of territorial waters follows the coast of the mainland, *extending where there are islands, so as to place around such islands the same belt.*

Fitzpatrick, C.J.

The same view of the extent of territorial jurisdiction is held by the British Government and has been supported on various occasions by the decisions of the British courts. *Reg.* v. *Keyn*, 2 Ex. D. 63; *The Queen* v. *Dudley*, 14 Q.B.D. 273, at 281; *The "Anna,"* 5 C. Rob. 373; see also *The "Frederick Gerring, Jr."* v. *The Queen*, 27 Can. S.C.R. 271, *per* Sedgewick, J., at 287 and 288.

The title of Great Britain to St. Paul's Island under the treaty of 1763 and by occupation is made abundantly clear in Mr. Newcombe's admirably prepared factum.

I would dismiss the appeal with costs.

Davies, J.

DAVIES, J.:—This is an appeal from the N.S. Judge in Admiralty, Drysdale, J., condemning the defendant schooner, a United States fishing vessel, as forfeited to the King on the ground that when captured she was fishing within 3 marine miles of St. Paul's Island, N.S., such island being a part of "the coast" of Canada, in contravention of the Customs and Fisheries Protection Act, R.S.C. c. 47, and amending Acts.

Two questions were raised and argued on this appeal. 1. That the proof was insufficient to establish the fact of the vessel having been, when captured, "fishing or preparing to fish" within 3 marine miles of the Island of St. Paul; and, 2. That even if that fact was proved, the Island of St. Paul, situate some 15 miles from the mainland, could not be held to be part of the "coasts" of Canada within the meaning of that term as used in the renunciatory clause of the treaty of 1818 between Great Britain and the United States.

On the question of fact as to the vessel when captured being actually engaged in fishing within 3 marine miles of the coast of St. Paul's Island, I cannot think under the evidence there can be any doubt and the local Judge in Admiralty so found.

The only answer made by the officers of the condemned ship was that they thought they were not within the 3 mile limit and that they had no intention to break the law. In most of these

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cases of alleged violation of the treaty of 1818 by fishing vessels, this excuse is generally set up. But even supposing that the excuse of non-intention to fish within the limits was advanced in good faith, the evidence in my judgment places the fact of the vessel being engaged in fishing very much within the limit of 3 miles beyond any question. The question is one of fact not of intention and dealing with the facts as we find them proved, it would require much charity to reach the conclusion that the officers were not aware that they were violating the law, even if such a conclusion was necessary to reach.

As to the legal question whether St. Paul's Island is to be held as part of the "coast" of Canada within the meaning of that term as used in the renunciation clause of the treaty of 1818, I do not entertain any reasonable doubt.

The admissions of facts in the case state

(a). That St. Paul's Island is an isolated island, covered to some extent by dwarfed spruce and very little of it is fit for cultivation. The island is situate in Cabot Strait 15 miles from Cape North, N.S., which is the nearest main land. The island is 3 miles in length and 2 miles in the widest portion of it. The island consists of grey coloured granite. (b). That St. Paul's Island has no settlers except an occasional fisherman in the summer time. The persons located there are the Dominion Government employees, that is to say:—The superintendent, the keeper of the lights, and a government life-saving crew. And when the ice is packed around the island and navigation is closed about it the lights are not lit. (c). That there are no bays, harbours or creeks in St. Paul's Island, and supplies are landed by boats from vessels standing off at sea in fine weather. For municipal and other purposes St. Paul's Island is deemed part of Victoria county.

Art. 1 of the treaty of 1818, after providing that the inhabitants of the United States should have "forever in common with the subjects of His Britannic Majesty the liberty to take fish of every kind" within certain specified limits, went on to provide as follows:—

And the United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within 3 marine miles of any of the coasts, bays, creeks, harbours of His Britannic Majesty's Dominions in America not included or within the above mentioned limits.

The question therefore resolves itself into one whether St. Paul's Island was a part of His Majesty's Dominions in America not included within the limits provided for common rights of fishing and if so whether its shores were embraced within the words "any of the coasts, bays, creeks, harbours" thereof in the renunciation.

The island is clearly not within the limits provided for a common right of fishing and in my judgment is embraced within the words of the renunciatory clause "any of the coasts, etc." of His Majesty's Dominions in America not included within the limits providing for a common right of fishing.

The argument for the appellant at bar, as I understand it, was an elaboration of that stated in the factum as follows:—

It is submitted that the very fact that the treaty of 1818 uses the words "*coasts, bays, harbours and creeks*" together indicates by all the rules of construction, that the land contemplated as that from which the three mile limit extends is such land as has coasts, bays, harbours and creeks, that is, the mainland and such islands as have these characteristics.

I am not able to accept such an argument. It practically amounts to this, that because in the treaty the word "coast" was followed by the words "bays, harbours and creeks" the renunciation only extended to such islands off the main coasts as have these latter characteristics. Why such a limitation should be read into the words "any of the coasts, bays, creeks, harbours, etc.," I cannot understand. In my judgment, "any of the coasts" is large enough and definite enough to embrace such an island lying off the mainland as St. Paul's is admitted to be.

It has always been claimed, treated and utilized as part of the King's Dominions in America and so far as I have been able to find no trace exists of any claim to the contrary having been set up since the treaty by any foreign nation.

Long before the Confederation of the Dominion of Canada, the island was by express legislation of the Province of Nova Scotia made part of the County of Victoria in that province and has for a great many years been used as a lighthouse and a station for a government life-saving crew.

If the argument advanced by the appellant was tenable it would apply to other islands, such as Prince Edward Island, Anticosti, Sable Island, etc., and would practically nullify the renunciatory clauses of the treaty.

The terms of the cession of territory made by France to Great Britain by the Treaty of Paris, 1763, clearly embrace St. Paul's Island, the islands of St. Pierre and Miquelon in the Gulf of St. Lawrence being alone retained by France. The occupation of St. Paul's Island by Great Britain since that treaty has never at any time, so far as I know, been questioned by any foreign power

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and it must be taken to be part of the Dominion of Canada, and its shores part of the coasts of the Dominion.

IDINGTON, J.:—I find no reason in fact or the relevant law for disturbing the judgment appealed from and hence am of the opinion that this appeal should be dismissed with costs.

DUFF, J.:—First, as to the sufficiency of the evidence to support the finding of Drysdale, J., that the appellant ship was found fishing within 3 marine miles of the Island of St. Paul's. I see no reason to disturb the finding. I accept the contention of the appellant ship that something more than a mere preponderance of probability is necessary to establish this. (See *Carlson* v. *The King*, 17 D.L.R. 615, 49 Can. S.C.R. 180.) It cannot be said that the evidence in this "case is in an uncertain and unsatisfactory state." (*The Kitty D.* v. *The King*, 22 Times L.R. 191.)

I proceed to consider the questions of law raised by the appeal. The factum of the Attorney-General contains an argument conclusively shewing that St. Paul's Island is British territory, and that it is *de facto* and *de jure* part of Canada, and that being so, the only remaining subjects for consideration are: 1. Is St. Paul's Island included within the phrase "coasts, bays, creeks and harbours of Canada?" And 2. Whether any treaty or convention is in force permitting the inhabitants of the United States to fish in the locality where the appellant ship was found. To sustain the judgment of the court below it is necessary, by reason of the provisions of the first section of c. 14 of the Statutes of Canada, 1913, amending c. 47 R.S.C. 1906, that the first of these questions should be answered in the affirmative and the second in the negative.

As to the first question, the argument on behalf of the appellant is expressed thus in his factum: That "coast" means the general coast line of the mainland at low water and that by the operation of the rule *noscitur a sociis* the word "coast" should be held in this context to have no application to a shore of such limited magnitude as to have no bays, harbours or creeks. I have no hesitation in rejecting this contention. I have no doubt the word "coasts" in this statute embraces the coast of any part of the territory of Canada.

As to the second question. The principal contention was that by the treaty of 1783, the right was granted to the inhabitants of

the United States to fish on the "coasts, bays and creeks" of all British Dominions in America, and that the renunciation by the United States expressed in art. 1 of the treaty of 1818, by which the United States renounced forever any right enjoyed or claimed by its inhabitants to fish within 3 marine miles of British coasts in America, with certain exceptions, not at present material, must be restricted in its application to those localities over which, by the accepted doctrines of international law, the British sovereignty prevailed; and it is argued that the extension of territorial sovereignty over the marginal seas (the 3 mile distance from the shore) is not recognized in the case of small unoccupied and unproductive islands such as St. Paul's Island.

This contention is quite without foundation. The international recognition of sovereignty in respect of marginal seas rests upon very easily intelligible and well settled principles. The grounds of the doctrine are very lucidly explained by Mr. Hall (6th ed., pp. 150, 151). *Imperium* over these waters is necessary for the safety of the state and over them control can be effectively exercised.

In the judgments in *Reg.* v. *Keyn*, 2 Ex. Div. 63, a vast number of authorities is collected in which this is accepted with unanimity. The passage in Grotius, which is the beginning of them, is cited by Cockburn, C.J., at p. 176, and is in the following words:—

Videtur autem imperium in maris portionem eadem ratione acquiri, qua imperia alia; id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat; ratione territorii, quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam so in ipsa terra reperirentur.

A power possessing a barren island is entitled to protect its property; and control over the marginal seas is just as essential for this purpose in the case of a barren island as in the case of a small highly productive one. With regard to the possibility of control, Westlake, at p. 190 of the first part of his book on International Law, discusses the subject in this way:—

The area of the land on which a strip of littoral sea is dependent is of no consequence in principle. Guns might be planted on a small island, and we presume that even in practice an island, without reference to its actual means of control over the neighbouring water, carries the sovereignty over the same width of the latter all round it as a piece of mainland belonging to the same state would carry. But an extreme case may be put of something which can scarcely be called an island. "If," Sir Charles Russell said when arguing in

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the Behring Sea arbitration, "a lighthouse is built upon a rock or upon piles driven in the bed of the sea, it becomes so far as that lighthouse is concerned part of the territory of the nation which has erected it, and as part of the territory of the nation which has erected it, it has incident to it all the rights that belong to the protection of territory—no more and no less." It is doubtful from the context whether the eminent advocate meant by this to claim more for the lighthouse in its territorial character than immunity from violation and injury, of course together with the exclusive authority and jurisdiction of its state. It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it converting a large tract into territorial water. It might, however, be fair to claim an exclusive right of fishing so near the spot that, without the light, fishing there would have been too dangerous to be practicable.

Further discussion seems superfluous. I may add, however, that I prefer to rest my judgment upon grounds of principle independently of Lord Stowell's decision in *The "Anna,"* 5 C. Rob. 373, the exact application of which may, I think, be open to argument.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Upon the evidence before him Drysdale, J., could not, in my opinion, have come to any other conclusion than that the schooner "Fallon" was fishing within 3 miles of the shore of St. Paul's Island when arrested.

I have heard no good reason advanced in support of the other ground of appeal, that the renunciation by the Government of the United States in the Treaty of 1818 of the liberty of American citizens to fish within 3 miles of the coasts of British Dominions in America does not apply to a 3 mile belt around St. Paul's Island because it is comparatively small and lies more than 3 miles from the mainland. That the island is a British possession and forms part of the Dominion of Canada does not admit of question. Two lighthouses are erected on it which are under the control of the Government of Canada. I can conceive of no reasonable ground on which it could be held that the territorial rights of the Dominion do not extend over the waters lying within 3 miles of the island. In *The King* v. *Chlopeck Fish Co.*, 1 D.L.R. 96, 17 B.C.R. 50, cited by counsel for the attorney-general, it was assumed, I think rightly, that the waters within the 3 marine miles of the shores of Cox Island, which lies about 7 miles off the coast of the mainland, were subject to the prohibition against fishing by Americans within territorial waters of Canada. Authority on such a point seems to be superfluous. Some, however,

may be found in the cases of *The "Anna"*, 5 C. Rob. 373, and of *"The Vrow Anna Catharina,"* 5 C. Rob. 15, cited in the factum filed on behalf of the attorney-general.

I would dismiss the appeal with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Magee, J.A. and Riddell, Lennox and Rose, JJ. June 8, 1917.

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NEGLIGENCE (§ I C—50)—UNSAFE PREMISES—INVITEE.

If a defendant has not neglected some legal duty to a plaintiff, the latter cannot recover damages from him for an injury sustained.

[See annotation 1 D.L.R. 240.]

APPEAL from the judgment of Kelly, J. in an action for damages for injury sustained. Reversed. Statement.

George Lynch-Staunton, K.C., for appellant.

S. F. Washington, K.C., for respondent.

MEREDITH, C.J.C.P.:—If the plaintiff's right, to recover damages from the defendants in this action, depended upon an actual invitation from the defendants to him to do that which he was doing at the time when he fell and injured himself, his case would be hopeless: actual invitation should not be confused with leave, or even desire, however great; one may be willing, indeed may be intensely anxious, that another may come to him, and yet be further from giving an invitation to do so than if his feelings were quite the opposite. Bearing in mind what an actual invitation is, no rational person could conscientiously say that the plaintiff was invited by the defendants to do that which I have mentioned; that the defendants really asked the plaintiff to mount their shipping platform No. 2, by means of the loose blocks of wood which, in a measure, caused his downfall; or indeed that they really asked him to mount that platform at all. Meredith, C.J.C.P.

But the plaintiff's right so to recover does not depend upon such an invitation; the mere leave of the defendants may under certain circumstances be quite enough to support such an action as this; and it is not, and never was, needful to invent clumsy words, or to give to ordinary words a meaning which, properly, they do not bear, in order to support a right of action, or to deal with it conveniently and effectively.

The plaintiff can retain the judgment which he has recovered in this action, only: (1) if the defendants owed to him some legal duty; (2) which they neglected; (3) thereby causing him the injury in respect of which he has been awarded damages.

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Then what duty did the defendants owe to the plaintiff? The jury apparently thought that it was the duty of the defendants to have proper steps from the ground to the top of their platform No. 2, or else to have "no steps at all." But it was a false assumption on the part of the jury as to having proper steps, a false assumption of a legal duty. There was no obligation of any kind to have steps of any character in connection with the platform. The defendants were entirely within their rights in building the platform as they did, without any steps or other means of getting upon it from the ground; and in building it as they did they made it plain, self-evident to every one, that it was not to be mounted in that way, or used as a means of entering their factory by any one on foot in the yard. And it was an assumption of a fact, without any finding upon it, and without any evidence upon which it could be found by any one, that the defendants had improper, or any kind of, steps for the purposes of doing, or permitting, that which the construction of the platform plainly shewed, as I have said, they intended should not be done. And all this is accentuated by the fact that the near-by platform, No. 1, was constructed with steps which no one has suggested were, in any sense, not proper and convenient, or which, in any sense, failed to provide ample means for that which was the self-evident purpose of steps—to afford those on foot in the yard, who had the right to use them, ample means of mounting that platform.

If the jury were charged, as they should have been, that, in law, the defendants might have steps or no steps, and, if steps, proper or improper ones, just as they saw fit, and that, no matter how insufficient the steps might be, the defendants would not be answerable in damages to any one injured in making use of them without the defendants' leave; if they were so charged, they must have disregarded that charge and deemed themselves makers, or expounders, of the law, as they must have done also in saying that the plaintiff was *justified* in doing as he did, in answer to the question: Could he, exercising reasonable care, have avoided his injury?

The plaintiff was upon the defendants' land by their leave and for the purpose of transacting business with them in a matter in which each had a money interest; and in such a case it is the duty of the occupier of the land to take reasonable care that the

other person is not injured through anything of an unusually dangerous nature, upon the land, of which the owner is, or ought to be, aware: but that must of course be limited to such part of the land as the other person has leave to be upon.

So that the main question is that to which counsel rightly confined, or at least towards which mainly they directed, their arguments: Had the plaintiff leave from the defendants to mount platform No. 2 in the way he was attempting to mount it when injured?

The jury have not found that he had; they were not asked in form so to find. They were asked whether the plaintiff was invited by the defendants to use the blocks in using which he fell; and, as that meant to mount in the way he was attempting, an affirmative answer to such a question would have been more, in the plaintiff's favour, than an affirmative answer to the question: had he leave?

Their answer was: "Being as there was no other means to get upon the platform, answer, yes." But that did not answer the question: it is really but in other words saying, "We find that he was justified in doing as he did do:" and that again really amounts to this: that we, the jury, exercising our own judgment in the whole matter, find that the plaintiff did no more than we think he should have had a right to do.

But, however the uncertain words of the jury may be looked at, if there be no evidence upon which reasonable men could find that the plaintiff had the leave of the defendants to mount the platform, there is an end to the plaintiff's claim. And of such leave I am unable to find any kind of evidence, whilst there is a good deal to the contrary.

What evidence, of any kind, is there of such leave, not to mention invitation?

As to any expressed leave, the evidence is altogether against the plaintiff.

The defendants' mind upon the subject was spoken in no uncertain words:—(1) In their conspicuous notice posted in the entrance to their yard, which notice the plaintiff and his wife passed by in driving into the yard, but which, he has testified, he did not see. The words are: "Positively no admittance to factory. Apply at office." Whether the plaintiff, or his wife, saw, or did not see, it does not at all detract from its effect as

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the continuous expression of the mind of the defendants on the subject:—(2) The immediate and direct expression of the mind of the defendants, through their servant to whom the plaintiff was sent and went, upon his business with the defendants, at the very time in question, is related by the plaintiff himself in these words: "He pointed out into the yard and asked: 'Do you see that building? Go around that building, and the scales will be there.'"

"Q. The man told you to go around to that platform, and they would bring the scales out there? A. Yes.

"Q. You went out and waited at the platform, expecting somebody to appear with these scales and put them on your waggon? A. I did.

"Q. That was the information you had as to what would happen up to that time? A. Yes. I was told to go there, and I stayed where I was told to go. I was told *to go and wait there for the scales.*"

The plaintiff's business there was to receive, take away, and pay for heavy weighing scales which he had purchased from the defendants: and, it need hardly be added, he was not on foot, he was driving, with his wife, in what is called a "double waggon," that is, a two-horsed waggon.

The means of delivering such heavy goods as these scales was the same at the defendants' factory as elsewhere: the goods are brought down from upstairs by means of a lift or "elevator," as it is commonly called: and, upon a truck, run out upon the delivery platform, and thence directly into the waggon or lorry which was drawn in alongside or was backed up to the platform to receive them; all this was done by the defendants' servants alone; then the man in charge of the waggon or lorry directed, if he desired to do so, where the goods were to be placed on the waggon or lorry, and the truck was run so as to bring the goods to the proper spot, the truck was slipped out and run back to the factory, thus completing the operation of loading. No part of the operation required the presence of the driver of the waggon or lorry, or any one with him, at any time, upon the platform; they had no business there. This is all made clear by the evidence adduced at the trial: and there is nothing to the contrary testified to by any one.

The plaintiff, having received the directions which I have read from his testimony at the trial, went back to his waggon, and, with his wife, drove into the defendants' yard. There were three other "teams" ahead of them, and they were obliged to follow them and take their turn in being attended to. The plaintiff saw at least one of these waggons loaded at the platform in question. When they had all gone on, instead of bringing his waggon up to the platform to be loaded, he let it remain some distance behind in charge of his wife, he himself having dismounted and being upon the ground. It is difficult to understand why he did not back his waggon into the platform and so let it be known that he was ready for his load. One can hardly imagine a surer way of securing prompt attention. But little, really, may depend upon that.

After waiting in the cold for a length of time, which he and his wife estimate at 10 or 15 minutes, he proceeded to mount the platform by means of several blocks of wood about 3 feet in length and 8 inches in width, and the same in depth, which some one had placed at one end of the platform for that purpose. His purpose was to enter the factory, by means of the platform, and hasten the delivery, in the way I have mentioned, of his scales; though, as I have said, his waggon was not yet at the platform to receive them.

In getting up, by means of these blocks of wood, he slipped upon one in such a manner that it "tipped up," and consequently he fell, and was hurt, but not enough to prevent him from carrying out his business with the defendants. He backed his waggon into the platform; the defendants' servants put the scales upon it: he went to the office and paid for them, and then drove home with them.

It is quite obvious that the plaintiff had no expressed leave to enter the factory as he intended: nor to go upon the platform for any purpose: as I have said, all that was expressed upon the subject was to the contrary.

Nor is there any evidence from which it can be implied that such leave was given: there is no circumstantial evidence of it: the circumstances prove only the contrary also.

Let me refer to some of them: (1) the construction of the platform, 3 to 3½ feet in height, without any steps; (2)

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its purpose, loading heavy goods on waggons and such like means of conveyance, only; (3) the temporary and make-shift character of the means of ascending; and (4) the entire absence of any evidence that any customer, teamster, or other person receiving goods there, ever used this means of getting upon the platform on any occasion.

It is no evidence of such leave that some persons, probably servants of the defendants, had long improvised means of getting from the ground upon the platform, using old boxes, blocks of wood, and "other rubbish," for the purpose: there being no evidence of a single instance of any one receiving goods there, having used such means. And, when there is no evidence of the thing ever having been done, how can there be evidence that it was done to such an extent, with the defendants' knowledge, that they can be found to have permitted it? Or why should any one suppose that a driver of a team of horses would dismount and take such means of getting upon the platform as these boxes, rubbish, or blocks of wood afforded, even if he had a right to go there?

No case that I am aware of gives any encouragement to the plaintiff's claim: the strongest of them in a plaintiff's favour, seems to me to shew how far short of any proof of liability on the part of the defendants, in this case, the plaintiff has come. In *Lowery* v. *Walker*, [1911] A.C. 10, the public had, to the knowledge of the defendant, habitually used a way across his field in going to a railway station; and he had, without prohibiting it, let loose, in the field, a horse, which is described as a dangerous animal with savage propensities, without giving any warning of the danger he thus knowingly and actively created.

We must not follow in the footsteps of the jury and give to litigants as their lawful rights that which we may think would be reasonable instead of that which we know, or ought to know, is the law applicable to their case.

And, if we could adjudge according to our individual notions of what is reasonable and fair, I should be quite unable to say that the plaintiff had any right to enter the defendants' factory as he was endeavouring to do when he fell and was hurt. One man may have a right to enter upon the property of another against the will of the other when he has contracted for such right,

as the defendant, in the case of *Wood* v. *Manley* (1839), 11 A. & E. 34, had. But business, no matter how important or urgent, is no justification for intrusion upon the property of another: *Timothy* v. *Simpson* (1834), 6 C. & P. 499. Every man is master in his own house: and may be as unreasonable as he pleases in regard to those who may come or be there.

Why should the defendants give leave to any one, coming, as the plaintiff was, to take away goods, to enter the factory? It could not be necessary in the interests of either. If the plaintiff had complaint, or demand, to make, the place to make it was at the office, and the person to whom it should be made was some one in authority: there was no such person to be expected, nor any one in fact, as far as the evidence shews, in that part of the factory that the plaintiff intended to enter. What could he do there? He had no right to command the defendants' servants there, or to interfere with the orders of their masters. What right had he to do anything there? And he knew that the man who was in charge of the matter, and to whom he had spoken, was not there, but was upstairs over the door into the building from the platform with the steps—platform No. 1.

It would be so much against the defendants' interest to admit any persons, such as the plaintiff, to their factory, that it should be generally known, as their warning stated, that no such admission was permitted. There is always more or less danger in such a place, and the more to those unfamiliar with it and its dangers. Why should either party risk that needlessly, and especially the defendants? Why permit that which would be likely to distract the attention of their workmen, and waste their time in gossip? Everything points against the possibility even of leave being given to enter the factory for any purpose, and more so against entering it by means of boxes, rubbish, or blocks of wood which no one in his senses could have imagined were stairs intended by the owners of the building to be used by customers.

The case seems to me to be a very plain one of failure to prove any cause of action; and a case in which that might be shewn in a few words; but I have chosen to say a good many because of the need to curb any disposition on the part of jury or Judge to deter-

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mine rights of property according to their notions merely of what is "justifiable" or right.

I would allow the appeal and dismiss the action.

RIDDELL, J.:—The plaintiff, a miller at Waterdown, bought from the defendants a pair of scales. Receiving notice that these were ready for him, he went with his waggon to the defendants' factory for them. He went into the defendants' office, and was referred to an employee upstairs: going upstairs and finding that person, he was told: "Do you see that building? Go around that building, and the scales will be there"—"to go and wait there for the scales"—"to go around to that platform and they would bring the scales out there."

He drove around and saw a delivery or "loading" platform; but, as there were several rigs ahead of him (which were having things loaded on them) he stopped his waggon some twenty feet away from the platform, got out on the ground and waited. After the last waggon ahead of him went away, he waited some ten or fifteen minutes for his scales to be brought out: it was cold, and the plaintiff got tired of waiting. He accordingly made up his mind to get up on the platform, go into the factory by the open door, and see what caused the delay.

The platform was only about four feet wide—it had no steps leading up to it, although a neighbouring platform had—there were, however, a few blocks of wood, some 3 feet long and 8 x 8 inches, lying loosely at one end of the platform, which apparently had been used by some one to mount the platform. The plaintiff tried to get on the platform by these blocks, "toppled over," and was rather seriously injured.

He brought an action which was tried at Hamilton before Mr. Justice Kelly and a jury—the jury gave answers to questions as follows:—

1. Was the injury to the plaintiff the result of negligence, or did it arise from mere accident? A. We, the jury, find negligence on part of company for not having proper steps or no steps at all.

2. If it arose through negligence, was there negligence on the part of the defendants which caused the injury? A. Yes.

3. If there was such negligence on defendants' part, state

fully and clearly what were the acts or omissions of theirs which caused the injury? A. We, the jury, find that the cause of injury is in the fall which plaintiff received on defendants' property.

4. Even if there was negligence by the defendants, could the plaintiff, by the exercise of reasonable care, have avoided the injury? A. No.

5. If so, state fully what he should not have done, or what he did not do that he should have done, to avoid the happening? A. We, the jury, find that he was justified in doing as he did do.

6. Was there any invitation by defendants to plaintiff to use the steps or blocks referred to? A. Being as there was no other means to get upon platform, answer, yes.

7. If there was such an invitation, for what purpose was such invitation given? A. To receive goods which was ordered.

8. If on your answers to the above questions the Court should be of opinion that plaintiff is entitled to damages, what amount of damages do you assess? A. We, the jury, agree to pay plaintiff six hundred dollars.

The failure of the jury to give a proper answer to question 3 may be considered healed by the answer to question 6—if there was an invitation to the plaintiff to use the blocks it is plain that the defendants are liable.

It is not necessary, in the view I take of the case, to consider whether the jury could reasonably find that there was an invitation for any purpose—I think they could not, but do not place my judgment on that ground.

The jury have found that the invitation was to use the blocks "to receive goods which was ordered" (We must not hold a jury to grammar, a jury like a King is *super grammaticam.*) The plaintiff was not using the blocks for any such purpose, but to mount the platform in order to trespass upon the defendants' factory.

He was invited to mount the platform (according to the jury) if and when he was "to receive goods:" that time had not come. By the instructions he received he was to wait and the goods would be brought out on the platform—even if the jury is right, then and then only the invitation was effective.

I would allow the appeal and dismiss the action, both with costs.

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ROSE, J., agreed with RIDDELL, J.

LENNOX, J. (dissenting):—The defendants manufacture and sell weigh-scales and other merchandise in the city of Hamilton. The facts in detail are sufficiently referred to by the learned trial Judge and other members of this Court. It is sufficient for the purposes of my judgment to summarise the result of the evidence by saying that the plaintiff, at the time of the happening of the injuries complained of, was upon the defendants' premises to enable the defendants to complete, and to complete upon his part, a contract for the sale by the defendants and purchase by the plaintiff of a set of scales; and was there pursuant to a notice in writing mailed by the defendants to the plaintiff.

[The learned Judge then set out the findings of the jury. See judgment of Riddell, J.]

Upon these findings judgment has been entered for the plaintiff for $600, and the defendants appeal.

I have had the advantage of reading the judgments of the Chief Justice and of my brother Riddell, concurred in by my brother Rose. With deep consciousness of my comparatively limited experience, with profound respect, and with regret, I find myself quite unable to agree that the judgment entered should be set aside, or, if it should be, that the action should be now dismissed.

The case was left to the jury upon the questions and in the way the defendants' counsel desired, if left to the jury at all. They have found that the plaintiff could not, "by the exercise of reasonable care, have avoided the injury," and, with their attention repeatedly and pointedly called to the question of "invitation," have specifically found that there was an invitation by the defendants to use the steps for the purpose of receiving the scales.

With singular sagacity, the defendants' counsel, both here and in the Court below, forced to the front the question of "invitation" as if the proof of this were an indispensable condition precedent to fixing the defendants ultimately with liability. I am of opinion that this was not necessarily the ultimate determining factor, upon the evidence at the trial; and that, if the steps were something in the nature of an undisclosed danger or

"trap"—and no reasonable jury could think otherwise—there was something else that the jury might have been asked: upon the footing of the rights of "a bare licensee." However, it is not necessary to pursue this line. The Judge's charge is not objected to, and neither upon the charge nor the form of the question have the defendants ground for appeal. The appellants, however, raise a straight issue, and submit that there was no evidence to support the finding of invitation. This is the main point, and, if well-founded, it is sufficient to entitle the defendants to have the judgment set aside; but there are other points also taken, although much less vigorously pressed—for instance, that the answers are vague and inconclusive, that the steps were not maintained by the defendants, etc.

If there was *no evidence* upon which twelve reasonable men *could* answer questions 6 and 7 as they are answered, then, taking the action as it was in fact tried out—though possibly not as it might have been—it is clear enough that the judgment cannot stand: and it is perhaps superfluous to repeat, what is almost a daily declaration, that if there was reasonable evidence, direct or inferential, we are not at liberty to disturb the findings of the jury merely because we feel that upon the evidence we would or might have come to a different conclusion of fact.

The judgment of the Court of Appeal in *Norman* v. *Great Western R. W. Co.*, [1915] 1 K.B. 584, is important as containing a recent re-indorsement of the doctrine of *Indermaur* v. *Dames*, L.R. 1 C.P. 274—in the Exchequer Chamber, L.R. 2 C.P. 311—and in declaring the principle that the duty of railway companies, and other companies exercising statutory privileges or duties, towards persons resorting to their stations, yards, or premises, in the course of business, is the same as the duty of the occupiers of private premises towards persons coming to their premises in the course of business: and consequently the principles upon which all this line of cases has been decided may be invoked. Lord Justice Buckley, at pp. 591, 592, said: "The liability of a person upon whose land another comes towards the latter in respect of not exposing him to danger may be stated in an ascending scale. The liability is lowest towards a trespasser . . . The next is the case of a licensee . . . . Next in the ascending scale is the invitee. The illustration commonly given is that of a shop-

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keeper who tacitly invites persons to come into his shop and do business with him. The duty of the invitor towards the invitee is stated by Willes, J., in *Indermaur* v. *Dames* in language which was affirmed in the Exchequer Chamber, and which has been repeatedly cited in subsequent cases as being a correct statement of the law. The statement is this: 'And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, *must be determined by the jury as a matter of fact.*' " The italics are mine.

This covers the whole field. The jury have found that the plaintiff used reasonable care and acted as a reasonable man would act in the circumstances, was "justified in doing as he did do;" and I entirely agree in these conclusions; that the plaintiff had a right to expect and rely upon it that the defendants would take reasonable care against injuries from unusual and dangerous conditions; and that the character and condition of the steps presented an unusual danger, of which the defendants were or ought to have been aware, and of all this the evidence is abundant and unmistakable; that the defendants were guilty of negligence, and that this negligence occasioned the plaintiff's injuries; and it certainly would be amazing and disappointing to me, with undisputed evidence that the defendants have been maintaining a succession of ricketty steps where people are accustomed to resort for purposes of business and where steps are obviously needed, almost "from time immemorial," if any jury could acquit them of negligence.

There remains the question of invitation, express or implied, and "invitation" or invitee" is not in terms used in the statement of Willes, J., just quoted; but "invitee" is what Buckley, L. J., is referring to; the rights and obligations of an invitee and invitor are what was determined on in both cases; and it is fundamental that this, like all questions of fact or inference from facts, after proper instructions by the Court, is exclusively for the consider-

ation of the jury. If there is no evidence, of course there is nothing for them to consider; but the purpose of the plaintiff's coming, the inquiries he made, and the directions he obtained, the condition of the weather, the delay, the object he had in view, and the means he adopted for effecting it, were all matters in evidence; and, subject to the instruction of the Court, it was for the jury, and exclusively the function of the jury, to say whether, invited upon the defendants' premises, as is admitted, and for a purpose not in dispute, he acted within the meaning of the invitation, that is, acted as a reasonable man, unconscious of danger, might be expected to act under the circumstances. If reasonable jurors might, upon the evidence, answer questions 6 and 7 as they are answered, the instruction to the jury not being attacked, their findings ought not to be disturbed: *Toronto Power Co. Limited* v. *Paskwan*, [1915] A.C. 734, at the foot of p. 739 (22 D.L.R. 340).

What should he have done? Go back to the office and be curtly told, "Do as I directed?" Or return upstairs to be petulantly instructed, "Go back where I sent you?" Or, what I think is more likely, "Go back and go into the shipping warehouse, and, if there is no one there, shout up the elevator-shaft to the factory, and some one will come?" Or, well-chilled, should he have gone home, and, when sued for breach of contract, be told: "You should have come in, our men could not know you were there, they cannot stand out freezing in the open yard, you would want to examine the scales of course before acceptance, there were the steps, there was the open door and the comfortable fire, &c., &c.; it is plain that you were looking for an excuse to get out of your contract."

Mr. Lynch-Staunton argued that, although the plaintiff was admittedly invited to come into the yard and up to the platform, he was not invited to use, and it was not intended that he should use, the steps, or come upon the platform, avail himself of the open door or enter the factory. It was not shewn to be a factory, and the jury would be right in inferring from the evidence generally that this is a delivery warehouse; and from the fact that the scales were brought down by the elevator that the factory is in the flat above. A notice posted upon a wall does not affect a blind man or a man who does not see it or cannot read it. "Beware of the dog" is not enough: Halsbury's Laws of

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England, vol. 1, p. 375, para. 818. The notice here does not affect the plaintiff's rights. He did not see it; and, more than this, he had inquired at the office, he had been directed to the yard, and he did not enter the factory, nor was he about to enter it.

That the steps were intended for the employees only, is also argued. This is not the point. The defendants, as regards persons doing business with them, must be taken to represent that their stairways, structures, and equipment are to be used as such stairways, &c., are ordinarily used. Persons coming upon business premises are not called upon to assume that appliances ordinarily used as means of access or communication are intended to be used by a limited class or for a limited special purpose only—nor are they bound to possess unerring wisdom, to proceed by the very best or most direct courses or to be always upon their guard. The girl who fell down the stairway, in a case in which an appeal was recently dismissed by this Court, because we could not interfere with the findings of the jury, was not by any means proceeding in a direct line, nor did she take at all the course she was intended to take; and, if she had, the casualty would not have occurred. The stairway in that case was not used by or intended for the use of customers; but it was recognised that it was for the jury, not for the Court, to say whether she acted as a reasonable person might act under the circumstances. It was not to be expected that the defendants here would enjoy a monopoly of all the wisest people in the land, or that ordinary people would never come to their premises; they were bound to keep their premises in a condition "to prevent damage from unusual danger" to persons coming there to do business and "exercising reasonable care."

In *Steer* v. *St. James's Residential Chambers Co.*, 3 Times L.R. 500, the plaintiff was not using the defendants' premises as they intended them to be used, nor was the plaintiff at the time of the accident in the passage he intended to take, the door the plaintiff opened was only intended to be operated by employees, the plaintiff professed to know the way to Brocklehurst's rooms, and so dispensed with assistance impliedly offered. The decision involved the consideration of whether the plaintiff was upon the premises as a volunteer, licensee, or invitee. Mr. Justice Field

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instructed the jury that they must consider the conduct of the plaintiff with reference to the circumstances. "He must take care. All care was determined by what a man might reasonably expect, and they had to see what degree of care was necessary to be taken by the plaintiff coming into a place of that description. It was the duty of every one to use due and reasonable care to prevent doing an injury to any one to whom he may have a duty. Was there a prospect of the plaintiff falling into the well, and had the defendants taken reasonable care to prevent it?" The case was left to the jury upon questions substantially equivalent to the questions here; and, their findings being for the plaintiff, the judgment was not afterwards questioned upon any ground.

In *Butts* v. *Goddard*, 4 Times L.R. 193, it was not pretended that the portion of the defendants' premises intended for user by customers or intending purchasers was not in a safe condition. There were notices upon the windows and an ample and obvious means of access which the plaintiff passed by. She ignored all this, and entered another door, in the same building, and proceeded along passages and hallways not intended for people seeking to do business with the defendants, and finally, opening a door in one of the passages, fell down a stairway and was seriously injured. Mr. Justice Manisty, instructing the jury, said: "The defendants ought to have their premises in such a state that people coming to transact business had a right to suppose those premises to be in a reasonably safe condition." (This sentence is not accurately reported, but the meaning is plain.) "The difficulty in this case was that the door here was not the usual door. No doubt the plaintiff was under the impression that she was entering in at the proper door. The jury would have to deal with the fact whether she was reasonably right in that impression. If they thought that the defendants had these premises, and had them so that a person might reasonably suppose he should go in there, then an invitation was held out to go there, and the defendants were bound to have that access reasonably safe. . . . Were they guilty of negligence, and did that lead to the accident, and was the plaintiff justified in thinking she was going in at the proper door?" The whole matter was left to the jury, they found for the plaintiff, judgment was directed to be entered for the plaintiff, and the propriety of the trial or the right of the

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plaintiff to recover was not questioned. It is all a question for the jury, as these cases shew.

It was the same in *Mason* v. *Langford* (1888), 4 Times L.R. 407, where the person injured came to the defendants' shop after closing hours and after the shutters had been drawn, and, finding the door slightly ajar, entered the shop. Hawkins, J., expressing a strong opinion against the right of the plaintiff, still left the question of invitation to the jury.

"It is necessary to distinguish between the standard of care ordinarily required and the degree of care actually excercised. It is the duty of the Court, if necessary, to define what the standard is, and the duty of the jury to decide, when the facts are in dispute" (and even if they are not in dispute?), "whether such standard has been attained:" Halsbury, vol. 21, p. 362, para. 630.

It was strenuously argued that a door, even an open door, means a "bar, a barrier, a notice not to enter," &c. I was not impressed; a solid wall would be more effective. It is a question of conditions. The open door of a church would be a fairly clear invitation to enter. The unfastened door of a shop, hotel, railway station, and of business premises generally, is usually regarded as license or invitation to enter to people having occasion to enter, without more. In international affairs "the open door" is an announcement to the world of unrestricted ingress and egress. To talk of actual or specific purpose or intent as distinguished from the import of obvious conditions is to evade the issue. The question always must come back to this: "Were the defendants' premises maintained in a reasonably safe condition for persons lawfully coming upon the premises and using them in the way they were likely to be used by such persons?" The defendants' responsibility must be measured not by their unknown intention but by the conditions which they allow to exist and their neglect to provide for the safety of persons to whom they owe the duty of care arising out of business relations or otherwise. They must assume that things upon their premises will be used in the way such things are ordinarily used, and that they will be used upon the assumption that they are safe and adequate. If they provide seats or a drinking fountain, and a person waiting to be served on that part of the premises, uses either and is injured by reason of the defendants' negligence, they cannot escape liability by

saying, "We intended the seats or the drinking water," as the case may be, "for the use of our employees only." Why? Because they must provide against unusual dangers and against injuries likely to arise out of the ordinary user of the premises by their customers in the condition in which they find them—they must foresee what is likely to, or probably may, happen. They must be bound by what they do or negligently suffer or omit to do. It is a peculiar argument that, because the negligence here was of an exceptionally flagrant character, because for years they had substituted one temporary contrivance for another, no proper steps at any time but always some makeshift erection, the plaintiff, using the steps the defendants provided in good faith for a purpose for which their position indicated they were intended to be used, in pursuance of his contract, and without negligence, is without remedy, but would not have been without remedy, had they been, though still unsafe, much better than they were.

The character or status of a person accidentally injured upon the premises of another, in relation to the owner of the premises, is not a question of law to be determined by the Judge or a Court—but a question of fact to be determined by the jury upon the evidence. Whether the plaintiff, upon the facts disclosed, was, at the time of the accident, upon the premises in the character of a trespasser, licensee, invitee, guest, or visitor, is a question of fact, and all questions of unusual hazard, want of repair, and negligence, are also questions of fact, and none of them can be withdrawn from the jury; *Toronto Power Co. Limited* v. *Paskwan*, [1915] A.C. 734, at pp. 738, 739, 22 D.L.R. 340; *Hanson* v. *Lancashire and Yorkshire R.W. Co.* (1872), 20 W.R. 297, judgment of Willes, J.; the legal rights, if any, of the person injured, when the facts are found, are for the determination of the Court.

In the *Paskwan* case, at p. 344, Sir Arthur Channell said: "The jury might perhaps under such circumstances have found that there was no want of reasonable care and only an error of judgment, but this jury have not done so. It is enough to say, . . . that there was a case which could not have been withdrawn from the jury, and that the jury have found against the defendants. The learned Judge could not have ruled that as a matter of law the answer of the defendants was necessarily con-

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clusive in their favour. It is unnecessary to go so far as Middleton, J., did in the Court below and say the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable."

Lord Chancellor Cairns puts the matter just as definitely in *North Eastern R.W. Co.* v. *Wanless* (1874), L.R. 7 H.L. 12, at p. 14: "The only question raised in the case for your Lordships' determination is, whether there was here evidence of negligence to go to the jury? What the jury should do upon the evidence, or whether they should find any damages or not, was a question for the jury, and is not for this House now to consider."

The learned trial Judge here could not, in my opinion, have properly withdrawn the case from the jury—there was evidence which the plaintiff was entitled to have submitted to them.

I am definitely of opinion that not only was there evidence to go to the jury upon which they might reasonably find that the plaintiff was an "invitee" when using the steps, within the meaning of that expression as used by the Courts, but further, were it not for the doubt of my own judgment necessarily engendered by finding my opinion in conflict with weighty and learned judgments of more experienced members of the Court, I would have thought that the question was not reasonably open to debate; in fact, that the jury could not, upon the evidence, have reasonably come to a conclusion other than they did.

It is argued that the plaintiff had no right to go upon the platform at all, or, if he did, he must step directly from his waggon. It is shewn that it was impossible for him to get from the kind of waggon he had directly upon the platform. It is said he must stay upon the waggon or stay *at* the platform and take delivery there—that it was for the employees of the defendants to bring out the merchandise and place it upon the waggon. This is not the evidence of the way goods were delivered at the defendants' warehouse: on the contrary, the evidence is, that the practice was for men who came for goods to go upon the platform, and go into the warehouse, and assist in the bringing forward and loading of the goods; and I venture to think, if a record could be obtained, that there is hardly an instance of delivery of heavy or bulky merchandise from that warehouse within the last dozen years, unless the man taking delivery was an invalid or a cripple or the

horses had to be held, in which he did not assist, and generally, although of course not invariably, go into the warehouse; and the jury were at liberty to apply their everyday common experience in drawing inferences of fact. It is common knowledge, it is universal or nearly universal custom, everywhere in this Province, in handling this class of goods.

I think the judgment should stand. But, if it should not, I am of opinion that the proper remedy is not a dismissal of the action, but a new trial. I am of course proceeding upon the basis, on which I have already sufficiently emphasised the opinion I entertain, that there was evidence to go to the jury upon the questions in issue. If there was, and their intention and meaning can be ascertained, the Court must give effect to it: and how far the Court should go in doing this, and that it must adopt no narrow or technical construction, is made clear by the judgment of the Privy Council in *British Columbia Electric R.W. Co. Limited* v. *Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4. It is not to be expected or required that juries will state their conclusions with judicial precision. In this case I think the jurors have made their meaning reasonably plain.

The issues to be determined, including the obligations of the defendants and the reasonableness of the plaintiff's acts and his rights, are dependent upon questions and inferences of fact. This Court has no power, however strongly entertained, to substitute its opinion for the findings of a jury based upon evidence, if adequately expressed. If the findings are inconclusive and unintelligible, the case has not been tried, and must go for trial. New trials are undesirable, and, with a view to preventing unnecessary litigation, Courts have endeavoured to reach finality at as early a stage as possible: see *James* v. *Clement* (1886), 13 O.R. 115; *Palmer* v. *Miller* (1887), 13 O.R. 567; *Lancey* v. *Brake* (1886), 10 O.R. 428; and *Hamilton* v. *Johnson* (1879), 5 Q.B.D. 263—to refer to a few of the numerous cases: and where it is clear that upon a new trial there could be no additional facts adduced, and upon the facts in evidence no jury of reasonable men could reach the conclusions complained of, it may be right for the appellate Court to dispose finally of the action: *Paquin Limited* v. *Beauclerk*, [1906] A.C. 148, 162 and many other cases. Section 27 of the Judicature Act is pretty broad and general in its terms;

ONT.

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Lennox, J.

but, broad as it is, in the view I entertain of the facts of this case, and having regard to what I understand to be the effect of *Watt* v. *Watt*, [1905] A.C. 115, and *Toronto R.W. Co.* v. *King*, [1908] A.C. 260, I am, with deference, of opinion that an order should not be made for dismissal of the action.

Reverting to the main question, I think the appeal should be dismissed with costs.

Magee, J.A.

MAGEE, J.A., agreed with LENNOX, J.

Appeal allowed.

B. C.

C. A.

McFEELEY v. B.C. ELECTRIC R. Co.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and Galliher, JJ.A. September 18, 1917.

WATERS (§ II A—66)—LITTORAL RIGHTS—ACCESS—TIDAL STREAM—NAVIGABILITY.

A riparian owner on that part of a tidal stream which is not navigable has no right of uninterrupted access over the unnavigable part or mud flats to a point where the water is navigable; in the absence of any past or present user by him or his predecessors of such water for navigable purposes, and no other littoral rights being interfered with, he is without recourse for an interference with the flow by the construction of an embankment, or for the possible decrease in the potential value of his land.

Statement.

APPEAL by plaintiff from the judgment of Morrison, J. Affirmed.

Martin, K.C., for appellant; *McPhillips*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In my opinion the embankment complained of was made without statutory or other authority, and I can find nothing in the subsequent legislation relied on by respondents to assist them.

It then becomes necessary to consider the rights and remedies (if any) of the appellant in the premises. Being an arm of the sea, False Creek is tidal water, and this fact is *primâ facie* evidence of the right of the public to navigate it: *Miles* v. *Rose*, 5 Taunt. 705, 128 E.R. 868. But that presumption may be rebutted. Bayley, J., in *The King* v. *Montague* (1825), 4 B. & C. 598, at 601, said:—

> It does not necessarily follow that because the tide flows and reflows in any particular place it is therefore a public navigation. . . . The strength of the evidence arising from the flux and reflux of the tide must depend on the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel (107 E.R. 1184).

The appellant's lots lie near the head of the creek or arm. The point at which it ceased to be navigable is some distance below these lots. The evidence, I think, amply sustains the judge's finding that the appellant's lots do not abut on navigable water.

Counsel for the appellant argued that even if False Creek were navigable only to a point some distance below appellant's lots, yet he had the right to reach navigable water over the flats lying between, which they term the foreshore, but which, I think, more appropriately should be termed the narrow channel of the creek and the flats on each side of it left bare by the receding tide. I am of opinion that this argument is not sound. There is no pretence that the appellant, or his predecessors in title, ever used these waters for the purpose of navigation. His claim for relief in this action is not founded on any present or past injury. There is evidence that the channel could, by artificial means, be made navigable up to and in front of the appellant's lots, and that in this way they could be given a value which they do not now possess. The appellant's case cannot be stronger than this, that the embankment decreases the potential value of his lots. In *Bell* v. *Corporation of Quebec* (1880), 5 App. Cas. 84, 49 L.J.P.C. 1, their Lordships, referring to a like argument said that such a speculation could not legitimately be imported into the case. That case was decided on the law of Quebec, but I think that said observations are applicable also to the case at bar.

The other littoral rights of the appellant are not interfered with because of the opening or culvert left in the embankment through which the tide flows and reflows to and from the appellant's lots.

I would dismiss the appeal.

MARTIN, J.A., agreed that the appeal be dismissed.

Martin, J.A.

GALLIHER, J.A.:—While I have considered a number of interesting points raised by the appellant as to the respondents' authority to construct the embankment in question, I express no opinion thereon as in my view the case can be disposed of against the appellant on another ground.

Galliher, J.A.

A narrow arm of False Creek extends up past the appellant's lots and the first point to be decided is—is this arm navigable water? The judge below has found that it is not, and I am satisfied from the evidence that this finding should not be interfered with.

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Galliher, J.A.

No littoral rights of the appellant as riparian owner are interfered with as the waters flow and recede from his land through a culvert in the embankment, but the appellant contends that he has the right of uninterrupted access over this unnavigable water or mud flat to a point where False Creek is navigable.

I have carefully examined the cases cited to us on this point, and others, but I do not think they bear out appellant's contention.

I take the same view as the Chief Justice for the reasons set out in his judgment. *Appeal dismissed.*

QUE.

C. R.

MOUNTAIN SIGHTS Ltd. v. CITY OF MONTREAL.

Quebec Court of Review, Archibald, A.C.J., and Greenshields, and Lamothe, JJ. March 30, 1917.

MUNICIPAL CORPORATIONS (§ I B—10)—ANNEXATION—DUTY TO OPEN HIGHWAY—MANDAMUS.

Ratepayers of an annexed municipality have a sufficient interest to compel by mandamus the opening and maintaining of a highway as required by the annexation statute.

Statement.

APPEAL from a judgment granting a petition for mandamus against defendant corporation. Affirmed.

Beaudry, Beaudry & Filion, for plaintiff; *Laurendeau & Co.*, for defendant.

Greenshields, J.

GREENSHIELDS, J.:—By a statute of the Province of Quebec, 1 Geo. V. c. 48, it was provided: "That the heretofore existing towns of Notre Dame de Grace and Côte des Neiges, should be and were annexed to the City of Montreal, and should thereafter form part of the City on Montreal, and should be known thenceforth as Notre Dame de Grace ward and Côte des Neiges ward of the City of Montreal.

By par. 7, s.s. (*k*), c. 48, it was enacted as follows:—

The City of Montreal shall within 2 years open and maintain a street from Snowdon Station, in Notre Dame de Grace, to Côte de Liesse Road, in the Parish of St. Laurent, of a width of 100 ft., macadamized, and with sidewalks.

The statute came into force by proclamation on June 4, 1910.

The city did not comply with the obligation or commands imposed upon it by the statute during the 2 years, and it sought further relief by the enactment of the statute 3 Geo. V. c. 54, by which it succeeded in obtaining a further delay to undertake and complete the work, such delay expiring on January 1, 1915.

On the last mentioned date, practically nothing had been

done: no road had been opened, much less maintained, from Snowdon Station to or connecting with any part of Côte de Liesse Road, and this condition existed on January 1, 1915.

On January 5, 1915, the plaintiffs, petitioners, proprietors of property within the limits of the old municipalities of Notre Dame de Grace and Côte des Neiges, obtained the issue of a writ of mandamus, by which they prayed, that the defendant, respondent, be ordered to open immediately a street, and to maintain the same, from Snowdon Station, reaching and connecting with Côte de Liesse Road, of a width of 100 ft., macadamized, and with sidewalks.

The plaintiffs, petitioners, allege the obligation imposed upon the defendant city, under the terms of the statute 1 Geo. V. c. 48, they allege the further extension of the time within which the obligation should be fulfilled; they allege the failure of the defendant respondent to fulfil its obligation, and the plaintiffs petitioners' interest to institute and prosecute the proceedings.

The respondent seeks to escape from the prayer of the petitioners, and in effect, while admitting the statutes, denies that the petitioners have a sufficient interest to sue out a writ of mandamus, and alleges: that the street would be of no public utility; that the respondent has acquired a certain part of the land necessary for the opening of the street, and has attempted to acquire certain other lands, but without success, and has not succeeded in acquiring sufficient lands for the opening of said street of the width called for by the statute; that, moreover, the fulfilment of the obligation imposed by the statute would entail an expense of $400,000, which would necessitate the respondent city increasing its borrowing powers, and which increase would be detrimental to the citizens of the city respondent, and finally, that the city respondent is not in a position to undertake and prosecute to a completion the said works.

An answer praying *acte* of the admissions and denying the affirmative allegations of the contestation joins the issues.

The judgment under revision granted the petitioners' prayer and ordered the respondent to proceed to open and maintain the street in question, and that within 30 days from the day of the service upon it of a copy of the judgment.

The respondent attacks the judgment and seeks its reversal, and does so in calling for an answer by this court to 3 questions:

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C. R.

MOUNTAIN SIGHTS LTD. v. CITY OF MONTREAL.

Greenshields, J.

1. Have the plaintiffs an interest recognized by law to institute the present action? 2. Can the respondent be condemned by a mandamus to execute what the petitioners demand? 3. Can the petitioners' action be continued or further prosecuted except for costs only?

At the argument at bar, the court was called upon by the counsel for the respondent to answer these questions, and these questions only.

I shall take up the questions of the order as suggested by the counsel for the respondent.

1. Have the petitioners an interest recognized by law to institute and prosecute the present demand?

There is no difficulty in accepting the statement of the learned counsel for the respondent, that without interest there is no action, nor, in like manner, is there any difficulty in accepting the statement of the counsel that no one, other than the exceptions mentioned in the Code, can plead before the court the rights of another.

The petitioners are now proprietors of property within the limits of the City of Montreal; they were not proprietors or ratepayers within the limits of the town of Côte des Neiges or Notre Dame de Grace on June 4, 1910, when the statute 1 Geo. V. c. 48, came into force; they purchased property within the limits of the city respondent, and particularly within the limits of Notre Dame de Grace ward and Côte des Neiges ward after there had been imposed upon the respondent city the obligation of opening and maintaining the street in question.

It should be here observed, that before the annexation, these two municipalities had decided that it was in the interest of the ratepayers of the two municipalities that the road in question should be opened and maintained.

The petitioners became ratepayers of the city respondent by purchasing property within its limits at a time when the city respondent had been commanded as a condition of its becoming proprietor of these two municipalities, to open and maintain that street.

The question as to whether the opening and maintaining of that street would benefit in a particular way the property bought by the petitioners, in my opinion, is not a matter of consideration in determining the question submitted by the respondent.

If the obligation to open and maintain the street existed under the statute, I should without hesitation say, that any ratepayer within the limits of the city respondent has an interest to force the execution or fulfilment of the obligation; in other words, it was an obligation assumed and accepted by the city respondent in favour of its ratepayers generally, and while a failure to fulfil its obligation might result in damages, specific and particular in favour of one ratepayer as distinguished from another, owing to the situation or location of his property, the right to force, by mandamus, the fulfilment of the obligation, existed in favour of every ratepayer and is enforceable.

There is, indeed, in the record proof that the petitioners in this case have a special interest to enforce the fulfilment of the obligation; but I do not arrive at the conclusion to answer the question in the affirmative on account of any special interest or interest peculiar to the petitioners; but upon the general principle that if a municipality is burdened with an obligation to open a street and maintain the same within its limits, it may be forced to do so by any ratepayers, not alleging and not proving any special interest distinct and separate from the interest of the general ratepayers.

I answer the question in the affirmative, and I hold that the petitioners have disclosed a sufficient interest in law to institute and prosecute the present proceedings.

Now as to question 2—Can the respondent be condemned by mandamus to execute what the petitioners demand?

I answer this with another question—Why?

The respondent has not shewn to my satisfaction why it should not be so condemned.

At the request of the city respondent, with its approval and acceptance, the statute was passed: the ratepayers of the annexed municipalities had decided to open and maintain a street—a matter quite within their jurisdiction, and the legislature brought about the annexation—the absorption by the City of Montreal of the two municipalities in question. The city respondent well knew of the determination of the authorities of the annexed municipalities to open and maintain the street, with full knowledge of all the facts it accepted the authority to annex with all its resulting consequence, including the opening and maintaining of

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this street. If the respondent did not know the extent of the responsibility thereby assumed, it is presumed to know: it was a clear obligation assumed by it, and it certainly cannot escape from the fulfilment of that obligation on any other grounds than any debtor of an obligation can succeed in a plea of voidance of its obligation.

The respondent seeks to escape the obligation: it says: "I had no money." That is not true: as a matter of fact, it can be stated that the respondent had at its disposition sufficient money to fulfil this obligation. It may be true it used its money with utter disregard to this obligation to fulfil or execute other obligations, not more binding but perhaps more onerous.

Unlike individuals, the respondent has means of getting money, or at least has means not possessed by the individual.

There is nothing in the record to justify the statement, that the city respondent was in the impossibility of fulfilling its obligation because it had not the necessary money with which to comply with the statute.

But the respondent urges that the statute is vague; it does not in clear terms command the city respondent to open the road and maintain it in a particular direction, or in a particular locality. There is one fixed point of departure, viz., Snowdon Station, which is well defined and free from any difficulty. That is a point of departure, a point of termination, in connection with Côte de Liesse Road.

The obligation is to join Snowdon Station with Côte de Liesse Road by a road 100 ft. wide. When the respondent has done that, it has complied with the statute and fulfilled its obligation, and until it has done that, it is a defaulting debtor of an obligation to every ratepayer in the City of Montreal, when it has chosen its route, when it has localized the road, either in the shortest or the longest distance—probably it should choose the line of least resistance—when it has done in its wisdom the works which the statute oblige it to do, it has fulfilled its entire obligation and it is immune from attack by any ratepayer.

I seek in vain to find any answer to the question presently under consideration other than an affirmative answer, and it is answered affirmatively and with emphasis.

The statute creates a contractual obligation between the peti-

tioners and the respondent, and if that contract is capable of specific performance, then the specific performance is compellable by a writ of mandamus; that is the purpose of the writ; there might be the other remedy of damages; under our law the creditor of an obligation may claim its specific performance, or may claim damages at the option of the creditor.

I hold that the obligation is capable of specific performance, and the respondent should be condemned to its specific performance.

Now as to question 3—Can further prosecution of the case be had except for the costs?

In support of the submission that this question should be answered, the respondent relies upon the Statute of Quebec, 5 Geo. V. c. 89, s. 20, which came into force on March 5, 1915, which gives to the city respondent a delay until January 1, 1917, to fulfil and execute its obligation as specified in 1 Geo. V. c. 48.

1 Geo. V. imposes, among other obligations, upon the city respondent the opening and maintaining of this road, and in general terms 5 Geo. V. c. 89, extends the time for the fulfilment of these obligations until January 1, 1917, but it adds: "The present provision will not affect any case pending before the Court as and from, or previous to February 1, 1915."

The present case was pending before the court on the date last mentioned, and if the statute means anything, it certainly must mean this, that any court seized with this case, which was pending at the date of the sanction of the statute, should take no cognizance, or to use the words of the statute—"Should not be affected or influenced in any way by the enactment of 5 Geo. V."

I shall so treat it, and so far as the determination or decision of this case is concerned, the statute invoked by the respondent has no effect whatever, neither does it affect the rights of the parties, nor should it in any way influence or affect the judgment of this court.

I am of opinion that the petitoners have fully established their right of action; their interest is manifest and apparent, and their right to the relief sought, or the remedy invoked, cannot be denied, and I am of opinion to confirm the judgment with costs.

Appeal dismissed.

B. C.

C. A.

ROGERSON v. COSH.

British Columbia Court of Appeal, Martin, Galliher and McPhillips, JJ.A. September 18, 1917.

VENDOR AND PURCHASER (§ I C—10)—SUFFICIENCY OF TITLE—EFFECT OF POSSESSION—RIGHT TO REPUDIATION.

By taking possession and exercising ownership over property the purchaser waives any objection he may have to the title thereto; a mere imperfection of title, capable of being perfected, as distinguished from a total want of title, does not give the purchaser the right to repudiate the contract.

Statement. APPEAL by defendant from the judgment of Lampman, Co.J.

Stacpoole, K.C., for appellant.

H. B. Robertson, for respondent.

Martin, J.A. MARTIN, J.A.:—I agree that the appeal be dismissed.

Galliher, J.A. GALLIHER, J.A.:—I concur in the conclusions of my brother McPhillips, whose judgment I have had the advantage of reading.

McPhillips, J.A. MCPHILLIPS, J.A.:—The trial judge gave judgment for the respondents upon an action brought for an instalment due and payable under an agreement for sale of land. The appellant resisted the action, alleging that the respondents, when the contract was entered into, were without title to the land and that upon discovery thereof the appellant repudiated the contract, and the appellant as well counterclaimed for the sum of $75 paid at the time of the purchase and claimed $25 costs of investigating the title. The trial judge has in his judgment set forth the facts and held upon the facts there was waiver as to any want of title at the time of the contract. The appellant purchased under the agreement for sale in question a 5 acre tract, and had also purchased a 10 acre tract, both being subdivisions of a tract of land 160 acres in area, the root of title being the same, the respondents holding the 160 acre tract under an agreement of sale from one Clarke who was possessed of a good title. The appellant went into possession of the 10 and 5 acre tracts and ploughed some of the land. The 10 acre tract had a house and barn thereon and the house was burned down on May 30, 1915. The 10 acre tract was purchased in August, 1913, and the 5 acre tract in September, 1914. At the time of the fire the appellant was in arrears in respect of both purchases. After the fire took place, the appellant was presented with an account of the arrears by the respondents, and on May 31, 1915, signed an order that the amount as shewn in the account, viz., $1,435.66, should be paid to

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the respondents out of the insurance money coming to him. Later this was varied and the money was paid in respect of the 10 acre tract and title was perfected to the 10 acre tract and the appellant borrowed money upon this parcel of the land, promising, at the same time, to pay the respondents what was due in respect of the 5 acre tract when his financial affairs were straightened out. The alleged repudiation of the contract in respect of the 5 acre tract took place by means of a letter from the appellant's solicitors, under date July 2, 1915—the ground therefor being stated in a very general way, "Your want of title to the said lands." Now the title the respondents had was well known to the appellant (see *Alderdale* v. *McGrory*, [1917] 1 Ch. 414, at 417, 418 (C.A.)). It had been seen and was evidenced by the completed transaction in respect of the 10 acre tract. All that the respondents had to do was to pay to Clarke the money due to him and the complete estate could be got in. As a matter of fact, in October of the same year, 1915, title was perfected in the respondents to the 5 acre tract—the application for an indefeasible fee thereto being made on October 16, 1915, and that title issuing to the respondents on October 25, 1915; and at the time of the commencement of action this title was in the respondents. It is true that under the agreement for sale from Clarke to the respondents the last instalment on the 5 acre tract was not due and payable by the respondents to Clarke until August, 1917, whilst the last instalment due by the appellant to the respondents in respect of this parcel of land was payable in March, 1917. But after all this is more a matter of conveyance than title to the land. The trial judge relied greatly upon *Camberwell & S. London Building Soc.* v. *Holloway* (1879,) 13 Ch.D. 754, at 763; *Goodchild* v. *Bethel* (1914), 19 D.L.R. 161; *Wallace* v. *Hesslein* (1898), 29 Can. S.C.R. 171, considering that upon all the facts there was evidence of waiver. In this, I am in entire agreement with the trial judge. In *Wallace* v. *Hesslein*, *supra*, Strong, C.J., at p. 176, said:—

> There was, moreover, a clear waiver of all objections to title by Wallace, who took possession of the property and exercised acts of ownership by making repairs and improvements to the amount of $285, according to his own evidence, thus exercising acts of ownership sufficient to shew a waiver.

The duty of the purchaser is to satisfy himself as to the title upon making the purchase of the land, not go into possession thereof and exercise acts of ownership and then, as here, raise

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objections as to title, some 10 months thereafter. Further, there is no evidence that throughout this time the appellant even called for the production of the title. And, as I have previously pointed out, the title in Clarke was a good title, and as the respondents could enforce conveyance to themselves, it was really a matter of conveyance not title. But apart from all this, there was waiver of all objections to title.

I am not of the opinion that *Harris* v. *Robinson* (1892), 21 Can. S.C.R. 390, constitutes any difficulty in arriving at the conclusion to which I come in the present case. Strong, C.J., in that case, at p. 402, said:—

> The authorities, however, are clear that when the vendor has no title whatever to the property he assumes to sell when he enters into the agreement as distinguished from cases in which he has some, though an imperfect title, that the purchaser may in the first case peremptorily put an end to the bargain and is not bound to give that reasonable notice which it is considered proper to require from him when the title is merely imperfect. The case of *Forrer* v. *Nash* (1865), 35 Beav. 167—the circumstances of which are stated in the judgment of the Chief Justice of the Court of Appeal is a strong authority for this proposition.

The situation at most at the outset in the present case was that of an imperfect title but capable of being perfected, further capable of being enforced at the suit of the respondents (*Brewer* v. *Broadwood* (1882), 22 Ch.D. 105; *Lee* v. *Soames* (1888), 36 W.R. 884).

There is the further consideration here that the repudiation was at a time long previous to the date when the appellant was to complete his payments. See *Smith* v. *Butler*, [1900] 1 Q.B. 694, 69 L.J.Q.B. 521 (C.A.); *Ellis* v. *Rogers* (1885), 29 Ch.D. 661. Unquestionably upon the facts of the present case and apart from the waiver the conduct of the appellant was such that the contract was treated as subsisting after the knowledge upon which the attempted repudiation is based, and if there was any right of repudiation that right was conditional upon the giving of a reasonable time to cure the defect in title. *Hoggart* v. *Scott* (1830), 1 Russ. & M. 293; 39 E.R. 113; *Eyston* v. *Simonds* (1892) 1 Y. & C., C.C. 608; 62 E.R. 1138; *Salisbury* v. *Hatcher* (1842), 2 Y. & C., C.C. 54; 63 E.R. 24; *Murrell* v. *Goodyear* (1860), 1 DeG. F. & J. 432, 45 E.R. 426. In general statement the law may be said to be that all that the vendor of land must shew is that he can give a good title at the time fixed for completion

(see *Boehm* v. *Wood* (1820), 1 Jac. & W., 419, 37 E.R. 435,) but it being demonstrated before that time that the vendor is devoid of title, or not enabled to effectuate title, that then the purchaser may repudiate (see *Forrer* v. *Nash, supra; Re Cooke* v. *Holland's Contract* (1898), 78 L.T. 106; *Re Bryant & Barningham's Contract* (1890), 44 Ch.D. 218; *Re Baker & Selmon's Contract*, [1907] 1 Ch. 238; *Re Hucklesby & Atkinson's Contract* (1910), 102 L.T. 214. The decision of Parker, J. (now Lord Parker of Waddington) in *Halkett* v. *Dudley* (Earl), [1907] 1 Ch. 590, at 596, has presented the view that the purchaser's immediate right of repudiation for defect of title is an equitable right only, with liability on the purchaser if the vendor makes a good title at the time fixed for completion (Hals. Laws of England, vol. 25, pp. 404, 405 note (*s*); Williams, Vendor and Purchaser, 2nd ed., p. 185, note (1)). The text writers would seem to question this statement of the law. In Williams, at p. 186, note (1), we find this stated: "It is respectfully submitted that the theory put forward by Parker, J., in *Halkett* v. *Dudley*, *supra* (in which none of the above cases was cited), is erroneous."

An express statement of the law by so distinguished a jurist as Lord Parker of Waddington cannot, it would seem to me, be weakened or displaced by any authority short of an ultimate court of appeal; that he was not familiar with the cases, although not cited to him, is an unwarranted assumption.

The trial judge in my opinion arrived at the right conclusion and the appeal should be dismissed. *Appeal dismissed.*

WINNIPEG CHURCH EXTENSION ASSOC. v. MARKIEWICZ.

MAN.
C. A.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, Haggart and Fullerton, JJ.A. November 12, 1917.

1. MORTGAGE (§ VI E—90)—RELIEF—STATUS OF MORTGAGOR—TRUSTEE.
A trustee personally responsible for a mortgage debt is entitled to the same protection as an ordinary debtor, and is within the provisions of 6 Geo. V. c. 21 (Man.).

2. JUDGMENT (§ VII C—282)—BY DEFAULT—INTERLOCUTORY AND FINAL—RELIEF AGAINST.
The court's power to relieve against a judgment by default extends to a final judgment founded on an interlocutory judgment; in such case they are both judgments by default, and may be set aside on proper grounds.

Statement.

APPEAL by plaintiff from an order made by Macdonald, J., setting aside the interlocutory and also the final judgment entered in an action for foreclosure of mortgage. Affirmed.

A. Monkman, for appellant; *J. B. Hugg* for respondent.

MAN.

C. A.

WINNIPEG CHURCH EXTENSION ASSOC. v. MARKIEWICZ

Perdue, J.A.

PERDUE, J.A.:—The plaintiff as mortgagee of certain land commenced action on the mortgage against the defendants, the mortgagors, for a sale of the land and other relief. No defence having been entered, the plaintiff signed interlocutory judgment. The case was then set down by way of motion for judgment and a judgment was pronounced by Mathers, C.J., which directed the defendants to pay the amount due to the plaintiff for principal, interest and costs, a day for redemption was appointed and a sale of the land was directed in case default should be made in redeeming the premises within the time appointed. The judgment was drawn up, signed and entered on July 18, 1917. On July 24, 1917, a motion was made by defendants to set aside the interlocutory judgment and the final judgment, and all proceedings thereunder and to let the defendants in to defend the action. The motion was made on several grounds, the principal being that defendants after action had paid to the plaintiff all sums for interest, taxes and insurance premiums necessary to bring the defendants within the provisions of 6 Geo. V., c. 21, and that the judgment was contrary to the provisions of the Real Property Act. The motion came on for hearing before Macdonald, J., who made an order, that upon payment by the defendants of the plaintiff's costs, within a time specified, the interlocutory and final judgments and all proceedings taken thereunder should be vacated, and that on payment of the costs within such time, all proceedings in the action should be stayed until some interest, taxes or premiums of insurance should be in arrear for more than one year, so that the protection of the above statute would not apply.

It was urged by the plaintiff's counsel that the statute did not apply to the defendants, because they were only trustees. But by the terms of the judgment they have been made personally liable for the debt and ordered to pay it. If they are personally responsible for the payment of the money secured by the mortgage, the Act would surely afford then the same protection as it would in the case of any ordinary debtor.

The real objection to the order was that Macdonald, J., as plaintiff's counsel contended, had no jurisdiction to set aside the judgment of Mathers, C.J.

From the affidavits filed on the motion before Macdonald, J.,

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it appears that after action and before all the defendants were served, the defendants paid all taxes on the land, and produced to plaintiff's solicitor the receipts shewing such payments. Shortly afterwards the defendants paid to the plaintiff's solicitor all arrears of interest. The above payments were made in May, 1917. A dispute then arose between the solicitors for the parties as to the amount of the costs, and, while this was pending, the plaintiff's solicitor signed interlocutory judgment in default of a defence being filed, and then set the case down to be heard on motion for judgment, and obtained the final judgment. On these facts, special leave was granted by Mathers, C.J., to make a motion to the presiding judge in court on July 26, to vacate the interlocutory and final judgments, and the motion was finally heard by Macdonald, J., on August 23.

The line of cases relied upon by the plaintiff's counsel, namely, *Re Lyric Syndicate, Ltd.*, 17 T.L.R. 162; *Preston Banking Co.* v. *Allsup*, [1895] 1 Ch. 141; *Walker* v. *Robinson*, 15 Man. L.R. 445, etc., depend for their decision on the principle that to allow a variation by a judge of a judgment or order which has been drawn up and entered (except as provided by the rules) would be in effect to allow a rehearing or appeal from the decision of the judge who pronounced the judgment or order. I cannot find that this rule is applied in cases where a party affected by the order had no notice of the motion and was not present or represented when it was pronounced, or to judgments signed in default of a defence. See *Williams* v. *Brisco*, 29 W.R. 713.

Rules 672-678 are under the one heading in the King's Bench Act and provide for appeals generally from a single judge. Rule 678 is added as a qualification of the six rules preceding it and is as follows:—

678. Any judgment by default may be set aside by the court or a judge upon such terms as to costs or otherwise as the court or a judge may think fit.

Then the question is, was the judgment pronounced by Mathers, C.J., a judgment by default? The interlocutory judgment entered because no defence had been filed was unquestionably a judgment by default. Form 122 in the schedule to the Act provides the form of the interlocutory judgment. It is as follows:—

No statement of defence having been delivered by the defendant herein it is this day adjudged that the plaintiff recover against the defendant as in his statement of claim demanded.

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Such interlocutory judgment might, on sufficient grounds being shewn, be set aside by a judge and the defendant be let in to defend.

The final judgment recited and was based upon the interlocutory judgment and upon the default in the delivery of a defence. The defendants were not represented on the motion. It seems to me, therefore, that beyond question the final judgment was also a judgment by default, within the meaning of the rules.

In an ordinary mortgage suit where no defence has been entered and none of the defendant are infants, the judgment may be obtained on *præcipe* (rule 616). This would clearly be a default judgment. No doubt where the plaintiff claims special relief against adults, as in the present case, he may enter interlocutory judgment and set the case down to be heard on motion for judgment. This motion may be heard by a judge on a day appointed for the hearing of court motions, or the plaintiff may set down the action for trial at a sitting of the court for the trial of causes at the place named in the statement of claim (rule 610). If the latter course were adopted by the plaintiff, then, under rule 581, the judgment obtained by the plaintiff in the absence of the defendant might be set aside by the court or judge on such terms as might seem fit. It would be a strange anomaly if a judgment pronounced at the sittings for trial of causes would be set aside by a judge on proper grounds being shown, while the same judgment, if pronounced under exactly similar circumstances, on an ordinary motion day, could not be disturbed.

There is another feature of the King's Bench Act which appears to me to strongly favour the view I have taken. Rules 607-612, which include rule 610 under which the plaintiff obtained the judgment in question, are under the heading "Default of defence" and provide the procedure for obtaining judgment by default. Then, further on in the Act, when we come to the part dealing with appeals, we have the saving provision contained in r. 678, that any "judgment by default" may be set aside by a court or judge on such terms as may seem fit. The obvious inference is that the last mentioned rule refers to judgments entered under rules 607-612.

I think the order made by Macdonald, J., was a proper one to make in the circumstances, and that it does substantial justice

between the parties. As the point of practice involved is new and there is much to be said in favour of the view taken by plaintiff's counsel, there should be no costs of the appeal.

HOWELL, C.J.M., and CAMERON and HAGGART, JJ.A., concurred.

FULLERTON, J.A. (dissenting):—We were referred to rule 678 of the rules of the Court of King's Bench. That rule enables a judge to set aside "any judgment by default."

Respondents contend that the final judgment entered in the action is a default judgment within the meaning of the rule. No authority was cited in support of the contention.

I have endeavoured to find a case in which a similar order as that complained of on this appeal has been made, but have not succeeded. I think the judge had no jurisdiction to make the order and the same cannot be upheld.

I would allow the appeal and set aside the order.

Appeal dismissed.

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COCKBURN v. TRUSTS AND GUARANTEE Co.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

MASTER AND SERVANT (§ I C—10)—WRONGFUL DISCHARGE—MEASURE OF DAMAGES—MITIGATION.

In an action for breach of contract by the master, profits derived by the servant out of the employer's business which he could not have earned if the contract had been performed should be deducted from the damages.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 33 D.L.R. 159, 38 O.L.R. 396, reversing the judgment at the trial, 32 D.L.R. 451, 37 O.L.R. 488, in favour of the plaintiff. Affirmed.

Hamilton Cassels, K.C., for appellant; *Sir George Gibbons*, K.C., and *Boland*, for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—It is claimed by the respondent that it was merely a surety. I have had some doubts whether this was really so, but the case has proceeded on this assumption and if it is so I suppose, according to the usual rule, the measure of the respondent's liability as a surety is the loss of the appellant under his contract of employment.

If the contract had been carried out and the appellant, continuing his employment, had been paid his salary of $5,000 a

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year for two years it is clear he could not have earned the $11,000 which he did from other sources. He has therefore not only sustained no loss, but is better off than if the contract had been fulfilled. I think this consideration of whether he could have made his profit from other sources if the contract had been fulfilled may be some test of whether such profits are to be taken into account in ascertaining the loss sustained by the breach of the contract.

The judgment of the Divisional Court gives as instances of what cannot be taken into account:—

> If, for instance, immediately after dismissal, the appellant had fallen heir to an estate producing $5,000 a year or had by a lucky chance speculated in stocks and made a large amount or if he spent the time which was not previously occupied in his employment so profitably as to bring him a good income.

In each of these three examples the gain to the appellant would have equally accrued if he had not lost his employment, it would therefore have nothing to do with his loss through the breach of the contract. In the actual case, however, the gain is directly dependent on the breach of the contract and would not have been made if it had not occurred. I do not suggest that this is an absolute test of what ought to be taken into account but I think it is sufficient to dispose of the claim in the present case.

The appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—I concur with Anglin, J.

Idington, J.

IDINGTON, J.:—Without committing myself to the entire reasoning adopted in support of the judgment appealed from herein I think the conclusion reached is right and that the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The point presented for consideration in this appeal is by no means free from difficulty, but I am convinced that the actual decision of the First Appellate Division is right and that the appeal must be dismissed with costs.

The principle upon which the appeal ought to be decided is expounded at length in the judgment of Lord Haldane in *British Westinghouse Electric Co.* v. *Underground Electric Railways Co.*, [1912] A.C. 673, at 689 and 690; *Staniforth* v. *Lyall*, 7 Bing. 169.

I do not entertain the slightest doubt that the appellant's dealings were not dealings which he was under any obligation to engage in for the purpose of mitigating damages, but that, as

Lord Haldane points out, is not necessarily decisive. Even though the course taken by him was not one which would ordinarily be taken in the course of business by a reasonable and prudent man in his circumstances, still, having done what he did, the whole of the facts may properly be looked at for the purpose of estimating damages provided that what he did was what a reasonable and prudent person might do properly "in the ordinary course of business."

Whether what the appellant did falls within this description is strictly a question of fact, and I have come to the conclusion that it does.

I have not felt it necessary to pass upon the question whether or not, consistently with this view, some allowance could properly be made to the appellant as compensation for the use of his capital and for the risk. I find it unnecessary to do so because the argument of Sir George Gibbons convinces me that any reasonable allowance on that footing would be overtopped by the allowance which *strictissimo jure* should be made to the respondents in respect of probable gains by way of salary, the opportunity for earning which the appellant deliberately decided to forego.

ANGLIN, J.:—The facts of this case are fully stated in the report of it in the provincial courts, 33 D.L.R. 159, 38 O.L.R. 396; 32 D.L.R. 451, 37 O.L.R. 488.

The fundamental basis of the assessment of damages for breach of contract—compensation for pecuniary loss naturally flowing from the breach—and its qualification—that the plaintiff cannot recover any part of the damages due to his own failure to take all reasonable steps to mitigate his loss—are too well settled to admit of controversy. The application of this qualified rule, however, sometimes presents difficulty. The qualification does not impose on the plaintiff claiming damages for the breach "an obligation to take any steps which a reasonable and prudent man would not ordinarily take in the course of his business:" nevertheless,

> when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

The applicability of the principles expressed in these passages from the judgment of Lord Chancellor Haldane in *British Westing-*

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house Elec. & Manufacturing Co. v. *Underground Elec. Rlys. Co. of London*, [1912] A.C. 673, at 689, to breaches of contract for personal services is shewn by the authorities cited by Hodgins, J., in delivering the judgment of the Appellate Division—notably in *Beckman* v. *Drake*, 2 H.L. Cas. 579, 608.

The action of the appellant in acquiring and disposing at a profit of a considerable part of the manufactured stock of his former employers arose out of his relations with them. It involved the employment by him of time, labour and ability which he had engaged to give to them. For his loss of an opportunity to use these in earning a salary from those employers he is now asking that the respondent shall be compelled to pay by way of damages. It would seem to be manifestly unfair that, if the appellant is thus to be remunerated on a contractual basis by way of damages, he should not be held accountable in mitigation for money made by using for his own purposes the time, labour and ability so to be paid for. The $11,000 profit which he made, although the making of it required some assumption of risk and responsibility and also an expenditure clearly beyond anything involved in his engagement by his former employers, and likewise beyond anything which it was his duty to them, or to the respondent, to undertake, is within the rule of accountability stated by Lord Haldane. The action which produced it arose out of his former employment in the sense in which the Lord Chancellor uses the phrase "arising out of the transaction," as is shewn by his illustration from *Staniforth* v. *Lyall*, 7 Bing. 169. Again to quote his Lordship (p. 691): "The transaction was . . . one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach."

By devoting his time, energy and skill for 2 years to the service of his former employers the appellant would have earned $10,000. A breakdown in his health, or other unforeseen contingencies might have prevented his doing so. Excused from that service, he was enabled by a happy combination of making use of the time, labour and ability thus set free and taking advantage of the opportunity afforded by his employers' misfortune within 66 days to make a clear profit of $11,000—and he still had at his disposal, in which to add to his earnings, if so inclined, or to amuse

himself if he preferred doing so, the remaining year and 299 days. Were he to be now awarded not the $10,000 claimed in his action but the $4,000 allowed him by the trial judge, he would, as a result of his employers' disaster, be better off by at least $5,000 than he would have been had he put in his 2 years of service—"a somewhat grotesque result," as Lord Atkinson put it in *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105, 115. Making due allowance for extra time and trouble expended and all other elements proper to be considered involved in the efforts which resulted in the plaintiff's securing the profit of $11,000, and taking into account the year and 299 days left at his disposal after that was accomplished, it seems reasonably clear that he did not sustain any actual damage as a result of losing his position. He was probably, on the whole, better off.

Upon the facts, when "allowed to speak for themselves," not only is the conclusion reached by the Appellate Division in conformity with legal principles and the authorities but any other would shock the common sense of justice.

Appeal dismissed.

FARMERS MUTUAL HAIL INS. ASS'N v. WHITTAKER.

Alberta Supreme Court, Harvey, C.J., and Stuart, Beck and Walsh, JJ. November 15, 1917.

CONSTITUTIONAL LAW (§ II A—194)—FOREIGN COMPANIES—INSURANCE—LICENSE TO DO BUSINESS.

It is within Dominion legislative powers, under sec. 91 of the B.N.A. Act, as to the regulation of commerce and aliens, to prohibit foreign insurance companies from carrying on business without a federal license, even within the limits of a single province; to such extent sec. 4 of the Dominion Insurance Act, 1910, is *intra vires*.

[*Re Insurance Act*, 26 D.L.R. 288, [1916] 1 A.C. 588, explained and followed; see also Annotation, 26 D.L.R. 295.]

Statement.

APPEAL by defendant from the judgment of Winter, J., in favour of plaintiff, in an action by a foreign insurance company for the recovery of a premium. Reversed.

Robert Ure, for appellant.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The plaintiff is an insurance company incorporated in the State of Iowa and holding a license under the Alberta Insurance Act but not one under the Dominion Insurance Act. The action is for the recovery of a premium in respect of insurance in this province.

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S. 4 of the Insurance Act (1910, Can., c. 32) provides that: "In Canada, except as otherwise provided by this Act, no company . . . shall accept any risk, or collect or receive any premium . . . or carry on any business of insurance, or prosecute or maintain any suit. . . unless it be done by or on behalf of a company or underwriters holding a license from the Minister." This section is set up as a defence to the plaintiff's claim.

The action was tried before Winter, Co. J., who, being of opinion that, by reason of the decision of the Privy Council upon the reference "In re Insurance Act," reported as *Att'y Gen'l for Canada* v. *Att'y Gen'l for Alberta*, 26 D.L.R. 288 [1916] 1 A.C. 588, that that section was *ultra vires*, the defence failed, gave judgment for the plaintiff and the defendant now appeals.

The decision referred to arose out of a reference made by the Governor in Council to the Supreme Court of Canada in which the court was asked to answer two questions: 1, "Are ss. 4 and 70 of the Insurance Act (1910) or any and what part or parts of the said ss. *ultra vires* of the Parliament of Canada?" and, 2, "Does s. 4 of the Insurance Act, 1910, operate to prohibit an insurance company, incorporated by a foreign State, from carrying on the business of insurance within Canada if such company do not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province?"

This second question expressly covers the case at bar and the answer given to it by the Privy Council was an affirmative one. If that section does operate, as the answer seems to indicate, to prohibit the plaintiff from carrying on its business in Alberta, it seems clear that it cannot succeed in this action, but the trial judge seemed to think that the answer of the Privy Council did not mean what I have suggested.

The judgment was delivered by Viscount Haldane, and all that is said about this question is contained in one paragraph which is as follows:—

> The second question is, in substance, whether the Dominion parliament has jurisdiction to require a foreign company to take out a license from the Dominion Minister even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation to impose such a restriction. It appears to them that such a power is given by the heads in s. 91 which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative. (p. 292).

It is apparent that there is much room for argument that the last sentence is not a declaration that the question submitted by the Governor-General in Council as above set out is to be answered in the affirmative because the judgment declares that the question is in substance only whether the Government has the power, while it is in fact not merely has the Government the power? but also, has it effectively exercised the power? for the question is, does the section operate to have this effect? One would suppose that the judgment intends to answer the question submitted but the argument of counsel may have been in the mind of Viscount Haldane rather than the exact words of the question and would appear so to have been when he declares that it is in substance something which is only part of what the question asks. Before considering this question the judgment had declared that the section was *ultra vires* and if it was invalid of course it could have no operation. That fact as well as the suggestion that the section was not properly framed to have the effect mentioned in the question no doubt leaves room for thinking that the Privy Council may have considered it entirely inoperative by reason of its being *ultra vires*, and that therefore there was really nothing left in the question but the extent of the power of parliament.

But while it is therefore not clear that the judgment answers the question submitted in the affirmative it certainly cannot be said that it answers it in the negative and I do not think we would be warranted in assuming, by reason of the qualification of the meaning of the question and the implied suggestion as to the wording of the section, that where in words it states that it is answered in the affirmative it means that it should be answered in the negative.

The terms of the section are undoubtedly general enough to include such companies as are specified in the second question but they are also wide enough to include companies incorporated by any province and doing business in that province only as well as to include individuals domiciled in any province. It was admitted on the argument on behalf of the Dominion that it was intended to apply to such last mentioned companies and persons and it was contended that the Dominion had the right to legislate exclusively on the subject and that therefore the section could extend its prohibition to such companies and persons. It was

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held by the judgment that this contention was unsound and that the section was therefore *ultra vires*.

It may be noted that the first question is one which cannot be satisfactorily answered with a simple "yes" and that consequently the declaration of the judgment of the Privy Council that it is properly answered in the affirmative does not in itself declare whether the section is wholly or only partly *ultra vires*, but inasmuch as the answer to the second question declares that parliament has the power to prohibit foreign companies from doing business without a license it seems to follow that the section which in terms includes such companies is not *ultra vires* in applying to such companies.

There is a little more definiteness in the answers given by some of the judges in the Supreme Court the decision being reported in *Re Insurance Act*, (1910), 15 D.L.R. 251, 48 Can. S.C.R. 260.

At p. 253, Idington, J., says:

> I must answer the second question in the affirmative if and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies, as well as others within the terms of which is embraced so much that is clearly *ultra vires*.

Anglin, J., also in answering the first question, states that the section is *ultra vires* except in its application to certain companies. He answers the second question by saying: "It would do so if *intra vires*," and Duff and Brodeur, JJ., answer the second question in the simple words: "Yes, if *intra vires*," having first declared the section to be *ultra vires* but without saying whether wholly or partly. The other two judges answered the question in the affirmative but as they were of the opinion that the whole section was *intra vires* their answers, in view of the decision of the Privy Council, cannot be relied on.

It appears from these answers that in the view of some of the judges, at least, the section was not necessarily invalid *in toto*, and that it had some operation. If that view is correct, it seems reasonable that it should have effect to the extent to which it is *intra vires*.

This is exactly the view this court adopted in *Re Cust*, 21 D.L.R. 366, 8 A.L.R. 308, where a section, in terms, included something beyond the powers of the legislature, and it seems to be within the terms of the Colonial Laws Validity Act, 28 and 29

Vict. c. 63, s. 2, which provides that any colonial law which is repugnant to any Imperial Act applying to the colony "shall to the extent of such repugnancy, *but not otherwise*, be and remain absolutely void and inoperative."

I am of opinion, therefore, that whether the judgment of the Privy Council should be deemed to be an answer in the affirmative to the full question as submitted or not it should not be deemed impliedly an answer in the negative but rather an omission to answer the question in full and that for the reasons I have stated the section is operative as against the plaintiff.

I would therefore allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

HILL v. MALLACH.

Saskatchewan Supreme Court, Newlands, Elwood and McKay, JJ. November 24, 1917.

NEGLIGENCE (§ I C—35)—GRANARY—ANIMALS.

Where a granary is properly constructed at the time the grain is stored therein, but afterwards becomes injured without the knowledge of the owner of the granary, so that stray animals can obtain access to the grain, the owner does not "have or store on his premises grain accessible to stock" within the meaning of the Open Wells Act (R.S.S. c. 124), and is not liable for damage to such animals.

Statement.

APPEAL by plaintiff from a judgment of a trial Judge in an action for injury to animals caused by eating grain which had escaped from a granary on defendant's land. Affirmed.

T. D. Brown, K.C., for appellant; *W. H. McEwen*, for respondent.

The judgment of the court was delivered by

Elwood, J.

ELWOOD, J.:—The defendant stored threshed grain in his portable granary on his own land. The plaintiff's horses were lawfully running at large within the municipality, came upon the defendant's land and consumed grain which escaped from this granary and, in consequence, died. It appears that there was a small hole in the bottom of the granary which allowed some of the grain to escape, that a horse—or horses—finding it and eating it would cause this leak of grain to continue and in that way obtain a sufficient quantity to cause its death.

The trial judge found that, at the time the grain was stored, the granary was such as would properly protect the grain and keep it from the reach of any stock, and practically finds that there were no holes or cracks by which the grain could leak, and that

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the hole or crack through which the grain leaked must have been made by gophers or field mice, or in some other way not the fault of the defendant.

Notwithstanding these findings, the plaintiff contends that by virtue of the Open Wells Act, c. 124, R.S.S., s. 3, the defendant is liable. That section is as follows:—

> 3. No person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises.

Counsel for the plaintiff in the course of his argument went so far as to state, and, in fact, he was logically bound to contend, that no matter how securely a granary was constructed at the time grain was stored therein, yet, if afterwards and without the owner's knowledge some third person wilfully and maliciously tore down part of the granary so as to permit the grain to escape, and thereafter, and without the knowledge of the owner of the granary and without any negligence on his part, horses strayed upon the premises and consumed some of the grain which so escaped and were injured, the owner of the granary would be liable.

I cannot bring myself to the conclusion that the section in question is capable of any such construction. I am of the opinion that, where a granary is constructed as the one in question was constructed, and, after grain is stored therein and without the fault or negligence of the defendant, an injury occurs to the granary which causes the grain to escape which causes damage to animals straying upon the premises, the defendant does not, within the meaning of the statute, "have or store on his premises grain accessible to stock." To hold to the contrary would mean that grain growers of this province would practically be insurers of stock running at large, and would be imposing upon the grain growers a burden which, in view of the extent of the industry of grain growing in this province, I have no hesitation in coming to the conclusion the legislature of the province had no intention of imposing.

The result is that, in my opinion, the appeal should be dismissed with costs. *Appeal dismissed.*

EDDY Co. v. CHAMBERLAIN AND LANDRY.

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New Brunswick Supreme Court, Appeal Division, Sir E. McLeod, C.J., White and Grimmer, JJ. November 23, 1917.

MECHANICS' LIENS (§ II—7)—"PRIVITY AND CONSENT" OF OWNER—CONTRACT WITH LESSEE.

To create a lien against the interest of an "owner," for work done and materials furnished with his "privity and consent," there must be something in the nature of a direct dealing between the contractor and the owner or person whose estate is to be charged; when the latter merely has knowledge that the work is being done or materials furnished, and silently assents thereto and benefits thereby, a lien is not thereby created against his interest. Such lien is not created for work done and materials furnished under a contract exclusively with a lessee of the property.

Statement.

APPEAL from an order of the Judge of the Gloucester County Court, dismissing an application on the part of the plaintiff (appellant) for a lien on an hotel owned by the defendant Landry, and under lease to the defendant Chamberlain, for materials, etc., supplied to the defendant Chamberlain. Affirmed.

A. R. Slipp, K.C., for plaintiff, appellant, *Geo Gilbert*, K.C., for defendant, respondent.

The judgment of the court was delivered by

Grimmer, J.

GRIMMER, J.:—This action is by a plaintiff who furnished material used in the construction of a building by the defendant on land of one Landry, the owner, to have lien declared under Con. Stat. 1903, c. 147.

The goods were supplied by the plaintiff company to the defendant, Chamberlain, who had a lease of the property from the owner, Landry, with right of purchase. The lease was made May 9, 1916, for the term of 1 year. At the time of making the lease, Chamberlain was in possession of the property, having built the hotel in the summer of 1915 for Landry, and the defendant occupied the same during the winter of 1916. The account filed shows that Chamberlain began to get building material from plaintiff in September, 1915, which was used in the hotel and from time to time thereafter down to December 11, 1916, got such goods and materials as he wanted. The contract for the goods furnished amounting in all to $1,043.98 was made by Chamberlain with the plaintiff and apparently without the knowledge and consent of Landry. Some $635 was paid by Chamberlain upon the account and a lien is asked for $408.98, the balance due.

From the evidence it appears that the defendant Landry had no contract with the plaintiff for any of the goods in the

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account. Nor did he authorize Chamberlain to obtain the same. No account was ever rendered to Landry by the plaintiff for the goods, nor claim made upon him for payment of the same. Further, it appears that in October, 1915, Landry informed the plaintiff he was the owner of the property but that they must look to Chamberlain for pay for any of the goods they gave him, as he would not be responsible. It also appears that during the time Chamberlain was getting the goods on the contract he from time to time gave notes to the plaintiff and accepted drafts to cover goods obtained, which notes and drafts he retired in due course. The contract for the supply of materials was made before the date of the lease, and in fact the great bulk of the goods in the account were delivered to Chamberlain before the lease was given, and the balance was delivered by him as tenant of the owner after the lease was made. There does not seem to be any evidence that would justify a personal recovery against Landry, and the question then arises can there be a lien against his estate in the land?

By c. 147, s. 2 (1) C.S.N.B., 1903, "contractor" means a person contracting with or employed directly by the owner for the doing of work, or placing or furnishing of machinery or materials for any of the purposes mentioned in the said chapter.

By sub-s. 3, "owner" extends to and includes a person having any estate or interest in the lands upon or in respect of which the work is done or the materials or machinery are placed or furnished.

In the absence of evidence shewing that the goods were furnished at the request and upon the credit of the owner Landry, it must be assured the plaintiff bases its claim for lien against his property on the ground that the same were supplied with his privity and consent or for his direct benefit, thus making the validity of the claim rest upon the effect and intent of the said sub-s. 3.

As to this, the evidence fails to shew any connection whatever between the plaintiff and Landry. The "claim of lien" states that the goods were supplied for Wm. O. Chamberlain "upon whose credit the materials were furnished."

Chesley Eddy, secretary-treasurer of the plaintiff company, states that when the goods were sold he did not know that Landry

owned the hotel, and that the account is one he has against the defendant Chamberlain, and that he had him sign an acknowledgement as to its correctness. Landry states he is the owner of the hotel, which is under lease to Chamberlain and in his possession. That between the 20th and 25th October, 1915, he had a talk with Eddy, secretary-treasurer of the plaintiff company, and told him he owned the property "and anything he gave to Chamberlain he would have to look to him for his pay;" that he had no contract with the plaintiff in any way for anything to be supplied the premises; that he did not authorize Chamberlain to procure anything for the property from the plaintiff nor to buy material therefor, nor was any statement or account ever rendered to him by the plaintiff of goods that went into the house, and that while at the plaintiff's place of business on one occasion he told them not to give Chamberlain anything on his credit. On cross-examination he further states, that in October, 1916, Mr. Eddy told him he was supplying goods to Chamberlain and he forbade him supplying them on his account, and that he did this in case there might be trouble over a lien. Chamberlain states he is the lessee of the property with the privilege of purchasing it at any time and that he got goods from the plaintiff on his own account. Also that Eddy, with whom he had his dealings, told him that Landry had called upon him and told him that he (Landry) would not be responsible for any more materials for the hotel; that the account is correct, and he gave the plaintiff his notes, and accepted some drafts in connection with the same which he retired. In all he paid on the claim $610. The plaintiff by its secretary-treasurer, Eddy, denies having the alleged conversation with Landry and that Chamberlain gave notes and accepted drafts for some portions of the account, but as the County Court Judge has found against him, and there is undoubted evidence to support the finding, it should not be disturbed. The trend of authority to-day with respect to "privity of consent," is that to create a lien against the interest of an "owner" by this means, there must be something in the nature of direct dealing between the contractor and the "owner" or person whose estate is sought to be charged. When the latter merely has knowledge that the work is being done or materials furnished, and silently assents to and benefits by such work or materials, a lien is not thereby

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created against his interest. The contractor supplies the materials at his own risk: *Gearing* v. *Robinson* (1900) 27 A.R. (Ont.) 364; *Webb* v. *Gage* (1902), 1 O.W.R. 327; Wallace on Mechanics' Liens (1913), pp. 54-93; *Graham* v. *Williams*, 8 O.R. 478.

S. 4 of c. 147 referred to is the one that gives the lien and provides that a contractor doing work upon or furnishing materials to be used in the construction, etc., of any building, etc., shall have a lien for the price of the work, machinery or materials upon the building, and the lands connected therewith. As we have seen under the Act, a "contractor" is one who contracts directly with the owner for the furnishing of the materials. By s. 3 (2), a contractor furnishing materials for an owner at his request and upon his credit, or on his behalf, or with his privity or consent, or for his direct benefit, shall have a lien, etc. These provisions, however, do not suffice to bring the plaintiff's case within the provisions of the Act, for when we look for whom and at whose request and upon whose credit, or in whose behalf, or with whose privity or consent, or for whose direct benefit, the materials were provided, we find it was not for Landry, the owner, but for the defendant Chamberlain, the tenant, and there is no evidence of any dealing of any kind between the "owner" and the plaintiff whereby he could be bound or his interest in the land be charged. Chamberlain was tenant of the land, with the privilege of becoming owner thereof. He would and did have the right to build upon and improve the land, based upon his contemplated ownership, and under these circumstances and others before herein referred to, it cannot be said the materials were furnished for the owner Landry.

As stated in *Gearing* v. *Robinson*, *supra*, this may perhaps be a very strict and literal interpretation of the Act, but it does seem to me it is the meaning of the language therein which ought not to be strained in order to charge one man's land with another man's debt. The County Court Judge, after hearing vacated and discharged the claim of lien, against which order the appeal is taken. In my opinion the appeal should be dismissed with costs, thus confirming the judgment of the court below.

Appeal dismissed.

REUM v. RUTHERFORD et al.

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Saskatchewan Supreme Court, Lamont, J. November 26, 1917.

SHERIFF (§ I—3)—LIABILITY FOR NEGLIGENCE OF DEPUTIES.

In Saskatchewan all the employees in the sheriff's office are appointed directly by the government, and the sheriff is not responsible for the negligence of any such employee.

Statement.

ACTION against a sheriff and deputy sheriff for damages caused by negligence in the sheriff's office.

S. H. Schull, for plaintiff; *G. E. Taylor*, K.C., and *L. McTaggart*, for defendant Rutherford; *W. H. McEwen*, for Employers Liability Assurance Co.; *William G. Ross*, for defendant Vollmer.

Lamont, J.

LAMONT, J.:—On December 30, 1913, Fred C. Reum recovered a judgment against the McElhinney Co., Ltd, for $5,105.55, in the Supreme Court. On December 31 of the same year, executions against the goods and lands of the said McElhinney Co. were placed in the hands of the sheriff of the judicial district of Moose Jaw. On January 5, 1914, a copy of the execution against the lands of the said company was received and entered in the Land Titles Office for the Saskatoon Land Registration District. On December 24, 1915, the said executions were renewed by the local registrar at Moose Jaw, and were on the same day handed in to the sheriff's office at Moose Jaw, and a copy of the renewed executions against the lands of the said company was forwarded to the Land Titles Office at Saskatoon for registration, but the sheriff's seal was not affixed to said copy. This copy was returned by the registrar of the Land Titles Office at Saskatoon to the sheriff's office at Moose Jaw for want of seal, and on January 4 was returned from the sheriff's office to Saskatoon with the seal duly attached thereto. It was received in the Saskatoon Land Titles Office on January 7.

Claiming that the failure of someone in the sheriff's office at Moose Jaw to attach the sheriff's seal to the renewed writ of execution so that it could be duly registered in the Land Titles Office at Saskatoon on or before January 5, 1915, was a breach of duty on part of the sheriff or his deputy, and that this breach of duty resulted in loss to him by reason of certain lands in the Saskatoon district bound by the previous writ being no longer bound thereby, the plaintiff has brought this action against sheriff Rutherford, his deputy Vollmer, and the guarantee company which had covenanted that the defendants Rutherford and

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Vollmer would properly perform the duties and obligations devolving upon them by virtue of their office and employment, and, in default thereof, the said company would make good and reimburse to the provincial treasurer any loss or damage which he should sustain by reason of the non-performance or improper performance of their respective duties on the part of either of the said defendants to the extent of the sum set opposite their respective names in the guarantee bond.

No evidence as to loss (if any) suffered by the plaintiff was taken, it being agreed that if the defendants, or any of them, should be held liable, a reference would be directed to ascertain the amount of such loss.

So far as the sheriff is concerned the facts are that on December 26, 1915, he left his office and was away on vacation until January 3. Before going away, as was his custom, he signed his name to a number of blank copies of execution. He did this because the Land Titles Act, s. 118, requires a copy of the execution to be certified under the hand of the sheriff and seal of his office. The signed blanks he left with Miss Pritchard, who was in charge of the department of his office handling executions, and whose duty it was on receipt of an execution or renewal to fill up the blanks on the form, to place thereon the seal and to forward the copy to the proper Land Titles Office. On receiving the renewal of the plaintiff's execution on December 27, Miss Pritchard omitted to affix the sheriff's seal before forwarding the copy to Saskatoon. In reference to the copy forwarded, she did not consult with the defendant Vollmer, nor did he know that an omission had occurred until this action was begun.

These being the facts, and, assuming that as a result of Miss Pritchard's omission, certain property bound by the execution was allowed to be transferred freed therefrom, are the defendants, or any of them, liable?

A large portion of the argument and many of the authorities cited as to the duties and responsibilities of a sheriff have, in my opinion, no application; because a sheriff, under the legislation of this province, occupies an entirely different position from that of a sheriff in England and in most of the other Canadian provinces. In these jurisdictions, the office of sheriff imposes upon its occupant certain well-defined duties and obligations. Some of

these it is the duty of the sheriff to perform personally, and those which he does not personally perform he must perform or fulfil through his servants or agents. These he employs as he deems it necessary or advisable. He directs them as to what they are to do and the way in which they are to do it. He pays them such remuneration as may have been agreed upon, and they are responsible to him for the due performance of the work he gives them to do. If they are not doing the work allotted to his satisfaction, he can dismiss them and employ others. The whole work of the office, however, is the work of the sheriff. He is responsible for its due fulfilment. If his servants or agents fail to duly perform the part allotted to them, their failure is the failure of the sheriff for which he is held responsible. The maxim *respondeat superior* applies. Furthermore, the fees and emoluments of the office belong to him.

In this province, while the name "sheriff" is retained, we have not at the present time an official similar to "a sheriff" in England. Under the Court Officials Act, both the sheriff and deputy sheriff are court officials, appointed by the Lieutenant-Governor-in-Council; both are paid salaries by the government. The fees and emoluments of the sheriff's office belong to the government. Not only has a sheriff no power to appoint his deputy, but he cannot appoint any clerk or employee necessary for the carrying on of the work of his office. All appointments to the Civil Service are made by the Lieutenant-Governor-in-Council on the recommendation of the Civil Service Commissioner. Civil Service Act, s. 18. Nor has a sheriff any power to dismiss any member of his staff. The Lieutenant-Governor-in-Council appoints them, pays them and alone has the power to dismiss them.

If the work of the sheriff's office is such as to render additional service necessary, the sheriff notifies the Civil Service Commissioner and the Lieutenant-Governor-in-Council appoints such persons as may be necessary to perform the work.

As was pointed out by Walsh, J., in *Great Northern Insurance Co.* v. *Young*, 32 D.L.R. 238, in referring to the Sheriffs' Act of Alberta, the whole scheme of the legislation appears to make the sheriff's office in each district a department of the civil service. The sheriff is appointed as its head, and he is furnished

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with the necessary staff to carry on the work. The effect of this is, that the work of the sheriff's office is no longer deemed to be that of a sheriff who must either perform it himself or get it done for him and on his account, but it is considered as part of the public service of the province, for the performance of which the government of the day appoints the necessary officials and staff. This being so, I do not see how the doctrine of *respondeat superior* can be made to apply. The work which the Lieutenant-Governor-in-Council appoints a deputy sheriff and the staff of a sheriff's office to perform cannot be considered the work of a sheriff, and, if it is not his work, he cannot be held responsible for the failure of some one else to perform, not his work, but their own.

In *Smith* v. *Pritchard*, 8 C.B. 565, 137 E.R. 629, at 638, Maule, J., said: "The reason that the sheriff is held liable is, that, having a duty imposed upon him by law, instead of performing it himself, he delegates it to another; and therefore it is but just that he should be responsible for the misconduct of those to whom he so delegates the performance of his duty." In *Great Northern Insurance Co.* v. *Young*, *supra*, the plaintiffs sought to hold a sheriff liable for negligence on the part of one of his bailiffs. In giving judgment in which he held the sheriff was not liable, Walsh, J., at p. 243, said: "While, as Maule, J., says it is but just that under the English system he should be responsible for the misconduct of those whom he employs, how unjust it would be to impose liability upon a sheriff in this province for the acts of a man for whose appointment he is in no sense responsible and over whom he has absolutely no power of dismissal or even suspension."

It was, however, contended that even if the sheriff was no longer answerable for negligence on the part of a member of the staff, he should still be held liable in this case, because s. 118 of the Land Titles Act cast upon him the duty of transmitting a copy of the execution certified under his hand and the seal of his office to the registrar of land titles.

That section, however, imposes the duty upon "the sheriff or other qualified officer." Whatever force the argument might have as against a sheriff in charge of his office at the time a copy was sent out without the seal being attached thereto, I need not

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here consider, for, in my opinion, effect cannot be given to it as against a sheriff who is on his vacation at the time the renewal writ was received. Under our system, a sheriff, if responsible at all, can only be responsible for his own personal negligence and such negligence cannot be attributed to him while lawfully on his vacation. The sheriff, therefore, in my opinion, is not liable.

Lamont, J.

Then, as to deputy sheriff Vollmer. On what principle can he be held liable for Miss Pritchard's omission, any more than the sheriff? She was not his agent, nor was she doing his work; I take it that she was appointed to do the work she was actually doing, but, whether she was or not does not in my opinion make any difference. The sheriff as head of the department may allot to the various members of the staff the work they are to do. That, however, would not make them the agents of his deputy to do the work in his absence, nor would it make the deputy liable for their failure to perform it.

I am therefore of opinion that no liability attaches to the deputy sheriff. As neither sheriff nor his deputy are liable, it follows that the defendant company cannot be held responsible. The action will therefore be dismissed with costs.

Action dismissed.

CANADIAN PACIFIC R. Co. v. THE KING.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 6, 1917.

PRINCIPAL AND AGENT (§ II C—20)—CUSTOMS BROKER—MISAPPROPRIATION —LIABILITY OF PRINCIPAL.

One employing a customs broker under a power of attorney, pursuant to the requirements of the Customs Act (R.S.C. 1886, c. 32, s. 157; R.S.C. 1906, c. 48, s. 132), to transact all business with the Collector of the Port or relating to the Department of Customs, is liable to the Crown for any duties unpaid through the fraudulent devices of the broker; the burden of proof that they had been paid or received by the Crown is upon the principal.

[11 D.L.R. 681, 14 Can. Ex. 150, affirmed on equal division.]

Statement.

APPEAL from the judgment of the Exchequer Court of Canada, 11 D.L.R. 681, 14 Can. Ex. 150, maintaining plaintiff's action with costs. Affirmed.

Lafleur, K.C., for appellant.

Newcombe, K.C., and *Wainwright*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree with Duff, J.

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DAVIES, J.:—I think this appeal must fail.

The conclusions of fact I have drawn from reading the evidence after the argument at bar are that the customs duties sought to be recovered by the Crown in this action never were paid to or received by the Crown. The moneys to pay them were no doubt paid over by the railway company to its agent in good faith for the purpose of paying these duties; but the latter misappropriated the moneys and applied them to his own use or to purposes other than those they were entrusted to him for. It may well be that this fraudulent agent was enabled to carry out his fraud alike in obtaining possession of the goods and in misappropriating the moneys entrusted to him to pay these duties by some remissness or negligence on the part of some of the customs officers. It seemed to me not that these officers were partners in the frauds perpetrated by the company's agent but that they too were deceived by him. Be that as it may, I cannot see how the Crown can be held liable for the remissness or neglect of its officers, if any such there was.

The controlling fact is that the duties on these goods now sued for have not been paid to the Crown; but were misappropriated and embezzled by the company's agent, who received them to pay the duties.

Under these circumstances, I hold that as between two innocent parties, the company and the Crown, the former must suffer because the wrongful misappropriation was made by its agent.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The respondent sued in the Exchequer Court and recovered judgment against appellant for alleged unpaid duties on goods imported into Canada between January, 1904, and November, 1905.

The parties in the course of the trial by their respective counsel signed the following admission:—

> The parties admit for the purposes of this case only under reserve of all objections as to the relevancy of the facts submitted, that the defendant issued to its agent Hobbs, cheques payable to the order of the Collector of Customs sufficient to cover all the duties payable by the defendant during the period covered by this action, except as to the amounts which have been paid to plaintiff or into court by the defendant herein. These cheques were deposited to the credit of the Receiver-General and used in the Bank of Montreal with moneys received for customs duties to buy drafts for the

Receiver-General representing the amounts of customs duties actually received from day to day from all sources according to the entries made at the Montreal Customs House, but certain of the entries made by, or on behalf of defendant at customs during said period, as a result of manipulation and alteration of documents such as disclosed by the evidence of record, represented the amounts payable for customs duties by defendant during said period to be less in the aggregate than the total amount of said cheques or of said duties actually payable.

The further testimony which might be adduced before the referee, if proceeded with, would be similar in character to that which has already been given as to the way in which the entries, cheques and funds and the clearance of the goods were dealt with, prepared, appropriated or affected. Ottawa, 19th December, 1912.

The man Hobbs therein referred to was a customs broker at Montreal to whom the appellant, pursuant to the requirements of s. 157 of R.S.C. c. 32, had given the necessary written authority in the following terms:—

Know All Men By These Presents That

We have appointed and do hereby appoint David Hobbs, of Montreal, to be our true and lawful attorney and agent for us and in our name, to transact all business which we may have with the Collector of the Port of Montreal or relating to the Department of Customs of the said Port, and to execute, sign, seal and deliver for us and in our name, all bonds, entries and other instruments in writing relating to any such business as aforesaid, hereby ratifying and confirming all that our said attorney and agent shall do in the behalf aforesaid.

The course of business adopted by the appellant for the purpose of passing its importation of goods through the Montreal Customs was of that methodical and rigourous business character which left no loose ends or possible opening for perpetration of the frauds now in question by Hobbs by the means he adopted unless by the connivance of some one in respondent's employment at the Customs House, or such employee being so ignorant and incompetent that he applied appellant's cheques clearly intended to pay the duties claimed in ways quite unjustifiable.

Each cheque issued by the appellant to the respondent's Collector of Customs to pay duties had thereon when given Hobbs not only the usual numbering of cheques, but a special number thereon by which it was possible to trace the parcel or shipment and invoice referred to in the way that has been done compelling the admission above quoted that in fact the duties thereon had been paid—not to Hobbs, but to the respondent's collector.

This is an action to enforce the payment of same duties a second time.

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The method adopted by Hobbs was to induce the Customs House clerk to take the cheques issued by appellant to the order of the Customs Collector and safeguarded from any such misapplication in every way that long experience had dictated as possible, and to apply them in payment of duties owing by third parties and thereby enable Hobbs to use the moneys or proceeds of cheques given to him by such third parties; or applying part of a cheque to pay appellant's customs duties and handing over balance of the amount of the cheque to Hobbs under the pretence that he was only making change. These third parties probably had not taken the same care as appellant to guard against possible fraud on his part.

The observance of common honesty or the slightest business intelligence, or both, on the part of him receiving on respondent's behalf the appellant's cheques, would have frustrated any such practices as these adopted. Indeed the collector had laid down a rule for this man's guidance forbidding the making of change beyond a few cents in any case, yet he repeatedly violated it, and thereby helped the man Hobbs to misappropriate in part as well as misapply entirely such cheques. How could any one imagine that the appellant who had taken such care to reduce Hobbs, so far as his cheques were concerned, to nothing but an errand boy, had become seized with such repeated and unprecedented fits of generosity?

How could any one for months and months handle such cheques and having thus an opportunity of comparing appellant's rigourous and guarded business methods with possible loose methods of others, fail to inquire why it had thus strangely departed from its usual businesslike methods?

Since when had it dawned upon any one that appellant had suddenly become a distributor of promiscuous charity or bounties for no consideration, and no apparent cause?

Whether the man employed by respondent, and who overlooked all such curious features presented to him from day to day, was an accomplice of Hobbs, or was merely a misplaced incompetent when trusted by respondent with the duty to avert such possible thefts, does not seem to me to matter.

The argument that would relieve the respondent from all responsibility for the consequences of mere stupidity of such a

servant in a position of trust needing intelligence to discharge it, would equally relieve respondent in case that servant appointed to receive, and receiving, the cheques was a criminal accomplice of Hobbs.

I fail to see how any legal distinction can be drawn between these two possible ways of viewing this claim so far as dependent upon palpable misappropriation of appellant's cheques in the way I have referred to. And I submit that the proposition that a debtor of the Crown can, after handing the servant thereof, duly appointed to receive it, a cheque to discharge the debt, be sued for such debt because that servant and someone else stole the cheque, or misappropriated the proceeds, after it was handed in, is untenable.

Yet that seems 'ess flagrant in substance than what is claimed by respondent. For what it claims from appellant was in truth paid by appellant, and all it had to do with the theft was that its cheques, which could not be readily converted, were misplaced in the accounts of an untrustworthy servant of respondent, and put to the credit of someone else.

It is said that misplacing was on the suggestion of Hobbs who had acted as I suggested as errand boy to deliver them. It is said that making entries was part of his duties and that in some cases he made false entries. But how did that justify the respondent's servant in misappropriating the appellant's cheques? As appellant well knew, and he was entitled to have the rule observed, if its cheque did not fit the entry it should be returned and no risk was run. The cheques were made to the order of the collector, and appellant left no excuse for any one doing anything with them except to apply them in payment for duties payable by appellant not by someone else, or if in any case an error to return the cheque evidently issued in error.

I fail to understand how that sort of wrongdoing on the part of the customs clerk can fall within the ambit of the ostensible authority given the customs broker as such, or as presented in the power of attorney above quoted.

The s. 157 requiring that power of attorney is followed by s. 158 which defined in more specific language than s. 157, what things the agent so appointed is expected to be able to do in relation to business with respondent.

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How can these things which a broker is expected to be able to do extend to the misapplication of a cheque given for some such purpose limited on its face, to him who chooses to read it inquiringly and understand its contents, to one thing which the appellant was concerned in, and not a multitude of other things which other parties were concerned in.

I cannot find in the cases, as I read them, cited by respondent's counsel, anything to support such a contention as set up relative to this branch of the case.

Indeed, the cases so cited in principle render respondent responsible for the misapplication made by its servants of the appellant's cheques entrusted to them for the purposes indicated and nothing else. Not only was appellant's delivery thereof to them within the range of their ostensible but also of their express authority.

The authority to make an entry or execute a bond or other instrument required by the Customs Act, or to take an oath, did not justify anyone in respondent's service in supposing, if he ever did suppose, that the man carrying a cheque made to the order of respondent's collector, could properly hand it over to someone else to pay his customs duties, or cash it and pocket some of the proceeds. So far as the claim depends on any such like dealing, the appeal should be allowed.

The schedule "A" I imagine, falls entirely under this.

The broker, Hobbs, acting within his apparent authority, seems to have betrayed his trust in other ways. He had occasion to pass material which he represented was either non-dutiable when dutiable, or dutiable at a lower rate than it actually should have borne. In misleading the Customs House officers in any such regard, he was thereby acting in such apparent discharge of his authority as to render appellant liable for his fraudulent conduct. If any goods thereby escaped payment of duty, the appellant is liable.

Whether the total of these items exceed the amount paid into court, I cannot say.

The schedules "B" and "C," I imagine, fall within this latter expression of opinion.

The appeal should be allowed accordingly. Even if the majority of the court should reach the same conclusion I doubt if it is a case for costs.

The agent of appellant seems to have acted improperly in many cases falling within the apparent scope of his authority in dealing with items in schedule "A."

Though I cannot find any justification in law for respondent seeking to recover what, through its own servant, was diverted to other uses than intended by appellant, I doubt if the latter's agent was not the original corrupter of the service. When apparently acting within the scope of his authority, he was playing false to both.

DUFF, J.:—The decision in this case turns, in my judgment, upon the effect of the power of attorney which is in the following words:—(see judgment of Idington, J.) and of the statute, ss. 157 & 158 R.S.C. (1886), c. 32.

The rule for construing powers of attorney is stated at p. 177 in *Bryant* v. *La Banque du Peuple*, [1893] A.C. 170.

> Nor was it disputed that powers of attorney are to be construed strictly —that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. It was pointed out, indeed, that the decisions on which the learned counsel for the appellant mainly relied in support of these propositions were decisions of English judges, but it was not shewn that there is any difference in this respect between the law of Canada and the law of England. The provisions of the Civil Code of Lower Canada, and the Canadian authorities which were cited to their Lordships, appear to be in harmony with English law and English authorities,

and at p. 180:—

> The law appears to their Lordships to be very well stated in the Court of Appeal of the State of New York, in *President &c., of the Westfield Bank* v. *Cornen*, 37 N.Y. 320, cited by Andrews, J., in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows:—
>
> Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to enquire into the facts *aliunde*. The apparent authority is the real authority.

Applying this principle to the circumstances of the case before us it seems to follow that as regards the moneys paid by Meunier to Hobbs in cash as balances of cheques delivered to him by Meunier after deducting the duties payable in respect of entries made by Hobbs on behalf o' the appellant company, Hobbs

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must be taken as between the appellant company and the Crown as having been acting within his authority. Adverting to the language of the power of attorney, it seems clear that *primâ facie* "all business which we may have with the collector of the Port of Montreal or relating to the Department of the Customs of the said Port," would embrace the "business" of receiving payment of such balances; and applying the words of the statute it seems equally clear that the acts of Hobbs in receiving such balances are such acts as by s. 157 are declared to be "binding upon the person by or on behalf of whom the same" are "done or performed" as fully as if they "had been done or performed by the principal."

In the situation as on the facts known to him it presented itself to Meunier, these balances were payable to the appellant company and the receipt of them, therefore, being part of the "business" which the appellant company had to transact with the Collector of the Port of Montreal or the Department of Customs was an act "warranted by the terms used" in the power of attorney and an act made binding upon the appellant company by s. 157.

A very different question, however, arises in relation to those moneys, residues of the appellant company's cheques, after deducting payment of the duties payable by the appellant company in respect of goods entered by Hobbs on behalf of the appellant company which by direction of Hobbs were applied by the Department itself in payment of duties payable in respect of goods entered by Hobbs on behalf of principals other than the appellant company. These acts of Hobbs cannot by any ingenuity be brought within the language of either the power of attorney or the statute. The entry of goods by Hobbs on behalf of other principals of his does not fall within the words of the power of attorney "business which we may have with the Collector of the Port of Montreal or relating to the Department of Customs of the said port," nor does the payment of duties payable in respect of such goods. Nor can the language of the statute be given the effect of making such acts binding on the appellant company as the acts of the appellant company for the short reason that they are not done "by or on behalf of" the appellant company.

For such acts Hobbs had neither actual authority nor osten-

sible authority. To make the doctrine of ostensible authority applicable "*the act done by the agent*" to quote from the judgment of the Judicial Committee delivered by Lord Atkinson in *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A.C. 174, at 184,

and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do; and, of course, the party prejudiced must have believed in the existence of that general authority and been thereby misled.

Paying duties on behalf of other principals payable in respect of goods entered on behalf of such principals did not belong to the particular class of acts which Hobbs was represented by the appellant company as having authority to do.

The direction by which in any particular case Hobbs procured the appropriation of part of the proceeds of one of the appellant company's cheques in payment of duties payable in respect of an entry made by him on behalf of another principal may, no doubt, be conceived as in one aspect a receipt by Hobbs of moneys owing to the appellant company; but in fact the appropriation under Hobbs' direction was a single indivisible act incapable of being divided into two distinct acts, a receipt by Hobbs on behalf of the appellant company and a wrongful misappropriation of moneys so received for the benefit of another principal. For the purpose of deciding the legal question upon which we have to pass this single indivisible act must be looked at as a concrete fact and when regarded in that way it is quite impossible to bring it within the category of "business" that the appellant company had with the Customs Department or within the category of acts "done or performed" either really or apparently "on behalf of" the appellant company.

These directions given by Hobbs to Meunier, to apply the residues of the company's cheques from time to time in payment of goods which he was entering on behalf of other customers, being directions not only beyond the scope of his actual authority but beyond the scope of his apparent authority, unless there was something in the conduct of the appellant company disentitling it to insist upon its strict rights, it follows either that up to the amount of moneys so appropriated the duties sued for have been paid or that these moneys are still in the hands of the Crown subject either to application by the Crown in payment of some obligation by the appellant company to the Crown or subject to the direction of the appellant company itself.

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I think there is nothing in the conduct of the appellant company to modify or affect its *primâ facie* rights. It is perfectly true that the beginning of the train of events and incidents which led to the loss, if loss there is to be, was in certain acts of Hobbs, fraudulent as against his principals, but "within the scope of his employment" according to the accepted meaning of that perhaps not very happy phrase. But if there is to be loss it must result from the fact that the Crown cannot now recover from Hobbs' principals the duties which he professed to pay by appropriation of the appellant company's balances, and of these acts it cannot be affirmed that in relation to such loss they were *fraus dans locum injuriæ*. Two subsequently operative causes—first, the irregular conduct of Meunier, the Crown's own servant, secondly, the concurrence of Meunier with Hobbs in the final act which (and this is the decisive point) was an act beyond Hobbs' actual as well as his ostensible authority, as above pointed out, by which or in consequence of which the residues were appropriated in payment of duties owing by these other customers of Hobbs—these were the effective causes of the loss, if such loss there is to be.

Whether strictly in contemplation of law there has or has not been payment to the extent mentioned may be an arguable question, but it is, I think, immaterial. Assuming that, in point of law, the duties must be considered to be unpaid but that the Crown has in its hands moneys of the appellant company which the appellant company intended to be applied in payment of the duties, and which from a time anterior to the commencement of the action down to the present moment, the appellant company has been insisting ought to have been and ought to be applied in payment of them; it is abundantly evident that the Crown could not, while retaining such moneys, maintain an action for the payment of the duties—for the short reason that the Crown declining to appropriate the moneys, the appellant company is entitled to direct the appropriation of them; and through the conduct of the appellant company, beginning with the sending of the cheques themselves, the Crown even before the commencement of the action had notice of the company's intention so to appropriate them.

The result is that, in my opinion, the appeal should be allowed

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as regards the moneys wrongfully applied by Hobbs in the manner above indicated, and that there should be a reference to ascertain the amount.

ANGLIN, J.:—Upon the facts in evidence the only possible conclusion is that the defendant company has failed to discharge the burden placed upon it by the Customs Act (R.S.C., c. 48, s. 264), of proving that the customs duties claimed from it in this proceeding had already been paid to the Crown. It is admitted that delivery of the goods in respect of which those duties were payable was obtained for the defendant company through fraudulent devices practised by its customs broker without proper entries of them having been made. There was never an appropriation to these duties of any moneys in the hands of the Crown. No request or direction for such an appropriation was ever made or given to the officials of the Crown. Whatever other defence or ground of counterclaim (if any) the circumstances may present, they do not sustain the plea of payment of the duties in question.

Nor do I think that in respect of the moneys embezzled by its broker the defendant company could have successfully maintained a counterclaim against the Crown for moneys had and received to its use.

Collusion between the fraudulent broker and the Customs House cashier who paid out to him, or by his direction appropriated to other purposes, portions of the proceeds of C.P.R. cheques issued to the order of the Collector of Customs and intended to be used for payment of customs duties on C.P.R. importations has not been found by the learned trial judge; and, highly suspicious as some of the circumstances undoubtedly are, I am not prepared to make such a finding. I am not to be understood as implying that proof of such collusion would necessarily involve responsibility of the Crown.

That there was gross carelessness and neglect of duty on the part of the Customs House cashier, which made the success of the broker's fraudulent scheme possible, is abundantly apparent. But, apart from statutory provision therefor, the Crown is not answerable for the consequences of laches or negligence on the part of its servants.

Ex facie it was within the scope of the power of attorney

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given to its broker by the defendant company that he should receive for it from the Customs officials moneys in their hands paid by it in excess of the amount of duties payable on goods entered on its behalf. I find nothing in the evidence to warrant a finding that any restriction on the scope of this apparent authority was ever brought to the notice of the Customs officials. The circumstance that all moneys paid by the C.P.R. for customs duties were paid by certified cheques did not amount to such notice. Though each cheque was intended when issued to cover duties upon a particular invoice, the cheque itself was not so ear-marked and there was nothing to bring notice of that fact to the customs officers. I would therefore not be prepared to hold that the receipt by its broker of moneys of the C.P.R. Company from time to time in the hands of the Customs officials in excess of the amount of customs duties for which entries made on its behalf shewed the company to be liable was beyond the scope of his apparent authority. While the appropriation from time to time of a portion of these moneys in the hands of the Customs officers to payment of duties owing by another of the broker's clients would, at first blush, appear to have been clearly beyond the scope of his authority from the C.P.R. Company, such a transaction may be regarded as having taken place merely as a convenient method of avoiding a roundabout process whereby the broker would receive a sum of money by way of refund upon C.P.R. account and would thereupon immediately hand over to the Customs cashier a like sum belonging to another client in payment of the duties of such other client—the net result being the same. A similar observation may be made as to the payments by direction of the broker to Customs officers, presumably as gratuities, of small sums taken from C.P.R. moneys in the hands of the Customs cashier.

The hardship to which the success of the Crown's claim subjects the appellant company is apparent. But we cannot for that reason afford it relief to which we are not convinced that it is legally entitled.

The appeal fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—This is an action for unpaid customs duty. Defendant (appellant) pleaded that it had paid the full amount of duty and was in fact in possession of cancelled cheques payable

to the order of the Collector of Customs and of vouchers establishing such payment.

It appears that one David Hobbs was given by the C.P.R. company a power of attorney;

Hobbs as such agent received and had charge of the invoices for all goods imported by the company and on his requisition cheques were issued to the order of the Collector of Customs for payment of duty. These cheques were made for fixed amounts corresponding to the invoices.

But instead of making his entries regularly with those invoices he concealed from the Customs authorities the quantities and values entered from day to day. He altered in some cases the documents on which the entries were to be made and his usual procedure was to prepare an entry for a definite number of cars and to attach to this entry an invoice which really covered a part only of the goods contained in the cars and in that way he succeeded in passing entries for much smaller sums than the quantity of goods required.

From time to time he was presenting to one of the cashiers of the customs some of the cheques which he was getting from the company. Sometimes those cheques were covering a larger amount than the entry passed and he was on his request reimbursed the difference by the cashiers and he misappropriated then the amount of the cheques which had been entrusted to him. Those cheques after being received by the cashier and the change given as I have said were handed over to the Collector of Customs by whom they were entered in the usual way and deposited to the credit of the Receiver-General.

There is no evidence that the Customs cashier benefitted by those transactions and so far the only man who seems to have benefitted from those frauds is Hobbs, the agent of the company.

In some cases the surplus cheques were applied in payment of the duties due by other importers for whom Hobbs acted as customs agent.

Those frauds having been discovered, Hobbs was arrested, convicted of forgery of invoices and sent to the penitentiary. But it remains to be decided whether this loss of money should be supported by the Crown or by the company.

The company, as I have said, relies on the cancellation of the

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cheques and on the receipts which they have in their possession to prove their payment. There is no formal evidence as to whether the receipts which they have in their possession have been duly given by the cashier. They are stamped receipts which could have been very easily forged and the circumstances of the case lead me to believe that Hobbs got a stamp made up which he used on the document which he handed back to the C.P.R. authorities to shew that the duties had been properly paid.

On the other hand, the official documents on which the official receipt appears would have been kept in his hands and would not have been, of course, handed over to the C.P.R. authorities; because if they had been handed over the fraud would have been easily detected and put an end to.

The terms of the power of attorney are as broad as possible. They gave authority to Hobbs to transact all business which the company might have with the Collector of the Port of Montreal and it is wide enough to cover all transactions in connection with the entry and payment of duties. He had power to make payments. He must have had power to receive change when necessary, such power being necessarily implied.

It is a well settled principle that the principal is responsible for the fraud committed by his agent while acting in the ordinary course of his employment, whether the result is or is not for the benefit of the principal.

In *Lloyd* v. *Grace*, [1912] A.C. 716, the House of Lords applied that principle.

I refer also to Story on Agency 9th ed., p. 374.

In the circumstances of the case, it seems to me only fair that in a case of that kind the principals should be responsible for the misdeeds of their agents unless there is negligence on the part of the other party or unless the party has by words or conduct made a representation of facts either with a knowledge of its falsehood or with the intention that it should be acted upon. Those elements cannot be found here.

In these circumstances, I am of opinion that the company has failed to prove that it has paid the customs duties in question and the judgment which condemned it to pay them should be confirmed with costs. *Appeal dismissed.*

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British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. September 10, 1917.

VENDOR AND PURCHASER (§ I D—20)—COMPENSATION FOR DEFICIENCY—COVENANT FOR TITLE—MEASURE FOR DAMAGES.

After a conveyance has been made under a contract of sale of land, damages may be claimed for breach of covenant of title in respect of any portion of the land bargained for not conveyed, and the grantee is also entitled to rectification; the value of the land not conveyed would be the measure of damages, in addition to any special damage within the contemplation of the parties when the contract was made; loss of profits through delay in registration of title caused by the vendor's negligence is too remote to be recovered as damages on a covenant for good title.

Statement.

APPEAL by defendant from the judgment of Morrison, J. Reversed.

Davis, K.C., for appellant; *Ritchie*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff applied on November 3, 1911, to purchase 2,560 acres of unsurveyed lands of the defendant railway, roughly describing them in the application. The application was favourably entertained by defendant, and subsequently the lands were surveyed by the plaintiff's surveyor, and his survey was accepted by defendants on May 25, 1912. The formal agreement of sale was executed in the month of July following, but prior thereto, namely, on June 12, 1912, defendants inadvertently included in the conveyance of a tract of land on that day conveyed to the Crown in right of the province, 124 acres of the land for which the plaintiff had applied, and which was included within the limits of his survey and formed part of the total of 2,560 acres.

In 1914, the defendants conveyed the lands to the plaintiff, and on his application thereafter to register his title the mistake above mentioned was discovered.

I stop at this point to consider the rights and remedies of the plaintiff at that time. If the contract had been an executory one plaintiff might have refused to go further and have recovered back his deposit and costs and expenses of investigating the title, or he could have taken the diminished acreage with an abatement of the purchase price—that abatement would have been the value of the deficiency at the date of the sale: *Hayes* v. *Goddard*, 22 D.L.R. 566, 21 B.C.R. 389.

Now, what is the position after conveyance? The plaintiff must, in the absence of fraud or mistake, rely solely on the covenants in the deed. The covenant for good title was broken in respect of the 124 acres. In my opinion the measure of damages

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would be the same as in the case of abatement for deficiency in acreage before conveyance, added to which would be such special damages suffered by the grantee as could be said to have been within the contemplation of the parties and which would flow naturally from the breach. In addition, the plaintiff would be entitled to rectification of the description so as to exclude the 124 acres, and thus give him a description capable of registration. The latter part of the relief would I think come within the covenant for further assurance.

On discovering the error the plaintiff did not elect to rely upon his covenant, but a lengthy correspondence ensued between the parties. I will refer to the correspondence prior to April 14, 1915, merely to point out that it indicates a *bonâ fide* effort on the part of the defendants to obtain a reconveyance by the Crown of the 124 acres and a recognition of that effort by the plaintiff's solicitor. I may say here that in my opinion the defendants were not bound to purchase back the said lands from the Crown.

It is not a case like *Engell* v. *Fitch*, L.R. 3 Q.B. 314, 37 L.J.Q.B. 145, affirmed in L.R. 4 Q.B. 659, 38 L.J.Q.B. 304, where a vendor who had it in his power to make good title refused to do so. The effort of the defendants to recover the 124 acres was a gratuitous one.

On April 14, 1915, plaintiff's solicitor wrote to defendants saying:—

Kindly advise me if any arrangement can be made between Mr. Bagley and the C.P.R. whereby a new deed can be given to my client, minus the portion of land which the C.P.R. has conveyed to the Government. If this is done, then I think the C.P.R. is entitled to compensate Mr. Bagley in cash for the deficiency.

The answer (April 20) acquiesces in this proposal or suggestion, but on May 3, the plaintiff's solicitor wrote:—

Owing to the fact that the property has been subdivided and sold, it would not be feasible for us to accept a deed from the C.P.R. minus the area conveyed by the company to the government.

The defendants then persevered in their effort to get back from the Crown the 124 acres. The correspondence shews the tacit acquiescence of the plaintiff in that effort and culminated in a letter, dated January 12, 1916, in which plaintiff's solicitor wrote to defendant:—

This is to notify you that unless you make title to the whole of the property immediately, so that the deed can be registered, we intend to sue you for damages arising out of the transaction.

The writ in this action was issued on April 1, 1916, and shortly thereafter the defendants succeeded in obtaining the 124 acres from the Crown, title to which the plaintiff then accepted and thereafter obtained a certificate of indefeasible title for the whole parcel.

Notwithstanding the completion of title the plaintiff proceeded with his action, claiming large damages practically for loss of his bargain. It appears that he subdivided the land, and then sold it to one Doyle, who in reality was buying it for one Harloff, who proceeded to sell the lots to his vendees. The sale from the plaintiff to Doyle was evidenced by an agreement, and the purchase money was payable in instalments, the last on August 26, 1916, at which date Doyle would become entitled to a conveyance. On that date the plaintiff's title was complete. But he complains that, because of the non-registration of his deed in the beginning, Harloff's purchasers were deterred from making advance payments of purchase money as some of them desired to do in consideration of a discount, and as Harloff's interest in these purchase moneys had been assigned to the plaintiff, he had lost large sums of money which otherwise would have been received by him.

Now, granting that Doyle was in default in payment of moneys due under his contract with the plaintiff, and that Doyle's vendees were also in default and that the default in each case was brought about by the non-registration of the deed from the defendants to the plaintiff, the damages (if any) suffered by the plaintiff by reason thereof were, I think, too remote to be recovered in an action on the covenant for title. The plaintiff has not lost his right so far as the evidence shews to recover from Doyle or to recover from Doyle's vendees under the assignment by Harloff to the plaintiff. In effect the plaintiff says I am going to make the defendant pay the debts of Doyle and Harloff's vendees. There has been no cancellation of those contracts because of the premises.

Turning now to the offer of the plaintiff's solicitor to take a new deed with the 124 acres omitted, and the willingness of the defendant to give it, the plaintiff was there on solid ground, it was his right to have such a deed by way of further assurance, that is to say, a deed with a proper description, and damages for the deficiency. At that time he claimed no other damages. That in my opinion was his sole right, but instead of pursuing it he

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allowed the defendants to go on with their efforts to get back the 124 acres, and when those efforts were successful, accepted the fruits of them. It is true he commenced his action for damages for breach of the covenant shortly before he accepted those fruits. But when he agreed to accept the title as finally completed, no cause of action was left unless it were for the delay in getting back the 124 acres. Even had there been unreasonable delay on the part of the defendants in procuring the conveyance back from the Crown, I doubt if the plaintiff on the facts and in the circumstances of this case could have recovered damages on account thereof. I say this, because there was no obligation on the defendants to endeavour to get these lands back. Had there been an obligation on the Crown to give them back, then it would have been the duty of the defendants to have taken such proceedings as were necessary to get them, and to give good title to the plaintiff, but in the absence of such obligation the efforts made to obtain a reconveyance of this parcel from the Crown were gratuitous efforts and were acquiesced in by plaintiffs. At all events the plaintiff cannot, having regard to his conduct, be in any better position than he occupied at the time he discovered the deficiency, namely, when he attempted to register his deed in the first place, and it has not been suggested that at that time he had suffered loss, in connection with the re-sale.

There is nothing in the case to shew that had he then insisted upon his right, namely, damages for the deficiency, and a rectification of the description, he could have recovered anything more than the value of the 124 acres. On the facts of this case it is difficult to see that the plaintiff is entitled to any damages at all, but as counsel for the defendants appeared unwilling to trouble the court with this question up to the amount paid into court, which is $100, I would reduce the damages to that sum. I think the plaintiff is entitled to the costs up to and including the time of his acceptance of the reconveyed parcel, or up to the payment of the said $100 into court, whichever was the later date. He should pay the defendants the subsequent costs of the action and of this appeal.

Martin, J.A.

MARTIN, J.A.:—I would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I would allow the appeal.

The case most relied upon by the respondents: *Engell* v. *Fitch*,

L.R. 3 Q.B. 314, is distinguishable. Here there is no refusal or unwillingness to complete title, but on the other hand from the time it became known that the 124 acres included in the Smith survey had been alienated to the Crown the appellants set to work to get a reconveyance in order that they might be able to make title to the respondents, and while it may seem that an unreasonable delay occurred in accomplishing this, yet governments are slow moving bodies and it does not appear that appellants were responsible for the delay.

An order-in-council was finally obtained re-vesting this 124 acres in the appellants after action brought. The respondents were notified of this and registered their conveyance but proceeded with the action for damages for loss of profits.

Smith, who surveyed the property by error, included this 124 acres. He was the respondents' surveyor, and while it is true that appellants approved the survey and executed the conveyance in accordance therewith, they did not become aware of the error until respondents attempted to register their conveyance.

After receiving notice as I before stated, I cannot say, nor do I think a jury would be justified in finding that appellants had not on their part done everything they could to get a reconveyance of this property from the government, which they eventually did and perfected the title.

It is further to be noted that respondents at first requested a conveyance of a lesser area, excluding this 124 acres, and a reduction in the purchase price which they were entitled to and to which appellants agreed, but respondents changed their mind and again requested appellants to procure title to this 124 acres, which they eventually did and which was accepted.

Under these circumstances I do not find in any of the cases any principle laid down which would justify maintaining the verdict.

I agree in the disposition made by the Chief Justice as to the moneys paid into court and as to costs.

McPHILLIPS, J.A. (dissenting), said that when the appellant undertook and agreed to convey the lands to the respondent, it had disentitled itself from so doing as to 124 acres. McPhillips, J.A.

The appellant was guilty of delay, and at all times the respondent was calling upon the appellant to comply with the covenant for title, and nothing which took place could be taken as amounting

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to any release upon the part of the respondent of the strict requirement that the appellant should comply with the terms of the covenant.

The registrar of titles had refused to register the conveyance made by the appellant, because of the fact that the 124 acres previously conveyed by the appellants to the Crown was included in the description of the land.

The title was not perfected until May, 1916, and the conveyance rendered capable of being registered.

By reason of the breach of covenant the purchasers from Harloff could not be compelled to perform their agreements of purchase, and the moneys which would have otherwise come into the hands of the respondent were lost to him.

Before the title was perfected the lands in question fell greatly in value, and it would be impossible for the respondent to sell the land for the purchase price of same, and the respondent had clearly suffered damages.

As to the damages being too remote, the judge was of opinion that they were not too remote; the damages as awarded by the jury could be said to be, in the language of Lord Atkinson in *Addis* v. *Gramophone Co.*, [1909] A.C. 488, 78 L.J.K.B. 1122, "damages for breach of contract . . . in the nature of compensation." The perfecting of the title some two years afterwards could not be said to be compensation, the profits of the resale had been irretrievably lost.

The quantum of damages gave rise to considerable doubt, however. The whole case was well presented to the jury, and he was not prepared to say that there was any error in law (*Kleinwort* v. *Dunlop* (1907), 23 T.L.R. 696, at 697). He was of opinion that the appeal should be dismissed. *Appeal allowed.*

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LEE v. ARMSTRONG.

Alberta Supreme Court, Harvey, C.J., and Stuart, Beck, and Walsh, JJ. November 30, 1917.

1. EXECUTION (§ I—8)—LIEN OF.

In Alberta an execution against lands filed in the Land Titles Office binds all lands of the debtor owned at the time of filing or subsequently acquired by him, while the writ remains in force.

[*Per* Beck and Walsh, JJ., Harvey, C.J., and Stuart, J., *contra;* review of legislation.

2. LAND TITLES (§ IV—40)—EXECUTIONS. ALTA.

The effect of sec. 77 of the Land Titles Act (Alta.), as amended by c. 3 (40), 1917, is that writs against lands already filed in a Land Titles Office for a particular land registration district bind any lands within that registration district, though not within the judicial district of the sheriff to whom the writ is directed, which belonged to the execution debtor at the date of the Act coming into force, or which are subsequently acquired by him while the writ remains in force. S. C. LEE v. ARMSTRONG.

[*Per* Beck and Walsh, JJ.; Harvey, C.J., and Stuart, J., *contra.*]

APPEAL from an order of Hyndman, J., dismissing an application for the removal from the record of an execution against lands. Affirmed, the court being equally divided. Statement.

A. M. Sinclair, and *J. B. Roberts*, for appellant; *J. E. Brownlee*, for respondent.

HARVEY, C.J.:—The plaintiff obtained an order *nisi* in a mortgage action and a judgment against the defendants upon which he issued an execution which was registered in the Land Titles Office on February 16, 1916. The above-named defendant was, at that time, the mortgagee of certain lands and after default under his mortgage, by virtue of proceedings taken, he obtained a foreclosure and vesting order, which he registered in the same Land Titles Office on July 17, 1917, whereupon the registrar issued to him a certificate of title to such lands and endorsed a memorandum on the certificate declaring that the defendant's title was subject to the plaintiff's execution. About 2 months after the plaintiff's execution was registered an Act was passed by the legislature which, as amended in April, 1917, declared that, in the event of a judgment being obtained upon a mortgage covenant, no execution should issue and that no proceeding whatever should thereafter be taken upon any execution already issued upon any judgment until the mortgaged lands were sold or foreclosed. The lands affected by the plaintiff's judgment have not been sold or foreclosed. Harvey, C.J.

An application was made to Hyndman, J., to direct the removal of the record of the execution from the defendants' certificate of title which he dismissed and the defendant has appealed.

I think the judge was right in holding that the act of the registrar was not a proceeding on the execution prohibited by the Act of 1916. It was no act whatever of the plaintiff and was only a ministerial act which the registrar conceived it his duty to perform and over which the plaintiff had no control whatever.

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The judge held that the land became bound upon the registration of the execution and there was nothing in the Act of 1916 which took away that binding effect and nothing that the registrar did affected that in any way. The judge quite clearly had not in his mind the fact that the land in question did not become the land of the debtor till more than a year after the execution was registered and after the Act in question was passed and at the time the Act was passed it certainly was not bound nor till more than a year later, if at all.

I am of opinion, however, that it never became bound by the execution and I come to my conclusion apart altogether from the provisions of the Act of 1916, but entirely from a consideration of the Land Titles Act itself. As it appears to me the effect of a writ of execution against lands, apart from the statute, is of little importance because our Land Titles Acts have always explicitly provided what the effect shall be. It may be that prior to 1887 when the Territories Real Property Act came into effect the writ bound the lands of the debtor as soon as it was placed in the sheriff's hands, but it is clear that thereafter it did not, for s. 94 of that Act provides that the sheriff may deliver to the registrar a copy of any writ affecting lands in his hands with a "memorandum in writing of the lands intended to be charged thereby," and that "no land shall be bound by any such writ until such copy and memorandum have been so delivered."

Now it is perfectly clear that no lands which the debtor did not then own could possibly be bound by the delivery of the writ to the registrar and that they never would be bound by the writ without some further action by the sheriff.

This continued to be the law until the Land Titles Act, 1894, when a new procedure was adopted, s. 92 providing for the delivery by the sheriff of a copy of the writ without any memorandum of the lands to be charged. The section also provides that: "No land shall be bound by any such writ until the receipt by the registrar for the registration district in which such land is situated of a copy thereof; but from and after the receipt by him of such copy no certificate of title shall be granted and no transfer, etc., executed by the execution debtor of such land shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force." That Act also provided

for the registrar keeping an alphabetical index of execution debtors.

When the provincial Act was passed in 1906 no change whatever was made and the law continued to remain without change until the plaintiff's execution was registered, but on April 15, 1917, an amendment was made which struck out the first portion of the above quoted provision and substituted the following, "and upon and from the receipt by the registrar of such copy all lands and interests in lands . . . shall be bound by such execution." While this does not say whose lands shall be bound, if there could be any doubt it is settled by a new sub-section added at the same time which provided that: "A writ of execution transmitted to any registrar by a sheriff shall be effectual as hereinbefore provided with respect to lands belonging to the execution debtor, etc."

This was the state of the law when the defendant became the owner of the land in question.

As I have already stated it is clear that under the first Act the writ in the registrar's office did not and could not by itself bind after-acquired lands. Moreover, it did not bind any lands of the debtor which were not specified in the memorandum of the sheriff. Now it is equally clear that when the law was changed by the later Act, the writ, when delivered to the registrar, did not and could not bind any lands but those of the debtor, but it now could and did bind all of his lands without specification, but I can see nothing in the amendment to warrant the conclusion that it was intended to have any wider effect. The binding of the lands is declared to be effective "from and after the receipt by the registrar" just as it was in the original Act and not also "from and after the acquisition by the debtor of other lands." The expression "from and after" of that Act and even more the expression "upon and from" of the last amendment appear to me to be capable of application only to a condition existing at the time. Lands acquired by the debtor a year after the receipt of the writ by the registrar cannot be bound "from" or "upon" the receipt, though, of course, they could be bound "after." I see no warrant, however, for separation of the words each of which has its application to all of the lands which the debtor then owns, the first word indicating the time of commencement and the

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second the duration, of the binding effect of the writ. For these reasons I think that the plaintiff's execution did not bind the land in question, and, of course, by reason of the Act of 1916 he can take no proceedings to make it have that effect.

There is another ground also on which I think the appellant is entitled to succeed. The writ of execution in question was directed to the sheriff of the judicial district of Calgary, while the lands which it is sought to have declared bound by it are situate in the judicial district of Lethbridge.

Now it seems clear that the writ in the hands of the sheriff to whom it is directed could affect no lands not situate in his bailiwick, consequently upon its being registered, since, by the terms of the section, it binds such lands only as it affects, it can bind only lands in his bailiwick. It happens that while there are only two land registration districts in the province there are 9 judicial districts and apparently for the purpose of giving the writ in the Land Titles Office effect as against all lands of the debtor in the land registration district a new sub-section to s. 77 was enacted in 1917 at the same time as the other amending provision. It enacts that: "A writ of execution transmitted to any registrar by a sheriff shall be effectual as hereinbefore provided with respect to lands belonging to the execution debtor situate anywhere in the land registration district," etc. I assume that this means what could have been said in fewer and plainer words that such writ binds all lands of the debtor in the land registration district but it appears to me that to hold that that new provision gives to a writ already registered a binding effect upon lands upon which before it had no binding effect is to give the provision a retroactive effect because, it destroys, by its own action, and without any act of the execution creditor, the right which the debtor had to deal with his land free from the execution if such land were not within the sheriff's bailiwick. In terms, it is prospective and not retrospective. It is not dealing with procedure as might be considered if the words were "shall be held to be effectual" instead of "shall be effectual." The rule of construction is, of course, against retroactivity unless it is clearly intended, and I see nothing indicating such an intention in this provision. There is, indeed, what might be fairly deemed evidence of a contrary intention as respects such a case as this, for by the one

amendment the legislature declares that the creditor can issue no execution in the case specified and take no proceedings on any execution already issued which would make it impossible for the plaintiff, by his own act, to do anything which would affect the lands in question and, by the other amendment, it enacts what, if given the interpretation suggested, will, by itself, give the plaintiff the benefit which he is prohibited from acquiring by his own act.

I would consequently allow the appeal and direct the registrar to note on the certificate that the defendant's title is not subject to the execution. The defendant should have the costs of the application and of the appeal.

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STUART, J.:—I continue to be of the opinion that there is nothing in the Land Titles Act, even as recently amended, which authorizes the issue of a writ of execution against lands. S. 77 refers to the delivery to the sheriff of a writ of execution "affecting lands," and the whole section obviously deals with such a writ. The words "*such* execution" are used at the end of the substituted words. The Land Titles Act is dealing with the question when *such* a writ shall bind the land as against third parties. The registration of a copy is notice to all the world that the land is bound. But if a writ delivered to the sheriff does not "affect" lands at the time it is delivered to the sheriff, then it is not such a writ as is referred to in s. 77. And, I apprehend that the expression "affecting lands" means more than merely "referring to lands" because a writ might well "refer" to lands and yet if there were no authority for its issue it would not legally "affect" them.

The legislation contained in the Land Titles Act, at least as it now stands, plainly disregards entirely the possibility that a writ of execution, assuming it to be legally issued, commanding a levy upon the lands of the judgment debtor may be executed, the lands may be seized and sold, and a valid transfer made to a purchaser without any registration at all as long as the rights of third parties did not intervene as between the creditor and debtor. And surely s. 77 of the Act would have no effect in such a case as validating the original issue of the writ.

I therefore think that the authority for the issue of the writ against lands must rest upon some law which operates upon the

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delivery of the writ to the sheriff and quite regardless of the registration of a copy in the Land Titles Office which may never take place at all.

It is upon this subject that I regret the absence of specific legislation.

It is apparently, however, scarcely now worth while returning to the subject of the authority for the issue of a writ of execution against lands, because the other members of the court are convinced that upon some basis or other, I am not yet quite sure what, the authority does exist. For myself the most satisfactory basis would appear to be the inherent jurisdiction of the court. With regard to lands in the "plantations" being looked upon by the English courts as "chattels" I apprehend that there is a distinction between the law of England, *as enforced in England*, and the law which English courts thought existed in the Colonies. It is the former, not the latter, which is, by statute, made in force here and our view of the latter might vary from that of the English courts. Possibly English writs of execution ran to the Colonies. Certainly up to about 1860 English writs of *habeas corpus* ran to the Colonies. The statute of George II. was directly applicable *proprio vigore* to the Colonies and was repealed (see *Seay* v. *Sommerville Hardware Co.*, 33 D.L.R. 508, at 511, 512), and therefore is not now of any effect.

Upon the crucial question as to the effect of s. 77 of the Land Titles Act as amended with regard to lands acquired by the debtor after the registration of the writ, there would appear to be much force in each contention. It might be suggested that as long as a valid writ of execution against lands is in the hands of the sheriff and has not been returned, inasmuch as he has a right under it to seize whatever lands of the judgment debtor he can discover in his bailiwick even though acquired subsequently to the issue of the writ, therefore the registration should bind them when so acquired. But by the Act as it now stands the binding effect extends to lands which the sheriff could not seize and sell at all as being beyond his judicial district.

On the whole I am inclined to the view adoped by the Chief Justice because the Act, in my opinion, deals with the effect of the registration at the time of registration and with the subsequent *continuance* of *that* effect, whatever it was. Now that effect

was obviously only operative upon lands and interests at *that* time belonging to the debtor. As I have intimated there seems almost as much to be said for the one view as for the other, but for the reason I give and the reasons given by the Chief Justice, I would, with some hesitation, adopt his view.

BECK, J.:—I concur with my brother Walsh but take occasion to add what follows:— Beck, J.

By the North-West Territories Act, 1875, s. 72, it was provided that execution of a judgment should be carried into effect in the manner prescribed by any Ordinance of the Lieutenant-Governor and Council or Assembly or if no such Ordinance be then in force, then, in like manner as a judgment in the Province of Manitoba.

The Administration of Civil Justice Ordinance, 1878, provided for the issue of executions against goods and lands, giving forms which are substantially the same as those ever since in use in this jurisdiction. S. 33 provided that goods, chattels, personal property, lands and interests therein shall be bound by the delivery of process against the same respectively to the officer entrusted with the execution thereof.

The Torrens system of land registration was introduced by Dominion statute, the Territories Real Property Act, 49 Vict. (1886), c. 26. That statute, s. 94, provided that: "No land shall be bound by any such writ or process until" delivery by the sheriff to the registrar of a certified copy of the execution. This provision continued throughout the various Acts amending or taking the place of that Act until the recent amendment of the Alberta Land Titles Act.

In the case of *Gardiner* v. *Gardiner*, 2 O.S. 520, 554, there is a very extended examination of the English authorities which shew that "in England it had long been understood as a principle and was so at the time of the passing of 5 Geo. II. c. 7, that inheritances in the plantations, in view of the law of England, were *chattels* for the payment of debts;" that is, according to English law applicable to the Colonies and plantations, "goods" had the original wide meaning of property or possessions like the word "*bona*" in civil law and the word "*biens*" in French law; and it was said that "the opposite rule of the English law derived from the feudal system which never had place in America was

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upheld by political considerations wholly inapplicable to the Colonies."

The statute, 5 Geo. II. c. 7, appears to have been passed only to settle doubts which had been raised in some Courts as to the correctness of this view. Following this Act, an execution expressly against the lands of the debtor was introduced generally. The obvious intention was that the effect of a *fi. fa.* lands should be in all respects the same against lands as the effect of a *fi. fa.* goods is against goods.

No one ever doubted that under a *fi. fa.* goods any goods of the debtor of which he might become the owner after the delivery of the writ to the sheriff were bound by the writ equally with those of which he was the owner at the time of the receipt of the writ.

The Statute of Frauds, 29 Car. II. c. 3, s. 16, enacted that: "No writ of *fi. fa.* or other writ of execution 'shall bind the property in the goods of the debtor,' but from the time that the writ should be delivered to the sheriff," etc.

Our Land Titles Act, as it stood prior to the amending Act of 1917, said, s. 77:—

> And no land shall be bound by any such writ until the receipt by the registrar for the registration district in which such land is situated of a copy thereof . . . but from and after the receipt by him of such copy, no certificate of title shall be granted, etc.

Just as the clear intention of the Statute of Frauds was merely to substitute the date of delivery to the sheriff for the date of the writ as the time from and after which the *fi. fa.* goods should bind the execution debtor's goods; so the provision referred to of the Land Titles Act was (first substituting the registrar for the sheriff) merely to fix the date of delivery to the registrar as the time from and after which the *fi. fa.* lands should bind the execution debtor's lands. In both instances, the effect of the executions as historic instruments of the court was recognized and impliedly continued except that the date of the commencement of their operations was definitively fixed as of the delivery.

I cannot see how it can be contended otherwise than that, just as a *fi. fa.* goods binds any goods acquired by the execution debtor after the receipt by the sheriff of the *fi. fa.* goods, so a *fi. fa.* lands binds any lands acquired by the execution debtor after the receipt by the registrar of the *fi. fa.* lands.

In this view the lands in question, immediately the execution

debtor became the registered owner of them, became bound by the *fi. fa.* lands. As this was the effect of the writ prior to the amending Act of 1917 it seems to me clear that it continued and that so far as the execution in question is concerned (it having been already issued) the effect of the amendment is merely to stay proceedings upon it.

Since the foregoing was written it has been called to our attention that the writ of execution was directed to the sheriff of the judicial district of Calgary while the land in question was situate in the judicial district of Lethbridge. S. 77 of the Land Titles Act was, however, further amended by c. 3 of 1917, s. 40, by adding the following sub-section:—

(3) A writ of execution transmitted to any registrar by a sheriff shall be effectual as hereinbefore provided with respect to lands belonging to the execution debtor situate anywhere within the land registration district whether or not such lands are within the judicial district of the sheriff to which the said writ is directed and whether or not such judicial district is within the land registration district of the registrar to which a copy of such writ has been transmitted.

I think the clear effect of this added sub-section is, as to writs of *fi. fa.* lands already filed in a Land Titles Office for a particular land registration district to bind any lands within that land registration district though not within the judicial district of the sheriff to whom the writ is directed which belonged to the execution debtor on the date of the Act coming into force (April 5, 1917), and also any such lands which subsequently became lands belonging to him so long as the writ remains in force. The adoption of this view, is not, it seems to me, giving a retroactive effect to the added sub-section and is merely the logical consequence of the views I have already expressed upon the general question. The effect of the amendment to s. 62—"no execution shall issue," etc.—is not, in my opinion, to prevent the sub-section added to s. 77 from being effective in respect of a writ already filed in the Land Titles Office; full effect is given to the first amendment by the operation of the words, "no proceedings shall be had or taken," etc.

WALSH, J.:—The plaintiff on February 16, 1916, placed in the hands of the sheriff at Calgary an execution against the lands of the defendant Armstrong issued under an order *nisi* made in this mortgage action. A copy of this execution was on the same day delivered to the registrar of land titles at Calgary. The lands with respect to which this order *nisi* was made have not

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yet been sold nor has any foreclosure order been made with respect to them. On July 17, 1917, this defendant became the registered owner of certain lands in the Calgary district and on the certificate of title issued to him therefor the registrar noted that his title was subject to the above-mentioned execution. He, thereupon, applied for an order directing the registrar to remove this execution from his certificate of title. Hyndman, J., who heard the application, dismissed it and from his order dismissing it the defendant now appeals.

Two grounds were put forward before us in support of this appeal, namely, that this execution does not bind this particular parcel of land at all because the defendant did not own it when the execution got into the registrar's hands and, if this is not so, that its binding effect is suspended by virtue of the amendment made to the Land Titles Act at the last session of the legislature until the lands covered by the plaintiff's mortgage have been sold or foreclosure of the defendant's interest in the same has been ordered.

Any doubt that there may have been as to the existence of a right to sell lands under execution in this province has been removed by the amendment to s. 77 of the Land Titles Act, effected by sub-s. 5, of s. 40, of c. 3, of the statutes of 1917. Under it, certain words of the section are struck out and the following are substituted for them: "and upon and from the receipt by the registrar of such copy" (referring to the copy of the writ of execution filed with him by the sheriff) "all lands and interests in lands whether such interests be legal or equitable and any interest of any unpaid vendor of land shall be bound by such execution." Though this amendment does not say whose lands are to be bound, it could, of course, be only those of the execution debtor and the new sub-s. 3 to s. 77 enacted by this same sub-s. 5 makes it plain that such is the case. While this settles any question that there may have been as to whether or not a writ of execution when filed in the Land Titles Office has any binding effect upon the lands of the execution debtor it raises for decision another question and that is what lands of the debtor does it bind, simply those which he owns when it reaches the registrar's hands or in addition those which he subsequently acquires at any time while it remains effective.

A writ of execution commands the sheriff to levy of the goods and lands of the debtor the amount of the judgment debt. Its authority is not limited to property of which the debtor is then presently the owner. It is a warrant to the sheriff to seize and sell any property of the debtor which is not exempt from seizure which he may at any time during its currency be able to find in his bailiwick. The registration of the writ in the Land Titles Office is meant to implement it and give full effectiveness to it. *Primâ facie* I should say that the legislature in giving this statutory recognition to its binding character intended to do so to the fullest possible extent so that the sheriff might thereby be enabled to do what the writ commands him to do, namely, make the amount of the execution out of any of the debtor's lands while it remains in his hands unsatisfied and otherwise continues effective. Is there anything in the language of the above-quoted amending section which compels us to limit its operation to lands owned by the execution debtor at the time of its registration? I do not think that there is. Its proper interpretation is a matter of some difficulty because of its careless wording but it seems to me that it is just as open to the wider as the narrower construction and that being so it should receive the wider interpretation if thereby effect will be given to the obvious intention of the legislature. It says that the execution shall bind "upon and from" its receipt by the registrar. If it had simply said that it should bind upon its receipt the argument for the narrower view would be much stronger for it might very well then be said that it spoke of something which was to happen at once and could therefore only affect something upon which the execution could immediately operate. The added word "from" carries it further than this. I do not think that it is used simply to continue or carry on the charge created by the filing of the execution on lands then owned by the debtor for it is not needed for that purpose as the charge once created on such lands by the filing of the writ would continue without more so long as the writ remains effective even if only the word "upon" were used. The word "from" must of course have some meaning. As used here I think it denotes the future as distinguished from the present which is expressed by the word "upon." Stroud says it is much akin to "after." I think that it is doing no violence to the language of the statute and is giving

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effect to the manifest intention of the legislature to hold that this amendment means that lands then owned by the debtor are bound upon receipt of a copy of the writ by the registrar and that lands from that time forward acquired by him become bound by it upon his acquisition of them.

Then it is said that the addition made to sub-s. 2, s. 62 of the Land Titles Act by sub-s. 3, of s. 40, of c. 3, of the 1917 statutes suspends the binding effect of this execution until the land covered by the plaintiff's mortgage has been sold or foreclosure of the defendant's interest in it has been ordered. This amendment reads as follows:—

> And no execution shall issue and no proceedings shall be had or taken in respect of any execution already issued on any personal judgment obtained either before or after the passing of this subsection, under the covenants, agreements or conditions contained in any mortgage, encumbrance or agreement for the sale of land or under any foreign judgment obtained in respect thereof whether the land described in such mortgage, encumbrance or agreement for sale has its situs within the Province of Alberta or elsewhere, until sale of the land mortgaged or encumbered or agreed to be sold has been had or foreclosure ordered in some competent jurisdiction and levy shall then be made only for the amount of the judgment or mortgage debt remaining unsatisfied with costs.

The plaintiff's execution was issued before this amendment was passed, so that what is enacted with reference to it is that pending a sale or foreclosure no proceedings shall be had or taken in respect of it. The registrar's act in noting it upon the defendant's certificate of title was not a proceeding had or taken with respect to it. It was in no sense essential to the preservation of the plaintiff's charge against this particular parcel of land. that it should be so noted for it is the registration of the execution and not the noting of it upon the execution debtor's certificate of title that gives it its binding effect. So long as the defendant remains the owner of this land so long does the execution while in force bind it whether noted upon his certificate of title or not, so that even if we should hold that the registrar was wrong in thus noting it and ordered its removal from the certificate of title, no good would result to the defendant unless we went further and declared that notwithstanding its registration the execution had temporarily lost its binding effect under the above amendment. And that is really what the defendant on the argument asked us to do. I do not see how we can do it. We cannot torture the con-

duct of the plaintiff or the registrar in merely allowing this execution to remain of record in the Land Titles office into a proceeding under it and it is only the taking of a proceeding that the statute prohibits.

I think that the appeal should be dismissed with costs.

I agree with my brother Beck as to the effect of sub-s. 3 added to s. 77 by the amendment of last session.

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, Haggart and Fullerton, JJ.A. November 12, 1917.

1. DISCOVERY (§ IV—20)—INTERROGATORIES—TO CORPORATION—MISTAKE—AMENDMENT—NEW TRIAL.
An answer to an interrogatory by a defendant, as long as it remains unamended, is an admission of fact binding on him; answers to interrogatories by corporations are to be made after full inquiries and investigation as required by the rules; where a jury is misled in its verdict by a mistake of the defendant in answering an interrogatory, a new trial will be ordered to enable the defendant to amend and re-frame the answers.
2. CARRIERS (§ II G—70)—NEGLIGENCE—BUMPING OF CAR.
Failure to detect bumping by a railway car, which later overturned, does not of itself imply negligence.

Statement.

APPEAL by defendant from the judgment of Prendergast, J., and a jury, in an action to recover for personal injuries sustained as passenger on defendant's train. New trial ordered.

A. J. Andrews, K.C., and *L. J. Reycraft*, for appellant.

D. Campbell and *H. F. Tench*, for respondent.

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HOWELL, C.J.M.:—The accident, the subject matter of this suit, happened on January 25, 1916, and the action was begun on December 2 of that year. The defendant's statement of defence was filed on the 15th of that month, and contained, besides general denials, only a statement that the accident was caused by latent and undiscoverable defects unknown to the defendant. On the 18th of that month the plaintiff delivered interrogatories for discovery and these were duly answered by an officer of the company. After this and after notice of trial had been served, the defendants applied for and obtained an order for an amendment of the statement of defence permitting them to set up the breaking of the equalizing bar, and pursuant to that order, on February 13, 1917, the amended statement of defence was filed. Par. 5a sets up the cause of the accident as alleged by the defendants and which they endeavour to prove at the trial. The clause is as follows:—

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5a. In the alternative to par. 5 hereof the defendant says that if the said coach did run off the said track and down an embankment, and if the plaintiff was injured the said coach left the said track and ran down said embankment and the plaintiff was injured owing to the breaking of an equalizing bar on the said coach, as a result of atmospheric conditions or of some other cause or causes which could not be foreseen and against which no care or skill on the part of the defendant or its servants and employees could provide and the defendant is not liable.

At the trial the plaintiff proved that he was a passenger on the defendant's train, that the coach on which he was travelling left the rails and was overturned and he was thereby injured. The defendants called witnesses to prove that the equalizing bar of this coach had its forward end broken while running, at a point about five miles from where the accident happened, and that this forward end fell down so that the angle or elbow of it ran along outside of the rail for about 5 miles until it struck a switch chair which it mutilated and then caught on the side of the rail which led off from the switch and thus drew the car from its rail and shortly afterwards it overturned without any negligence of the defendants.

The defendant's case is that this bar broke because of weather conditions and without negligence and that this caused the coach to leave the rail and because it left the rail it was overturned.

It became at the trial all important for the defendants to prove that the coach left the rail just after passing the switch, otherwise the theory that the equalizing bar, by catching on the branch rail, caused the coach to leave the rail would be untenable.

To meet this evidence the plaintiffs put in evidence interrogatories 16, 17 and 18, and these with the answers are as follows:—

16. Did not the coach in which the plaintiff was riding on said train run off the track when approaching the village of Kirkella in the Province of Manitoba? A. Yes, near the Village of Kirkella. 17. If not, did it leave the track at all? A. Answered by answer No. 16. 18. If it did, where did it leave the track? A. Coach No. 714 left track at mileage 5.05 McAuley subdivision, that is 5.05 miles from the defendant's station at Kirkella aforesaid.

In reply to this counsel for the defendants sought to put in No. 37 in explanation but this was refused. The whole of the interrogatories and answers were put in before us on this point. No. 37, with the answer, is as follows:—

37. How far had the said train travelled after such break occurred? A. Train No. 60, to which said coach was attached, travelled 5,03 miles after the said equalizing bar broke before said coach left the track.

Interrogatories for the purpose of discovery are provided for by r. 423, following very largely the provisions of the Eng. O. 31. There is no such provision for discovery in Ontario and the only cases I have seen on the effect of answers to interrogatories are the English cases.

R. 423 (3) requires very full discovery by corporations and requires full inquiry to be made from all officers and servants and full inspection of all documents so that the answer given by the corporation shall be a clear and true statement of fact.

S.-s. 6 provides that the answers to interrogatories by a corporation shall be by oath of one of its officers and in this case the answers were by Mr. D'Arcy, who is described as "General claims agent." It was his duty, therefore, before answering, to make full inquiries and read any reports of the accident before making the answers.

In answer to No. 18, he stated clearly that the coach left the track 5 miles west of the switch where it overturned and if that is so the evidence given by the defendants as to the cause of the accident is quite untrue. The answer to No. 37, which the defendants wished to put in, does not explain the former answer, it merely shows that the equalizing bar broke 10 miles before Kirkella switch was reached. It cannot be said that this answer explains the former one, and it does not contradict it, and I should think the procedure would be very wrong if it did. If it was explanatory, then the explanation should be put in on the request of the defendant: *Lyell* v. *Kennedy*, 27 Ch.D. 1 at 15.

It seems to me that the answers to the interrogatories by corporations are admissions of fact which are to be made after full inquiries and investigation as required by the rules in order to save expenses at the trial and save the calling of numerous witnesses. The answers are really not the answers of the officer but of the corporation, and I think the English cases fully hold them to be admissions of fact made by the corporation: *Welsbach* v. *New Sunlight*, [1900] 2 Ch. 1 at 14; *Chaddock* v. *British S. Africa*, [1896] 2 Q.B. 153 at 158; Phipson, 438; Annual Practice (1917) 519.

No doubt as soon as the accident happened full inquiries were made by the defendants and full reports were made, and many months afterwards the company states to the plaintiff in answer to an interrogatory—which statement must only be made

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after full inquiry—that the coach left the rail 5 miles from where it was overturned. The plaintiff went down to trial with this admission and having proved that he was a passenger in the coach and that it left the rail and overturned and that he was thereby injured, he made out his case, as shown in numerous English and American cases.

The defendants then entered upon the defence and called many witnesses to establish their defence above outlined, and amongst other things, gave much evidence to shew that the coach left the rail at the switch within 180 feet from where it was overturned. They called witnesses who swore that the equalizing bar clearly caught upon the rail branching off at the switch and that this pulled the coach from the track.

In reply to this evidence the plaintiff's counsel read the interrogatories 16, 17 and 18 and the answers above set out. If those interrogatories are true they completely answer the defence. Questions were left to the jury and the questions and the answers by the jury are as follows:—

1. Q. Was the breaking of the equalizing bar the cause of the accident? Yes or no? A. No. 2. Q. If that was not the cause of the accident, what was the cause of the accident? A. The hind truck of rear car left rails near the place where broken part of equalizing bar was found coming in contact with switch toppled car over. 3. Q. Was there negligence on the part of the company? Yes or no? A. Yes. 4. Q. If there was any negligence—how? A. The inability of company's employees to detect the bumping of the car. 5. Q. If you find negligence on the part of company, assess the damages. A. $4,500.

The jury apparently relied on the answer to interrogatory No. 18 as shewn by their answer to question No. 2, and thereby refused to believe the testimony at the trial by the defendants and this leaves the plaintiffs *primâ facie* case unimpaired and to me the answer to question No. 4 seems immaterial.

It would make an inroad in the administration of justice if a defendant could admit a fact by an answer to an interrogatory and then at the trial set up a state of facts contrary to the admission upon which the plaintiff relied. If the defendants wished to set up the defence sworn to at the trial they should have, before the trial, applied to amend the answer to question No. 18.

The answer to question No. 39 "said equalizing bar broke right over the journal box at the west end of said coach." According to the evidence given by the defence it did not break

over the last journal box but over the one next to the last. Again, in answer to No. 41, it is stated "Said equalizing bar was on the north side of the said train." According to the testimony given for the defendants if points of the compass are to be given as an answer it should be the south side.

After carefully considering the evidence given at the trial I am compelled to think that there may have been great mistakes made in answering the interrogatories, and perhaps the plaintiff relying upon it did not call other evidence at the trial.

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As a new trial is to be granted, I shall not comment upon the evidence, but merely say that because of the answer to question No. 18, the jury could not have fully considered the evidence given at the trial.

With much doubt and hesitation, I think a new trial must be granted, but the defendants must pay the costs of the trial and of this appeal. The defendants are to be at liberty to amend and re-swear the answers to the interrogatories upon payment of the above costs within two weeks after taxation. The costs of the trial shall be taxed without regard to the statutory limitation.

CAMERON, J.A., concurred.

Cameron, J.A.

PERDUE, J.A.:—The plaintiff was injured by the derailing and upsetting of the rear coach in the train in which he was travelling as a passenger on the defendant's railway. The plaintiff at the trial did not attempt to prove any specific negligence on the defendant's part but relied on the general presumption of negligence. See 4 Hals. 47. The defendant put in much evidence for the purpose of establishing that the derailing of the coach was caused by the breaking of an equalizing bar on the rear truck of the coach. According to the evidence, the end of the bar where it rested above the journal box broke off and the bar dropped down until it caught on a lower part of the truck, the elbow of the bar being brought close to the ground outside the rail. The defendant's contention is that the bar remained in this condition while the train travelled some five miles until it came to a switch at the point of a "Y" near Kirkella, that then the elbow of the equalizing bar caught in the rail of the other leg of the "Y" and, as the car moved on, the diverging rail in which the bar was caught wrenched the truck off the rails and caused the coach to overturn. It was claimed that atmospheric conditions, the

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night of the accident being intensely cold, caused the breaking of the bar, that although due care and skill had been used on the part of the defendant the breakage could not have been foreseen or guarded against.

Interrogatories had been administered by the plaintiff to the defendant. Several of these with the answers to them were put in evidence by the plaintiff and read to the jury. No. 18, which was one of those so put in evidence, is with its answer as follows:—

18. If it (the coach), did, where did it leave the track? A. Coach No. 714 left track at mileage 5.05 McAuley subdivision, that is 5.05 miles from the defendant's station at Kirkella aforesaid

The defendant's counsel claims that this answer was an error, the above point being the place where the equalizing bar broke, the piece broken off having been found there. At the trial he applied to have an answer to another interrogatory put in to shew the error. The trial judge expressed his belief that the answer to No. 18 was an error and that the evidence shewed the place where the train did leave the track, but he allowed No. 18 to be put in and refused to admit the answer sought to be put in by the defendant. No application was made to amend the answer to No. 18. The answer to the interrogatory could under r. 423 be put in evidence by the plaintiff at the trial and the judge acted properly in admitting it. As long as it remained unamended it was an admission of a fact binding the defendant. See *Welsbach Co.* v. *New Sunlight Co.*, [1900] 2 Ch. 1. The defendant should have moved to amend the answer under r. 365. See *Saunders* v. *Jones*, 7 Ch.D. 435, 452; *Hollis* v. *Burton*, [1892] 3 Ch. 226.

The jury saw fit to accept the answer of the defendant to interrogatory No. 18, and found, as the cause of the accident, that "the hind truck of rear car left rails near the place where broken part of equalizing bar was found coming in contact with switch toppled car over."

According to this finding of the jury, a heavy passenger car travelled over 5 miles with the rear truck off the rails, at a speed of 25 miles an hour, and still no one on the train discovered that anything was amiss, and no mark was made by a wheel on the ties or on the ground in all that distance—a physical impossibility. The jury also found that the breaking of the equalizing bar was not the cause of the accident.

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In reply to the question as to what the negligence was, the jury made this answer: "The inability of the company's employees to detect the bumping of the car." This was the only negligence found against the defendant and the finding necessarily negatives any other negligence on their part. I am strongly impressed that the above answer does not disclose any negligence. Inability to detect bumping might be due to the fact that there was no bumping. This would not necessarily imply negligence. If there was no audible bumping that condition would go far in bearing out the statements of defendant's witnesses that the truck of the coach was not derailed until it came to the "Y."

I think the jury was misled by the mistake of the defendant in answering interrogatory 18. From the evidence and from what took place at the trial I think the answer was clearly a mistake. There should be a new trial and the defendant should have leave to amend the answers to his interrogatories by having them re-drawn and re-sworn, but this privilege is granted only upon condition that the defendants first pay to the plaintiff the full taxed party and party costs of the trial and of the appeal to this Court.

HAGGART, J.A., concurred.

Haggart, J.A.

FULLERTON, J.A.:—There is no evidence, except an answer to an interrogatory put in by the plaintiff, to support the finding of the jury in answer to the second question. The plaintiff put in evidence at the trial certain answers to interrogatories as follows:—

Fullerton, J.A.

16. Did the coach in which the plaintiff was riding on said train run off the track when approaching the village of Kirkella in the Province of Manitoba? A. Yes, near the village of Kirkella. 17. If not, did it leave the track at all? A. Answered by answer No. 16. 18. If it did, where did it leave the track? A. Coach No. 714 left track *at mileage 5.05* McAuley subdivision, that is, 5.05 miles from the defendant's station at Kirkella as aforesaid..

The answer to the last question is obviously an error, but it may be, and probably is, the fact that the jury acted on this admission in making the finding it did.

I think the appeal should be allowed and a new trial granted upon the appellant paying the costs of the trial and of the appeal.

The appellant is to have leave to amend the answers to interrogatories. *Appeal allowed.*

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S.C.

FOGDE v. PARSENAU.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., and Lamont and Brown, JJ. November 24, 1917.

ANIMALS (§ I C—25)—STRAY ANIMALS ACT—DISTRAINT—INJURIES BY.

An estray distrained within a municipality may, under part 3 of the Stray Animals Act (Sask.), be impounded in the nearest accessible or available pound either within or without such municipality. No action will lie for damage caused by estrays to stacks not enclosed by a lawful fence as defined by part 6 of the Stray Animals Act (Sask.).

G. N. Broatch, for appellant; *G. E. Taylor*, K.C., for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—In this case both the plaintiff and the defendant were resident within the Rur. Mun. of Eyebrow, and, at the time in question, there was no by-law of the council of the municipality determining the period of the year during which animals should be restrained from running at large in the municipality, under the provisions of s. 5 of the Stray Animals Act, c. 32 of the statutes of 1915.

S. 13 of the Act enacts that any proprietor may distrain any animal that is "astray."

It is clear from the evidence, and it is not disputed, that the plaintiff's horses were estrays according to the meaning of the Act, and that the defendant was the proprietor of the land and stacks of grain on and around which the horses were found during a period of the year in which animals might lawfully run at large within the municipality. There was no pound open in the municipality, so the defendant distrained the horses and drove them to a pound which had been established in an adjoining municipality. The plaintiff in order to release his horses from the pound was obliged to pay $95.95, which he did under protest. Action was then brought by the plaintiff for the recovery of that amount and other amounts, which will be referred to later.

The District Court Judge who tried the action dismissed the plaintiff's case, on the ground that the defendant was justified in impounding the animals when and where he did, and that, as there was no pound open in the municipality of Eyebrow, the pound in an adjoining municipality was the "nearest accessible" pound under the provisions of s. 16 of the Act. The plaintiff now appeals.

The main point to be decided is, whether the provisions of

part III. of the Act and, more particularly, of ss. 15 and 16, apply to a case where there is no pound accessible or available within the municipality where the estrays are distrained. It is not disputed that the pound in question was "the nearest accessible" pound *de facto*.

A comparison of the provisions of parts I., II., III. and V. of the Act, leads me to the conclusion that it was the intention of the Act that pounds should be exclusively used for the purpose of the area within which and for which they were established.

S. 8 provides that every rural municipal council *shall* by resolution determine the location of such pounds and appoint such poundkeepers as may be necessary to provide reasonable facilities in all parts of the municipality for the impounding of estrays and animals unlawfully running at large. It also provides that the secretary of the municipality "shall cause to be published early in each year in such local newspapers as largely circulate among the ratepayers a list of the pounds, giving the location of each, and poundkeepers, for the then current year, and shall in like manner publish throughout the year any alterations or additions which may be made in respect thereto."

S. 9 enacts that:—

> Every municipality shall be responsible for the acts and negligence of its poundkeepers, or their agents, in the performance of their duties, and shall be liable for all loss and damage resulting therefrom.

Part II. of the Act deals with the herd district in unorganized areas, and provides for the appointment of poundkeepers in that district by the Minister and for due publication of the name and post office address of each poundkeeper and the location of each pound.

The provisions of part V. of the Act apply (*a*) to unorganized portions of the province not included within the herd district, and (*b*) to the herd district and the organized portions of the province in the event of a pound for any reason not being accessible or available. Organized portions of the province mean those portions which have been erected into rural municipalities.

It is quite clear that although s. 13 gives "any proprietor" the right to distrain "any animal" that is an "estray," that section and the other sections of part III. do not give proprietors in unorganized portions of the province not included within the herd district the right to impound an estray in the nearest acces-

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sible pound, although there might be a pound accessible *de facto* in an adjoining municipality or portion of the herd district. The special procedure provided by part V. must, in that case, be resorted to. That procedure also applies "to the herd district and to organized portions of the province in the event of a pound for any reason not being accessible or available." In my opinion, that means accessible or available within the herd district or municipality.

I, therefore, come to the conclusion that as there was no pound open in the Eyebrow municipality, there was no pound accessible or available which the defendant could make use of, and he should therefore have resorted to the remedy provided by part V. of the Act. The impounding of the plaintiff's horses by the defendant was therefore illegal, and the plaintiff is entitled to damages. He claims $95.95, the amount paid under protest to release the horses; $350 for depreciation in value of the horses, and $50 for wrongful removal and detention.

The plaintiff is, in my opinion, entitled to recover the amount of the first item.

As to the second item, while the evidence shews that the horses, after being impounded, were not in such good condition as they were before, there is nothing to shew that this was attributable to any lack of reasonable care on the part of the pound-keeper. I would, therefore, not allow that portion of the claim. As to the third item, the plaintiff is entitled to nominal damages for wrongful removal and detention, and I would allow him $25 on that ground.

The judgment appealed from will, therefore, be set aside and judgment for the plaintiff will be entered for $120.95, together with costs of action. The defendant will also have to pay the plaintiff his costs of this appeal.

Brown, J.

BROWN, J.:—The parties hereto are residents of the rural municipality of Eyebrow. In the month of January, 1916, the defendant distrained certain of the plaintiff's horses which, at the time, were damaging his grain stacks. There was no by-law in the aforesaid municipality determining the part of the year during which animals shall be restrained from running at large and there was no pound open within the municipality. The defendant impounded the animals so distrained in a pound,

located within a neighbouring municipality, and the plaintiff, in order to get possession of his animals from the poundkeeper, was compelled to pay to him some $95.95, of which amount $25 was for damages to the defendant's grain and the balance for the poundkeeper's fees and expenses.

It is not disputed that the animals were "estrays" within the meaning of s. 2 (15) of the Stray Animals Act, being c. 32 of the statutes of 1915, and it is admitted that the pound in which the animals were impounded was, in fact, the nearest accessible pound to the point where the animals were so distrained.

It is contended on behalf of the plaintiff that the defendant had no right in law to impound the animals in a pound located outside of the municipality of Eyebrow—that the pound in which the animals were impounded was available only to animals distrained within the municipality in which that pound was established.

The consideration of this question requires a review of the whole Act. The Act is divided into 6 parts; part I. empowers municipal councils to locate pounds and appoint poundkeepers within the municipality; part II. makes provision for the establishment of Herd Districts by the Minister of Agriculture, for the location of pounds and the appointment of poundkeepers within such districts; part III. provides for the distraining and impounding of animals. Part IV. makes regulations respecting pounds and poundkeepers. Part V. applies:

(*a*) To unorganised portions of the province not included within the herd district;

(*b*) To the herd district and to organised portions of the province in the event of a pound for any reason *not being accessible or available,*

and there is a distinct procedure provided for estrays within such districts which excludes the consideration of pounds altogether. Part VI. deals with fences and trespassers on property enclosed thereby.

It will be seen that the Act has in view three distinct classes of district; (1) municipalities; (2) herd districts; (3) unorganised portions of the province other than herd districts.

In so far as unorganised portions of the province other than herd districts are concerned, there is laid down one distinct procedure for dealing with estray animals—that which is contained in Part V.—which makes no provision whatever for impounding.

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In so far as the municipalities and herd districts are concerned the Act, in my opinion, contemplates two distinct procedures being taken, dependent on whether or not a pound is accessible or available. If an estray is distrained within the limits of a municipality or herd district and a pound is accessible or available, whether or not located within such municipality or herd district, then the provisions of part III. apply, and such animal may be impounded in such accessible or available pound which is nearest. On the other hand, if an estray is distrained within the limits of a municipality or herd district and a pound is not accessible or available, either within or without such municipality or herd district, then, in contemplation of the fact that such animal cannot be impounded, the provisions of part V. are applicable and must be followed. In other words, in so far as municipalities and herd districts are concerned, the municipal or herd district boundaries have no bearing on the case; it is entirely a question of accessibility or availability of a pound.

If I am correct in this view of the Act, then the animals in question were legally impounded.

It does not seem to me necessary to consider the question of when a pound is accessible or available; but one can readily see that there may be a pound even within fairly close proximity and still the same may not be accessible or available.

As already indicated, a portion of the money which the plaintiff seeks to recover consists of $25 which he was compelled to pay as damages, and which the defendant claims was a low estimate of the damage done to his stacks.

Part VI. of the Act defines what a lawful fence is, and s. 53. (1) states:—

> The owner of an animal which breaks into or enters upon any land inclosed by a lawful fence, shall compensate the proprietor for any damage done by such animal.

The defendant's stacks appear to have been surrounded by a fence as good as any that are defined by the Act as being a lawful fence. Nevertheless, the Act states in s. 50 (2):—

> (2) Any fence which does not comply with the requirements of this section shall not be deemed a lawful fence.

As the fence in question was not in accordance with the requirements of the Act, it cannot be deemed a lawful fence and therefore, in my judgment, the possibility of the defendant claiming any

damages for the destruction of his stacks is excluded. The defendant not having any right to claim such damages, and the poundkeeper having collected same under his instructions and on his behalf the plaintiff is entitled to recover the amount he so paid.

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The appeal, therefore, in my opinion, should be allowed with costs, and the plaintiff should have judgment for $25 and the costs of action. As this $25 was recoverable under the small debt procedure, being merely a claim or demand for debt, the provisions of District Court rule No. 18 should be applied as to costs, both of trial and appeal.

LAMONT, J.,—I concur in the conclusion reached by my brother Brown. *Appeal allowed.*

Lamont, J.

Re SOLICITORS.

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Alberta Supreme Court, Blain, M.C. August 28, 1917.

SOLICITORS (§ II C—30)—*Lien on documents for services rendered as affected by dissolution of firm and assignment of debt to new firm—Effect of proof of debt under winding-up proceedings against client—Waiver.*]—Application for the allowance of a solicitor's lien. Granted.

S. W. Field, for solicitors; *N. D. Maclean*, for client.

BLAIN, MASTER:—The firm of Short, Cross, Biggar, Sherry & Field was solicitors for The Canadian Agency Ltd.; and as such became possessed, in the ordinary course of business, of papers and documents belonging to that agency and the agency became indebted to the solicitors for costs, statements of which were delivered to the agency from time to time. The firm dissolved subsequently to the coming into its possession of the documents and papers and to the incurring of the costs, and two new firms were formed, to one of which, Woods, Sherry, Collisson & Field, the debt owing by the agency was assigned and the documents and papers delivered over to it. I am asked to decide whether the lien ceased on the dissolution of the original firm or if it continued whether or not Woods, Sherry, Collisson & Field can enforce it. No material was used on the application but the facts as above were admitted. Thesiger, L.J., says in *Sheffield* v. *Eden*, 10 Ch.D. 291, at p. 293, that reasonableness is the foundation of all the legal doctrine of lien, and Cotton, L.J., in *Guy* v.

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Churchill, 35 Ch.D. 489, at 491, says that "the lien of a solicitor is grounded on the principle that it is not just that the client should get the benefit of the solicitors' labours without paying for them."

The existence of a lien in favour of Short, Cross & Co. was admitted and it would seem to me to be unreasonable to hold that because that firm came to an end, by dissolution, that therefore the client should be entitled to possession of its papers and documents without paying the debt due the solicitors. The fact, alone, that a solicitor has ceased to practise does not destroy a lien, and the death of a solicitor does not destroy it. It is enforceable by the personal representatives and assignees of the solicitor. In *Bull* v. *Faulkner*, 2 DeG. & Sm. 772, 64 E.R. 346, Knight Bruce, V.C., held that a solicitor may assign a debt due to him for costs, with the benefit of any lien he may have upon any documents for such costs. See also *Enniskillen Elec. R. Co.* v. *Collum*, 29 L.R., Ir. 421. The debt owing by the agency was assigned by Short, Cross & Co. to Woods & Co. and the documents and papers on which the lien is claimed delivered to that firm. I think the assignment of the debt and delivery of the papers amounted to an assignment of the benefit of the lien and I understood counsel for the liquidator to admit this. In any event, it was stated that an assignment, if necessary, could be obtained. *Vaughan* v. *Vanderstegen* (*Annesley's* case), 2 Drew. 409, 61 E.R. 778, was cited in support of the contention that no lien existed in favour of the new firm. There a solicitor claimed a lien for costs due his firm, on title deeds which had come into his personal custody as solicitor, It was held there was no lien as the deeds were never in the custody of the firm, and that to support the lien the deeds must have come into the possession of the person whose bill of costs is the object of the lien. In the case before me the papers and documents came into possession of the firm to whom the debt for costs was due, and the new firm claims the benefit of the lien by virtue of assignment of the debt.

The Canadian Agency Ltd. is now in liquidation but a lien good before a winding-up commenced is not interfered with by the winding-up order. *Re Capital Fire Insurance Co.*, 24 Ch.D. 408, 49 L.T. 697. Proof of the debt, if made in the winding-up proceedings, may effect the question of lien, but this point was not dealt with on the argument.

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I am of opinion that the lien exists and that the firm claiming the benefit of the lien is entitled thereto and I decide accordingly.

I am asked to determine the effect on the lien of proof in the liquidation proceedings.

At p. 347, Poley on Solicitors states, that a lien is lost by proving in bankruptcy proceedings, and Cordery on Solicitors, 3rd ed., at p. 372, says that "a solicitor abandons his lien by proving in bankruptcy for his bill, since proof amounts to payment." The cases referred to by these authors as supporting their statements are bankruptcy cases, the reports of which are not in our library and which I, therefore, have not had an opportunity of reading.

I was referred to *Re Meter Cabs Ltd.*, [1911] 2 Ch.D. 557, as shewing that the same principle would apply in liquidation as in bankruptcy. This was a case in which the solicitor was claiming a particular lien on a fund recovered through his instrumentality. The judge says at p. 559, "now the common law lien prevails notwithstanding the bankruptcy of the client," and after reviewing cases supporting this, says, "These were bankruptcy cases but the same principle applies to a company in liquidation," he, however, refers only to the continuance of the common law lien.

Whether or not the solicitors in proving for the amount of their bill in the liquidation proceedings waived their lien is, it seems to me, a question of intention. Poley at p. 347, in dealing with the question of waiver, says, "The waiver is generally an implied one, and results from the act of the solicitor. The principle on which waiver is presumed is that the solicitor has elected to adopt some other means of obtaining payment."

In the proof of claim filed by the solicitors in the case before me, they notified the liquidator that they hold no security for the indebtedness or any part thereof other than a solicitors' lien upon certain duplicate certificates of title covering lands, particulars of which were set out.

I am of opinion that there was no intention on the part of the solicitors to abandon or waive their lien and no election, by the filing of the proof of claim, to adopt its allowance as payment and that the lien still exists. Even if allowed there may not be sufficient funds to pay the claim in full. *Claim allowed.*

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NEUMAN v. INTERNATIONAL HARVESTER Co.

Alberta Supreme Court, McCarthy, J. September 17, 1917.

SALE (§ II C—35)—*Implied warranty as to fitness—Breach—Farm Machinery Act.*]—Action for damages alleged to have been sustained by plaintiff in connection with the purchase from defendant company of a 2 horse power pumping outfit, for the purpose of watering his garden.

G. M. Blackstock, for plaintiff.

R. R. Evans, for defendant.

MCCARTHY, J.:—I think there must be judgment for the plaintiff. The evidence, I think, establishes that he is entitled to succeed. The result of the authorities at common law seems to be clearly stated in Ker's Digest of the Law of Sale, at p. 53, where it says:—

> Where goods are ordered for a particular purpose known to the seller under such circumstances that the buyer relies upon the seller's judgment in that behalf, a warranty by the latter is implied that the goods supplied shall be reasonably fit for the purpose,

which is included in the Sale of Goods Act. I find, as a fact, that the outfit in question was purchased for the purpose of irrigating the land and that purpose was known to the company's agent; I find, as a fact, that the buyer relied upon the seller's judgment and that the outfit was not reasonably fit for the purpose for which it was purchased. In addition to his rights at common law, I am of the opinion that the case is one which comes within the purview of the Farm Machinery Act, under which the plaintiff is entitled to protection.

There will, therefore, be judgment for the plaintiff for the sum of $275 damages; the pumping outfit to be the property of the defendants. There will be costs to the plaintiff according to column 1 of the schedule as to costs, and there will be no set-off. *Judgment for plaintiff.*

TOWN OF ATHABASCA v. SHAW.

Alberta Supreme Court, Scott, J. October 20, 1917.

TAXES (§ IV—175)—*Lien for—Enforcement—Parties.*]—Appeal from the judgment of the Master at Edmonton refusing the application of the plaintiff for an order for the sale of certain lands to realize its lien for arrears of taxes due thereon. Affirmed.

Griesbach, O'Connor & Co., for plaintiff, appellant.

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SCOTT, J.:—Upon referring to the proceedings in the action I find that the plaintiff in its statement of claim alleges that the defendant is indebted to it in a certain sum for arrears of taxes upon certain lands. It does not allege that it is entitled to a lien on the lands for these taxes but it claims an order for the sale of the lands under its lien in satisfaction of the arrears. Judgment was entered against the defendant by default of appearance only for the amount of the arrears. It thus appears that the plaintiff abandoned its claim for the sale of the lands under the lien as the judgment is merely a personal one against the defendant.

Sturgeon Falls v. *Imperial Land Co.*, 20 D.L.R. 718, and *Local Improvement District No. 453* v. *North Saskatchewan Land Co.*, [1917] 2 W.W.R. 138, which were relied upon by plaintiff's counsel, do not appear to me to be applicable as they merely held that the plaintiffs were entitled to judgment declaring that the lien existed and directing the sale of the property to satisfy the liens.

The plaintiff in this case has not yet established his lien by action and until he does so he is not entitled to an order for sale.

The defendant is sued as the person assessed as owner of the property. It does not appear that he is the real owner and I have the impression that it was stated on the argument that he was not the registered owner. Where a municipality seeks a declaration that it is entitled to a lien on lands for arrears of taxes due upon it and an order for sale to realize the lien all persons interested in the lands, especially the registered owner (if he is not the person assessed), should, in my view, be made parties to the action. It appears to me that it would be unreasonable to hold that they have not the right to deny the existence of the lien or the right to a sale under it.

In the cases referred to it does not appear that all the parties interested in the properties there in question were not before the court.

I dismiss the appeal with costs. *Appeal dismissed.*

JOHNSTON v. MILLS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. October 23, 1917.

NEGLIGENCE (§ I B—16)—*Steam-plow—Fires—Negligence of servant or independent contractor—Measure of damages.*]—Appeal

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by defendant from the judgment of Taylor, J., in an action to recover damages for the alleged negligence of the defendant resulting in the burning of certain buildings of the plaintiffs, awarding the plaintiff $270 damages as follows: House, $195; stable, $40; chicken house, $10; general damages, $25. Varied.

H. V. Fieldhouse, for defendant, appellant; *H. P. May*, for plaintiff, respondent.

The judgment of the court was delivered by

BECK, J.:—The house was burned on a different occasion and under different circumstances from those relating to the other three items. The appeal as to the house is only on the ground that the amount allowed in respect thereof is excessive. The appeal as to the second and third items is on the ground that the alleged negligence was the negligence of one McCaig, who was not the servant of the defendant but an independent contractor, for whose negligence the defendant is not responsible. There was no appeal as to the fourth item.

The law upon the question thus raised is put concisely and I think correctly in 21 Halsbury, tit "Negligence," pp. 471 *et seq.*

The defendant was the lessee from the plaintiff of a farm on which the building burned stood. The defendant engaged McCaig to plow with a steam plow at a certain rate per acre. It was calculated that McCaig would plow 50 acres, though in fact he plowed only 10. There was no evidence that McCaig was subject to the orders of the defendant or that the defendant interfered with him in any way. The defendant was not at the farm when the fire occurred.

There is no evidence that a steam plow being used in plowing would in the natural course of things create a danger to the land upon which the plowing was being done or to any buildings upon it and in the absence of such evidence—which would surprise me if given—there was no obligation on the part of the defendant to take any precautions to prevent any possible danger in that respect. For this reason I think the defendant, who I think was an independent contractor, was not liable to the plaintiff, assuming that negligence on McCaig's part was proved.

As to the value of the house, having gone over the evidence I think the value placed upon the house by the judge was excessive. It was a shack, shanty roof, shingled, 1 door, 3 windows,

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size 14 by 20, height 8 ft. on lower side, about 12 feet on higher side, drop siding, boarded on inside, with tar paper on the studding, with partition of boards making two rooms and a pantry. The shack was 11 years old, the sills were rotten, it had been used as a granary and the walls and floor had given.

A witness, a builder who had examined the building, said he would rebuild it new for $136 and that the building as it stood was worth about half that sum. Allowing something better than these figures in view of the evidence of some of the other witnesses I think that $100 would represent quite the full value of the building as it was when it was burned.

I would therefore reduce the damages in respect of the house to $100.

In the result, I think that the appeal should be allowed with costs and that the plaintiff have judgment in the court below for damages in respect of the house, and that those damages be fixed at $100 to which is to be added the item of $25, and the plaintiff should have his costs in the court below. *Appeal allowed.*

GOLD SEAL Limited v. DOMINION EXPRESS Co.

Alberta Supreme Court, Ives, J, November 2, 1917.

INTOXICATING LIQUORS (§ I A—5)—*Provincial powers as to —Interprovincial trade—Carriers—Liability for refusal to carry lawful shipment of liquor.*]—Action against common carrier for refusing to carry a shipment of liquor.

A. A. McGillivray, for plaintiff; *G. A. Walker*, for defendant.

IVES, J.:—The plaintiff company is a corporate body duly incorporated under the Companies Act, c. 79, R.S.C. 1906, and is empowered by its letters patent to, among other things, engage in and carry on throughout Canada the business of . . . bonded or other warehousemen, brewers, malsters, distillers, manufacturers, importers, exporters, distributors of all kinds of wines, spirits, malt liquors . . . and to do all such other things as are incidental or conducive to the attainment of the above objects. The plaintiff also holds a compounder's license under the Inland Revenue Act.

On and prior to July 6, 1917, the plaintiff maintained a warehouse in the City of Calgary and Province of Alberta wherein

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were stored its imported wines and liquors for purposes of export from the province.

On the said July 6th, the plaintiff, in pursuance of its business, tendered to the defendant company, a common carrier, three packages of liquor, each properly labeled and addressed, for carriage to points outside the province, and which liquors are admitted to have been *bonâ fide* purchased by the addressees residing outside of the province, signifying its readiness to pay carriage charges. The defendant refused to receive these packages or to carry the same on the ground that it was in effect prohibited from so doing by the provisions of the Liquor Act, being c. 4 of the statutes of Alberta, 1916, and amendments thereto. The Liquor Act is without any preamble, but by s. 72 the legislature in express words declares its intention. The section reads:—

While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Alberta, except as specially provided by this Act, and restrict the consumption of liquor within the limits of the Province of Alberta, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Alberta and a person in another province, or in a foreign country, and the provisions of this Act shall be construed accordingly.

Sec. 24 of the Act reads:—

No person within the Province of Alberta by himself, his clerk, servant or agent shall have, keep or give liquor in any place wheresoever, other than in the private dwelling house in which he resides, except as authorized by this Act.

Then follow three subsecs. of 24 making certain exceptions not applicable here.

Sec. 25 annuls the application of sec. 24 to certain transactions in liquor and declares that sec. 24 does not apply so as to prevent common carriers or other persons from carrying liquor from outside the province to a place within the province where liquor *may be lawfully kept*, or from a place within the province where liquor *may be lawfully kept* to another place within the province where the same *may be lawfully kept*, or to a place outside the province.

S. 27 before its repeal made a further exception to s. 24 and read as follows:—

Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse provided such liquor warehouse and the business carried on therein complies with requirements in subsec. (2) hereof mentioned, or from selling from such liquor warehouse to persons in other provinces or in foreign countries or to a vendor under this Act.

The Act was amended by c. 22 of the statutes of 1917, and by the amending Act, which came in force on July 1, 1917, s. 27 was repealed, thereby removing the exception to s. 24, which enabled the plaintiff to carry on its business from a liquor warehouse within the province.

The defendant company urge that the repeal of s. 27 removes plaintiff's right to have a liquor warehouse and therefore as a common carrier it cannot deliver to or accept from the plaintiff liquor for carriage inasmuch as plaintiff's warehouse is no longer a place where liquor may be lawfully kept within the province under the provisions of s. 25.

Under the Act as amended there is no exception to its prohibitions within which the plaintiff company may carry on its business, and for such purpose maintaining a liquor warehouse, unless it be found in s. 72. As was said in the judgment of their Lordships of the Privy Council, in the case of *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders*, [1902] A.C. 73, in discussing s. 119 of the Manitoba Act, almost identical in language with our s. 72, "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 *bonâ fide* transactions in liquor which come within its terms."

Surely that language covers the present case. The law is well settled by a number of Privy Council cases that a provincial legislature cannot interfere with interprovincial trade, and that state of the law is recognized in the Liquor Act by s. 72, which in effect exempts the plaintiff's business from the provincial prohibition.

As to the question of damages, it is not contended that the amount claimed has not been suffered at the time the action was brought but the defendant urges that the plaintiff was bound to act promptly and not aggravate the damage by delay.

The plaintiff could and should have applied promptly for relief and had it done so the loss would have been reduced to that of a few days. I will fix the same at $250.

I would, therefore, answer the questions submitted as follows:—To Q. 1: No, but the plaintiff is entitled to receive $250 damages. To Q. 2: Yes.

Judgment for the plaintiff accordingly, with costs.

Judgment for plaintiff.

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LIQUIDATOR OF THE MONARCH OIL Co. v. CHAPIN.

Alberta Supreme Court, Simmons, J. November 6, 1917.

COMPANIES (§ VF—263)—*Contributories—Illegality as defence—Sufficiency of allotment—Name not on shares register—Rectification—Companies Ordinance, N. W.T.—Winding-up Act (Can.)—Specific performance of subscription.*]—Action by liquidator to enforce liability of shareholder as contributory.

A. M. Sinclair, for plaintiff; *J. M. Carson*, for defendant.

SIMMONS, J.:—The defendant relies upon the ground that there was no allotment of the shares or, in the alternative, that he cannot be called upon as a contributory because he was not entered upon the share register as a shareholder. His defences are purely technical and hinge upon the proper construction of the Companies Ordinance. It is quite clear there was a binding contract between him and the company to pay the balance on the subscription on the one hand and on the other to issue the shares when same were paid for and either party could have obtained specific performance in an action against the other upon the concluded contract at any time up to the moment the winding-up order was granted. The company was not in default and had taken none of the steps required by the Act and the Articles of Association to declare the shares forfeited for non-payment, and had, it is admitted, continued to insist upon the performance by pressing for payment, and the defendant admits that he was willing to make payment if his co-directors would do so. While the only reason given for repudiation in the notice of October 13, 1915, is non-allotment, I think he is entitled to raise any other ground under the issue raised before me.

I am of the opinion that the defendant can not successfully set up a claim that the shares in question were not allotted to him.

As a director of the company he, together with his co-directors, acting under powers conferred by the articles of association, set aside a number of shares for a certain period of time and issued an invitation to the present shareholders to subscribe for any number up to the maximum number of shares then held by each shareholder. As a present shareholder he applied for the maximum number of shares he could obtain under the aforesaid resolution and he paid one-fifth of the purchase-price in accordance with the terms of said resolution.

In the application, he waived his right to receive the share certificates at the option of the directors, and appointed the secretary his attorney to receive notice of allotment. He moved a resolution at a subsequent directors' meeting that shareholders who had made partial payments on this issue should be given stock at their own request and expense to the extent of the amounts so paid but without waiving the right of the company to enforce payment of the balance. He acted under this resolution and obtained 978 paid-up shares. This was an unequivocal act, clearly indicating that, as between the company and himself, there had been an allotment in accordance with his application. If there is an offer to take shares and an acceptance by the company of the offer, which is communicated to the party making the offer, there is a completed agreement enforceable by either of the parties and this in effect is an allotment of the shares the subject matter of the bargain. *Pellatt's* case, 2 Ch. App. 527. In *Jackson* v. *Turquand* (1869), L.R. 4 H.L. 305, at 313, the Lord Chancellor (Lord Hatherley) observed:

> It appears to me that the reasoning of the Vice-Chancellor and of Turner, L.J., is sound, that the contract is one that is immediate and that it gave to the person who elected to take the shares and accepted the offer an immediate right to the shares; that they were shares which could not be dealt with or disposed of from that moment on the part of the company.

I quote also from Chitty, J., in *Nicols* case, 29 Ch. D. 421, at 426.

> What is termed "allotment" is generally neither more nor less than the acceptance by the company of the offer to take shares. . . That offer is accepted by the allotment either of the total number of shares mentioned in the offer or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance.

Number 6 of the Articles of Association provides that the allotment of shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit with full power to give to any person the call of any shares either at par or at a premium and for such time and such consideration as the directors think fit.

Art. 9 provides that if by the conditions of allotment of any share the whole or part of the amount and issue price thereof shall be payable by instalments, every such instalment shall when due be paid to the company by any person who for the time being *shall be registered holder of the share.*

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Art. 10 provides that the directors may, from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively, and not by the conditions of allotment made payable at fixed times, and each member shall pay the amount of every call so made on him to the person and at the times and places appointed by the directors. Also a call may be made payable by instalments.

Art. 20 provides that if by the terms of the issue any amount is made payable at any fixed time or by instalments at any fixed time such amount or instalment shall be payable as if it was a call duly made by the directors.

The situation in the case under consideration is this—an application was made and an allotment under terms in which 80% was payable by instalments and this was further modified so that shares would issue to the applicant *pro tanto* for the amount of any instalment made by him.

The second objection is the failure of the company to enter the defendant's name upon the share register as the registered owner of the shares in question.

S. 25 of the Companies Ordinance prescribes the status of membership as a shareholder as one who has agreed to become a member and whose name is entered on the register.

In a company which is conducted in a proper and businesslike way, I apprehend that as soon as an allotment has been made the share register should disclose the fact by an entry on the register of the allottee as the registered owner of the shares.

Unfortunately, through careless conduct of the affairs of the company (by the directors) this is not done in many cases. On the other hand, the entry on the register of a shareholder is only *primâ facie* evidence of ownership and consequent liability as a shareholder and the remedial sections of the Act may be invoked to make the proper rectification in either case.

The principles upon which the court will act to rectify the register before and after a winding-up order are illustrated in the following cases:—

Pellatt's case, 2 Chancery Appeals, 527; *Chapman & Barker's* case (1867), L.R. 3 Eq. 361; *Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325; *Jackson* v. *Turquand*, L.R. 4 H.L. 305; *Sichell's* case,

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(1867), L.R. 3 Ch. 119; *Davies* case (1872), L.J. Ch. 659; *Adams* case (1872), L.R. 13 Eq. 474; *Nicol's* case (1883), 29 Ch. D. 421; *Re Macdonald & Sons*, [1894] 1 Ch. 89; *McDowell* v. *Maclem*, 4 O.W.R. 482.

A contract for purchase of shares will be dealt with in the same way as other contracts in so far as the equities in favour of or against the respective parties are concerned. The court will remove from the register of members any one who ought not to be registered and place upon the register any one who should be on the register.

Where a winding-up order has been granted and an application is made to correct the register the equities that existed immediately before the winding-up order will be applied.

Acquiescence, waiver, lapse of time, inability to put the parties back in the original position, statutes of limitations, may prevent interference just as in ordinary contracts. The courts will, however, apply the ordinary rules as to equitable relief somewhat strictly against a shareholder for the reason that the laws incorporated in the various Companies Acts are founded upon the basis of partnership law with the principle engrafted upon it of limitation of liability by the statute.

It is not the mere fact of the name appearing on the register which makes a person liable as a member of the company. If he has not agreed to become a member he cannot be made a contributory. *Oakes* v. *Turquand*, L.R. 2. H.L. 325, at 350.

Entry upon the register and keeping the register open for public inspection are primarily for the benefit of creditors and others dealing with the company, per Lord Cranworth, in *Oakes* v. *Turquand*, *supra*, p. 366.

The defendant admits that the company were pressing for payment of his arrears on his share subscription and that he was willing to pay up if his co-directors would also do so. Upon the argument before me it was not seriously contended that any equity existed in his favour as against the company and the reason is obvious. It was his duty as well as that of his co-directors to get in these moneys for the company. It would seem that the equity was all in favour of the company. It is contended, however, that there is no power in the court to rectify the register and therefore he can not be put on the list of contributories, as sec. 98 of the Imperial Act, 1862, now s. 163 of the Companies

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Consolidation Act, 1898, is not in the Canadian Winding-up Act. A comparison of the Acts, however, indicates that the power of the courts under the Canadian Act is quite as wide as the remedial sections of the Imperial Act. S. 40 of the Companies Ordinance, c. 61., N.W.T., provides for the rectification of the register on the application of the person or member aggrieved or any member of the company or the company itself may apply to the court for rectification. The power was vested in the company immediately before the winding-up order to apply for rectification under this section.

S. 20 of the Winding-up Act, R.S.C. 1906, ch. 144, provides that:—

> The company from the time of the making of the winding-up order shall cease to carry on business except in so far as is in the opinion of the liquidator required for the beneficial winding-up thereof; but the corporate state and all the corporate powers of the company, notwithstanding it is otherwise provided by the Act, charter or instrument of incorporation *shall continue until the* affairs of the company are wound up.

An important corporate power existing immediately before the winding-up order was the power to bring an action in the court for specific performance of contracts made with the company and the collection of debts owing to the company was a necessary incident of winding-up the affairs of the company. That power, with others, was clearly continued in the liquidator by s. 20.

It may be contended that the liquidator should apply to the court for leave to bring an action for specific performance of the contract, but I am of the opinion that the liquidator is correct in bringing the matter to an issue in the present form. All claims to place shareholders or others on the list of contributories are really actions for the specific performance of contracts. In a parallel case under the English practice the procedure is analogous to the method of application to the court in the present instance. In the Imperial Act the regulation of companies and the winding-up provision were enacted by one and the same legislature and there is consequently a closer correlation between the remedial legislation before winding-up and after, than in the Canadian legislation, where different legislatures enacted the law governing before, and after winding-up. S. 34 (*a*) read with s. 20 of the Canadian Winding-up Act is quite wide enough to justify

summary application to the court. In the result the issue is tried out in the same way as if a formal action had been instituted.

Judgment will therefore be for the liquidator for the amount of the claim and costs. *Judgment for plaintiff.*

FARNEY v. CANADIAN CARTAGE Co.

Alberta Supreme Court, Hyndman, J. November 7, 1917.

ASSIGNMENT (§ III—25)—*Of mortgage—"Absolute assignment" within Judicature Act—Collateral security to bank.*]—Action on chattel mortgage.

Henwood, for plaintiff; *Field & Carr*, for defendants.

HYNDMAN, J.:—The question before me in this application is whether or not the plaintiff has the right to maintain this action.

This depends upon the nature of the document which he and his wife executed in favour of the Royal Bank of Canada—did that document operate as an absolute assignment of all their interest in the chattel mortgage from the Canadian Cartage Co. Ltd. to the plaintiff Farney and Mary Farney his wife, dated December 1, 1915, or was it by way of charge only? The material words of the assignment are as follows:—

> Now this indenture witnesses that in consideration of $1 now paid by the assignee to the assignors, receipt whereof is hereby acknowledged, the assignors do hereby assign and set over unto the assignee its successors and assigns all that the said hereinbefore in part recited mortgage and also the said sum of $3,500 and interest thereon now owing as aforesaid together with all moneys that may hereafter become due and owing in respect of the said mortgage, and the full benefit of all powers and of all covenants and provisos contained in the said mortgage. And the assignors do hereby grant, bargain, sell and assign unto the assignees its successors and assigns all and singular the said goods and chattels therein mentioned described in the schedule endorsed thereon marked "A" and all the right, title, interest, property, claim and demand whatsoever of the assignors of, in, to, and out of the same and every part thereof subject to the proviso for redemption contained in the said mortgage.

It is also clear on the face of the instrument that it is given as collateral security for an indebtedness by the assignors to the bank, and although there is no provision for reassignment upon payment to the bank of the assignors' indebtedness, that is implied by law (*Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 190). In my opinion, notwithstanding the fact that the assignment was made for the purpose of furnishing collateral security

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to the bank, nevertheless it is an absolute assignment within the meaning of the Judicature Act. The case seems to me to be similar to *Re Bland and Mohun*, 16 D.L.R. 716, 30 O.L.R. 100.

As I view the facts here, the mortgagees, Farney *et ux.*, assigned not a part of the security but the whole of it, all the interest they had in it, both goods and money, and placed the assignee bank in a position to collect the full amount of the mortgage and give a good and effectual discharge to the mortgagor, leaving it still to be discussed between the assignors and assignee how that sum total should be applied and distributed (*Re Bland and Mohun supra*). All that remained to them was an equity of redemption, which is a matter entirely between them and the bank and which would in no way concern the mortgagors when they came to pay the mortgage debt. Having divested themselves of all title in the goods and money secured by the mortgage, I fail to see what right the plaintiff has to maintain the action.

POSER v. TOWN OF VEGREVILLE.

Alberta Supreme Court, Scott, J. November 23, 1917.

MUNICIPAL CORPORATIONS (§ II F—165)—*Power to change system of power plant and water works—Assent of ratepayers—Approval of Board of Health—Financing—Injunction.*]—Action by a burgess of the town who sues on his own behalf as well as on behalf of the other burgesses and seeks an injunction restraining the town, its officers, servants, workmen and agents from tearing down, dismantling or otherwise interfering with any machinery in connection with the water, sewerage and electric light systems of the town or from doing any work in connection with the building of a new power house or prospecting for water or in extending, changing or altering the present system of works.

Ford, K.C., for plaintiff; *Parlee*, K.C., for defendant.

SCOTT, J.:—The following by-laws were duly passed by the council in 1912 and 1913 after they had received the required assent of the burgesses, viz.:—

By-law No. 71 which, after reciting that it was desirable to construct a combined system of waterworks and sewerage, the cost of which was estimated at $75,000, provided for the raising of that amount by way of loan.

By-law No. 84 which, after reciting that the town should own and operate an electric light and power plant as a public utility the total cost of which was estimated at $25,000, provided for the raising of that amount by way of loan.

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By-law No. 86, which, after reciting that the moneys raised under by-law No. 71 had been expended in the construction of waterworks and sewerage and that the amount required to complete them was $30,000, provided for the raising of that amount by way of loan.

Under these by-laws the necessary funds were raised and waterworks, sewerage and electric light systems were constructed. They were taken over by the council as practically completed. The waterworks have been operated by the town ever since some time during the year 1914, and the electric light system from some time during the year 1915. There is some evidence to the effect that these systems were never fully completed in accordance with the plans and specifications but I am satisfied that they were taken over by the town as substantially completed and that, if not fully completed, the only question remaining open is as to the amount, if any, which should be deducted from the contract price.

The systems consisted of a series of wells sunk outside the town limits about a mile north of its centre, a power house adjacent thereto, containing the necessary machinery and appliances for generating power and electricity, a main water pipe line leading from there to a 60,000-gallon stand pipe in the southerly portion of the town with distributing pipe lines therefrom and an electric line leading from the power house to the town with distributing lines therefrom. There is also a surface water reservoir, the location of which is not shewn. With electricity generated at the power house the water is pumped from the wells, forced through the main to the reservoir and from thence to the stand pipe from which it is distributed by gravitation.

The council of the present year proposes to abandon the wells from which the water is now obtained, to purchase the necessary land for and sink new wells near the centre of the town, to dismantle and abandon the present power house and erect a new power house in the vicinity of the new wells and place therein the machinery and appliances now in the present power house, to abandon entirely the surface reservoir and force the water direct from the new wells to the stand pipe and to purchase further machinery and appliances which will be necessary solely by reason of these alterations in the systems.

In furtherance of this object the council has already entered into agreements for the purchase of the necessary lands, as to

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one parcel with one Ryan for $800 of which $50 was paid at the date of the agreement and the remainder in payments extending over 4 years with the option to the purchaser of paying the whole amount at any time. It has already expended about $2,000 in prospecting for water at the new site and has there found a supply sufficient to yield 6,000 gallons daily. It has already commenced the erection of the new power house and has purchased building material therefor. It has also entered into contracts for the purchase of machinery and appliances for the new system at a cost of $2,200, the purchase money being payable in instalments, some of which will not mature until after the expiration of the present financial year. The evidence shews that the total cost of the proposed alterations will be from $8,000 to $12,000.

Of the moneys raised under by-law No. 86 a sum of about $6,500 remained unexpended for the purposes of that by-law. The present council proposes to apply that amount in part payment of the costs of the proposed alterations. It is shewn, however, that this balance, instead of being applied as it should have been, in reduction of the liability under the by-law, was long since expended for the general purposes of the town and is not now in the treasury.

No by-law authorizing the proposed changes in the system has been passed by the council. The only matter appearing in the minutes of the council respecting them are certain resolutions not under seal respecting the purchase of the new site and of certain machinery and appliances.

The approval of the Provincial Board of Health of the proposed changes in the system, which is required by sec. 11 of the Public Health Act, has not yet been obtained.

Under s. 163 (37) of the Towns Act the council of every town has authority to pass by-laws for the building, erecting, controlling and operating any electric light or power plant and (subject to the provisions of the Public Health Act) any waterworks plant subject to the ratification of the by-law by two-thirds of the burgesses voting thereon. S. 79 provides that by-laws for contracting debts or borrowing money which do not provide for the payment thereof within the financial year shall, before the final passing thereof, receive the assent of two-thirds of the burgesses voting thereon.

The requirements of both these sections have been fulfilled with respect to the systems already constructed as the required proportion of the burgesses have assented both to their construction and to the borrowing of the necessary funds therefor.

In my view the main question to be determined in this action is whether the proposed changes in the system are of such a nature as to require the assent of the required proportion of the burgesses and, if so, whether the assent given by them to the by-laws referred to should be construed as extending to and including the proposed changes.

In my opinion, the changes are of such a fundamental nature that they should be held to be practically a new system. While it is true that in them a considerable portion of the present plant is intended to be utilized, such as the machinery and appliances in the present power house, the stand pipe and the distributing pipes leading therefrom, yet the abandonment of the present wells, the obtaining of a water supply from an entirely different source, the dismantling and abandonment of the present power house, the erection of a new power house in a different locality, the abandonment of the surface reservoir and the purchase of expensive machinery and appliances which are not required in the working of the present system constitute such radical changes in the systems that before being made they must be submitted to the burgesses for approval.

I am also of opinion that the assent of the burgesses to the by-laws referred to cannot be held to be an assent to the proposed changes or to extend to and include them. It is reasonable to assume that before the burgesses voted upon the first two by-laws the council of the day had considered and adopted a certain definite scheme for procuring a water supply and the construction of the necessary plant for the working of the different utilities. The by-laws state their estimated cost and their cost could not reasonably be estimated unless plans and specifications for a certain definite scheme had been adopted. It was necessary that plans and specifications should be submitted to the Provincial Board of Health, under s. 11 of the Public Health Act, before the town could obtain authority to proceed with the work. It is also reasonable to assume that the burgesses, before voting upon the by-laws, must have been made aware of the scheme adopted by

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the council. They could not otherwise have intelligently voted upon the by-laws. That a certain defined scheme had been adopted and the work thereon partially completed at least before the last of the three by-laws and that the burgesses were voting upon that scheme only is apparent from the fact that that by-law recites that $75,000 had already been expended upon it. I think it may, therefore, be taken for granted that the scheme upon which they voted was the one which was afterwards carried into effect by the construction of the present plant and, in view of the extent of the proposed changes, it would, in my opinion, be unreasonable to hold that their assent to the by-laws should be held to be an assent to them.

I am also of opinion that the entering into by the present council of contracts for purchase, the payments upon which extended beyond the end of the present year, was unauthorized.

Evidence was adduced at the trial by both parties upon the questions whether the proposed changes were necessary or expedient and whether the present financial position of the town warranted the expenditure required therefor. During the trial I expressed the view that these questions were not open to me to consider because, if the council was authorized to proceed with the work, the question of its expediency was a matter entirely for its consideration.

The plaintiff is entitled to an injunction restraining the defendant from making the proposed changes in the water, electric light and power systems until such time as a by-law authorizing same has received the assent of the required proportion of the burgesses voting thereon.

The plaintiff will have the costs of the action taxed under column 2 of the schedule, including the costs of examination for discovery and the costs of the application to dissolve the interim injunction obtained by him. *Judgment for plaintiff.*

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Re GALBRAITH AND KERRIGEN.

Ontario Supreme Court, Middleton, J. May 2, 1917.

DEEDS (§ II B—25)—*Defect in Form—Parties—Omission of Words—Grantor and Grantee—Dower Clause—Sufficiency to Pass Title—Vendors and Purchasers Act.*]—Motion by Galbraith, the

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vendor, under the Vendors and Purchasers Act, for an order declaring that an objection made by the purchaser, Kerrigen, to the title to land, the subject of an agreement for sale and purchase, was invalid.

D. G. M. Galbraith, for the vendor.

J. T. Richardson, for the purchaser.

MIDDLETON, J.:—On the 27th April, 1915, William Tisdall, the owner of land, sold to Galbraith. A deed was executed by Tisdall and his wife, but it was defective in form: the question is, whether, notwithstanding the defect, it is sufficient to pass the title.

The deed is on a printed form. Tisdall is named as party of the first part, Galbraith as party of the second part, and Tisdall's wife as party of the third part. The form contemplated the addition of the words "hereinafter called the grantor" after Tisdall's name, and "hereinafter called the grantee" after Galbraith's name, but these expressions were omitted. The deed then proceeds, "The grantor doth grant unto the grantee," &c., &c.—The "party of the third part wife of the party of the second part" bars her dower.

A new deed cannot now be obtained.

Lord Say and Seal's Case (1711), 10 Mod. 41, decided in the days of Queen Anne, shews that errors were not unknown in the days of our ancestors. There the names of the parties had been left blank. In the operative clause the grantor was not named, but the grantee was named. The deed was held good, for it was to be interpreted according to the intention of the parties. "The intention of the deed is plain, if this deed do not make Lord Say grantor, as to him it would have no effect at all, who yet sealed it."

In *Mill* v. *Hill* (1852), 3 H.L.C. 828, a more drastic remedy was applied. The wrong person was named as grantor. At p. 847 it is said: "The general rule of construction is, that the Courts, in construing the deeds of parties, look much more to the intent to be collected from the whole deed, than from the language of any particular portion of it. The intent must be collected from the deed itself, and not from evidence *aliunde;* and the Courts consider themselves authorised and bound, where they can collect the intent from the language of the deed, if all the parts of the

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deed will admit of it, to construe that deed rather according to the general intent than according to any particular phraseology contained in it."

It is there pointed out that what is desired is, not to find a grantor, but to construe an express grant by one person as a grant by another; "to reject, therefore, the precise and distinct terms in the granting part of the deed—to take out one name and in effect insert another, according to the supposed intent" (p. 848).

The House of Lords, having no doubt as to the true position in equity, made light of the supposed rule of law that a deed cannot be construed contrary to the express words of the grant, by holding it "clear, upon the face of that deed, that the property became subject in equity to the trusts," and that the effect was precisely the same "as if the legal estate had itself passed" (pp. 851, 852).

The importance is that the case of *Lord Say* received the approval of the Lords.

In this case I have no trouble.

The deed was intended to convey the land. The parties to the deed are known and named. The owner would *primâ facie* be the grantor. He and his wife alone sign. His wife bars her dower. From this it may be assumed that he was the grantor, and Galbraith, the remaining party, the grantee

All this, derived from the deed itself, is, I think, sufficient to shew that the objection is not well taken.

Re LOSCOMBE.

Ontario Supreme Court, Middleton, J. May 4, 1917.

TRUSTS (§ II A—41)—*Ante-nuptial settlement—Appointment of trustee—Presumption—Construction of deed of settlement—"Surviving" children.*]—Motion by E. W. Loscombe, as trustee under a marriage settlement, for the advice and direction of the Court as to the carrying out of the trusts of the settlement.

W. F. Kerr, for E. W. Loscombe and F. C. Loscombe.

D. B. Simpson, K.C., for H. C. Loscombe, Blair T. Reid, C. W. Loscombe, and George S. Reid.

C. J. Holman, K.C., for Katie Klosse.

MIDDLETON, J.:—The late Robert Russell Loscombe, one of His Majesty's counsel, on the 3rd March, 1873, made an

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ante-nuptial settlement, in view of his approaching marriage with Catharine Reid. Mr. Loscombe was then a widower with six children and Mrs. Reid a widow with three sons.

The marriage was duly solemnised, and one child, Ernest W. Loscombe, was issue of the marriage.

The settlor died on the 7th October, 1915, his wife having predeceased him on the 13th August, 1914.

Annie Burnham, a daughter of the settlor, predeceased him and his wife, and left her surviving a daughter, Katie Klosse, who claims to be entitled to a share in the distribution directed to take place after the death of the settlor and his wife.

Before discussing this question, it is necessary to deal with a preliminary objection.

The motion is made by E. W. Loscombe as trustee under the settlement. It is suggested that he was not duly appointed and is not in fact trustee.

The original trustees were David Fisher and Peter Cameron, both now dead. Under the deed, the settlor and his wife had power to appoint new trustees if any trustee should die or become incapable of acting.

After the death of Fisher, and while Cameron was still alive, but incapable of acting, an action brought in the name of Cameron, as surviving trustee, came on for hearing before Mr. Justice MacMahon on the 30th November, 1901, and on that day stood over to allow a new trustee to be appointed. On the 12th December, 1901, a judgment was pronounced, reciting that on the 6th December, 1901, under the provisions of the settlement, E. W. Loscombe had been appointed trustee in the place of Cameron, and the action was directed to proceed in his name as plaintiff in lieu of Cameron.

This appointment cannot now be found.

On the 26th August, 1904, a deed was executed by the settlor and his wife, which recites the settlement, the death of Fisher, the incapacity of Cameron, and that "by an order of the High Court of Justice" E. W. Loscombe was appointed trustee.

No such order can be found, and it is probable that what was referred to was the recognition of Loscombe as trustee by the judgment referred to.

Where the parties who have the power to appoint trustees join in a deed which recognises certain persons as occupying the

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position of trustees, their due appointment is presumed. The deed so executed would in itself amount to an appointment and cure any irregularity or defect in any former appointment: *Poulson* v. *Wellington* (1729), 2 P. Wms. 533; *In re Farnell's Settled Estates* (1886), 33 Ch. D. 599.

This objection fails.

The question upon the main motion arises upon the terms of the settlement. The property is conveyed to trustees for the benefit of the husband for life and on his death for the wife for life, charged in each case with the maintenance of the children, "and from and after the decease of the survivor" upon trust for the support education and maintenance of the said children respectively as aforesaid until the youngest child becomes of the age of twenty-one years, when the said trustees "shall sell and dispose of all and every the property real and personal held by them in trust as aforesaid and reduce the same into money and shall divide the proceeds of such sale as well as all other moneys appertaining to the said trust between the surviving children of the said Robert R. Loscombe and Catharine Reid and of either of them and the children of the said intended marriage share and share alike."

There is no clause in the settlement making any provision for the children of any child who may predecease, and the only gift to children is in the direction to divide the proceeds above quoted.

It is sought to bring this case within a rule long established, frequently acted upon, and even more frequently distinguished, which has the sanction of the House of Lords in *Wakefield* v. *Maffet* (1885), 10 App. Cas. 422. This rule is clearly stated by Sir William Grant, M.R., in *Howgrave* v. *Cartier* (1814), 3 V. & B. 79, at pp. 85, 86: "If the settlement clearly and unequivocally makes the right of the child to a provision depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the Court leans strongly toward the construction which gives a vested interest to the child . . . usually as to sons

at the age of twenty-one; and as to daughters at that age or marriage."

All the cases are based upon the natural presumption that the settlor would intend to make such a provision for his children that in the event of the death of the child leaving issue such child will not be left unprovided for; but each settlement must be construed according to the words actually used, and the Court cannot introduce into the settlement a provision not only not made by the settlor, but contrary to the provision made.

The rule possibly extends only to provisions for children, issue of the marriage; but, assuming it to be capable of wider application, in this case the word "surviving" cannot be ignored so far as the children of the former marriages are concerned; they only take if they survive. There is no other gift to them, they must be within the class among whom the proceeds of the sale are to be divided, or take nothing. There is no other gift.

Nothing would be gained by discussing other cases in which it has been sought to apply the rule. As said in the case quoted (p. 85), "There is no great difficulty in collecting the law." And in another case Sullivan, M.R., said (p. 29): "It would be a mere parade of learning to go through all the cases in which the rule was cited as settled:" *Wakefield* v. *Richardson* (1883), 13 L.R. Ir. 17.

Put shortly, no rule or case justifies me in declaring that, when the settlor directs the property to be divided among those who survive, he means a division to include the children of those who do not survive.

Nor can I declare the settlement to mean, by "surviving children," those who attain twenty-one and do not survive the period mentioned.

There may well have been reasons understood and discussed upon the treaty for marriage for drawing a distinction, as appears to have been drawn in the settlement, between the children of the former marriages and the children of the proposed marriage. I am not to speculate; but my duty, when the expressed intention is clear, is to give effect to it, even though it may seem to me to be unreasonable and even unjust.

I must therefore declare that Katie Klosse is not entitled to share in the distribution.

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The costs of all parties will be paid out of the fund.

I trust that those who supported Mrs. Klosse's claim upon the argument will adhere to their position, and will voluntarily allow her to share with them.

REX v. WARNE DRUG Co. Ltd.

Ontario Supreme Court, Masten, J. October 17, 1917.

INTOXICATING LIQUORS (§ III D—70)—*Unlawful keeping for sale by druggist—Invalid's port wine—Ontario Temperance Act—Dominion Proprietary or Patent Medicine Act—Scope of provincial powers—Summary Convictions Act—Right of appeal—Certiorari.*]—Motion to quash a conviction of the defendant company, by Police Magistrate "for that the said Warne Drug Co. Ltd., on Wednesday, August 15, 1917, did expose or keep for sale liquor, without first having obtained a license under the Ontario Temperance Act authorising it so to do, contrary to s. 40 of the same Act."

R. T. Harding, and *G. N. Gordon*, for defendant company.

J. R. Cartwright, K.C., for the Crown and the magistrate.

MASTEN, J., in a written judgment, said that the defendant was a corporation carrying on business as a duly qualified chemist and druggist in the city of Peterborough, and was also duly licensed under the Proprietary or Patent Medicine Act of Canada, 7 & 8 Edw. VII. ch. 56; that the defendant company kept and exposed for sale a liquid compound known as "Wilson's Invalid Port-wine;" and that this compound contained 35.22 per cent. of proof spirits. There was some evidence of the use of the wine as a beverage, and of resulting intoxication.

For the defence it was proved that the compound was a proprietary patent medicine, registered as such under the Dominion Act above-mentioned; that the defendant company bought the compound from a wholesale drug-house in the original packages in which it was sold; that the defendant company had sold it for 15 years as a tonic, and would not knowingly sell it to any one who would use it as a beverage.

It was contended that, under the Dominion statute above mentioned, the defendant company was authorised to carry on the sale of this article throughout Canada, and that it was ultra vires of the Ontario Legislature to interfere with or obstruct the

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authority so derived from the superior federal source. As to this the learned Judge said that the Ontario Temperance Act and the Proprietary or Patent Medicine Act do not enter upon the same field of legislation. The "pith and marrow" of the Dominion Act is the prescribing with respect to the sale of patent medicines certain conditions and limitations for the protection of the public; and it does not purport to confer upon the licensee any special authority to carry on trade throughout Canada. This view is supported by the legislation enacted by the federal Parliament at the session just closed, whereby it is provided that any penalty under the Dominion statute shall be in addition to any penalty under any Provincial law, and that the provisions of the Dominion statute shall not be deemed in any way to affect any Provincial law. See *Rex* v. *Axler* (1917), 13 O.W.N. 40. This objection is overruled.

The next point raised in support of the application to quash was based on sec. 125 of the Ontario Temperance Act and sec. 129 as amended by 7 Geo. V. ch. 50, sec. 44: it was contended that the compound contains sufficient medication to prevent its use as an alcoholic beverage, and that that is not negatived by shewing that some persons with perverted tastes choose to drink it. As to this the learned Judge said that he was satisfied, upon the evidence adduced, that the compound was capable of being used as a beverage, and had actually been used as such; there was certainly evidence before the magistrate from which he might draw the inference that the compound was not sufficiently medicated to prevent its use as a beverage; and, upon this motion, the conclusion of the magistrate upon that question of fact could not be reviewed.

The next objection was based upon sec. 131 of the Ontario Temperance Act, as amended by sec. 46 of 7 Geo. V. ch. 50. The principal officer of the defendant company swore that he was not aware that the provisions of secs. 124 and 125 of the principal Act had not been complied with, and had believed and still believed that the compound was sufficiently medicated to prevent its use as a beverage; and it was not controverted that the defendant company sold the compound in the same state as it was when he bought it. As to this the learned Judge said that, upon the whole testimony, the magistrate might well have

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found that sec. 131 did apply; but, having regard to secs. 85 and 88 and to the fact that the evidence tendered had not satisfied the magistrate that the defendant company could not with reasonable diligence have obtained knowledge of the fact that the provisions of secs. 124 and 125 had not been complied with, the magistrate's finding could not, on this motion, be interfered with: *Rex* v. *Le Clair* (1917), 39 O.L.R. 436.

A preliminary objection was raised on behalf of the magistrate, namely, that, under sec. 92, sub-sec. 2, of the Ontario Temperance Act, an appeal lies to a County Court Judge; and that sec. 10, sub-sec. 3, of the Ontario Summary Convictions Act, R.S.O. 1914 ch. 90, applies, in these circumstances, so as to preclude the defendants from making a motion for what is equivalent to a *certiorari* to remove the conviction and quash it. The learned judge was at first of opinion that this objection could not be maintained; but, after consideration, felt bound by authority to allow it to prevail: *Rex* v. *St. Pierre* (1902), 4 O.L.R. 76; *Rex* v. *Cook* (1908), 18 O.L.R. 415; *Rex* v. *Renaud* (1909), *ib.* 420, 423; *Rex* v. *Cantin* (1917), 39 O.L.R. 20, 22; *Rex* v. *Chappus* (1917), 39 O.L.R. 329, 331.

Upon the preliminary objection, as well as upon the points raised by the defendant company, the motion should be refused.

Motion refused.

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JOHNSON v. REGENT CONSTRUCTION Co.

Quebec Superior Court, Duclos, J. May 13, 1917.

BROKERS (§ II B—12)—*Commissions—Sufficiency of services—Distinction between procuring loan and agreement to lend.*]—Action for broker's commissions for finding loan. Dismissed.

DUCLOS, J.:—On March 14, 1916, defendant authorised plaintiff to procure a loan of $45,000, secured by mortgage on the Regent Apartments, and agreed to pay plaintiff 2% commission on the amount of loan effected. Plaintiff placed the application before the Standard Life Assurance Co., and on April 11, 1916, received a letter from McGoun, manager, informing him that the loan had been agreed to, and asking him to furnish Marler with the title deeds. The following day plaintiff communicated this acceptance to defendants, who furnished their title deeds to Marler, Fleet, etc., attorneys, to report thereon, and on June 22

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these gentlemen, while finding no fault with the defendants' title, advised the company not to make the loan by reason of the particular situation of the property offered as security. Acting upon this advice the Standard Life Assurance Co. declined to make the loan. Some months later defendants themselves secured a $50,000 loan on the security of the same property from other parties.

The plaintiff now claims his commission of 2%, amounting to $900, urging that, having found a lender, his obligation was fulfilled and he is entitled to his commission irrespective whether the loan was or was not ultimately effected. He submitted that the Standard Assurance Co., having agreed to make the loan unconditionally, the defendant was bound to take action against it to compel it to fulfil its agreement.

In support of this contention counsel cited a large number of authorities which, with one exception, refer to an agent's rights to commission in the case of a sale. I have carefully considered these authorities and find they can all be easily distinguished from the present case, and that the decision in each case rests upon the particular facts of that case.

There is further distinction to be made between a case for the recovery of a commission for securing a loan and one for a commission effecting a sale. In the case of a sale the consent of the parties is equivalent to a sale, and an action lies for specific performance in case either party refuses to carry it out. So that when an agent has found a purchaser acceptable to the vendor, and an agreement of sale is arrived at, it may well be urged that the sale is complete, and the commission earned, although the actual transfer of the property never takes place, through the act of either or both parties thereto.

But in the case of a loan, an agreement to loan does not effect the loan, and if the individual who has agreed to lend subsequently refuses to do so, no action lies for specific performance. There might be an action for damages, but no judgment could compel an individual to loan against his will.

It surely cannot be urged that the defendant agreed to pay plaintiff a commission for the privilege of borrowing a law suit. In the case of *Hicks* v. *Lamarre* (47 Que. S.C. 335, decided by Archer, J., and confirmed in the Court of Review), it was held that the agent could recover his commission because the loan had not been completed through the fault of the borrower.

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There is no pretence that the loan in this case was not completed through any fault of the defendants. On the contrary, the proof shews that they were anxious to complete the transaction. Now, under the very terms of the contract upon which the plaintiff relies it is stipulated that defendant will pay him a commission upon the amount of loan effected. Can it be said that the loan was effected in this case? I think not: and the plaintiff's action, must, in consequence be, and it is, dismissed, with costs.

Action dismissed.

POULIN v. GRAND TRUNK R. Co.

K. B.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., and Lavergne, Carroll and Pelletier, JJ. October 29, 1917.

[See Annotation 7 D.L.R. 5.]

MASTER AND SERVANT (§ V—340)—*Workmen's Compensation Act (Que.)—Additional compensation—Inexcusable fault of master or fellow servant.*]—Appeal from a judgment of the Superior Court which condemned the Grand Trunk R. Co. to pay $4,025 to Theophiline Poulin, widow of Wilfrid Gagnon, in compensation for her husband's death on February 29th, 1916, near Lisgar, Que.

Gagnon was a fireman on one of the locomotives in collision and it was charged that the accident which resulted in his death was due to the gross and inexcusable fault and negligence of the company and its employees, and particularly of a telegraph operator, who was on duty at the time at South Durham station, inasmuch as he forgot to give to the conductor of Gagnon's train telegraphed instructions which would have held his train up on a siding while the other locomotive passed. The judgment of the Superior Court, condemning the company to pay the widow $2,000 indemnity in addition to the $2,025 admittedly due under the Workmen's Compensation Act, was affirmed.

A. E. Beckett, K.C., for appellant.

Perron, Taschereau & Co., for respondent.

ARCHAMBEAULT, C.J., in delivering the judgment of the court said: The first question that we have to decide is whether an employer can be held liable to pay additional indemnity if the inexcusable fault has been that of his servant or deputy. The company appellant pretends that the employer is responsible for additional indemnity only when the inexcusable fault is directly attributable to him. This argument is based on a difference which

ex s between our law and the French law. Art. 20 of the latter declares that the indemnity payable by the patron may be increased by the court when the accident is due to the inexcusable fault of the patron or those substituted for the patron in the service.

Art. 7325, R.S. Que. 1909, merely states that the court may increase the indemnity if the accident is due to the inexcusable fault of the employer. Our law does not mention—as is done in the French law—that the indemnity may be increased when the accident is due to the inexcusable fault of one acting as deputy for the employer. The appellant concludes from this fact that the chief of an enterprise is not responsible for the inexcusable fault of his deputy. Our legislators, it was submitted, had under their eyes the dispositions of the French law, and in omitting that part of the disposition which refers to the responsibility of the deputy, it was manifest that the legislature intended to limit the liability to pay an additional indemnity for inexcusable fault to instances in which inexcusable fault was that of the master personally.

It is the first time this court has been called upon to decide this important question—whether the master is responsible for the inexcusable fault of the persons whom he has appointed to execute his work?

But if this court has not already given a decision on this subject, the Superior Court has given judgment in several cases holding that inexcusable fault of the master includes that of his deputy; so it may be said that the jurisprudence of the Superior Court, at least in Montreal, is settled in the sense I have just stated. I do not think that because our law refers only to inexcusable fault on the part of the patron and does not mention the fault of the deputy for the patron, the legislators intended thereby to limit the patron to responsibility for his own personal inexcusable fault. If our law has not reproduced textually the French law on this subject, it seems to me it was not because it was intended to withdraw the patron from liability for the inexcusable fault of his deputy, but rather because it was not intended to make the distinction, as in the case of the French law, between the general civil law and the workmen's compensation law in the matter of the inexcusable fault of deputies. In the absence of a law to the contrary, the fault of the deputy is that of his employer. Art.

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7325 had no need to mention the deputy except to limit the responsibility enacted by the general law in regard to fault.

To conclude from the reading of the law as it stands that a master is withdrawn from liability for the inexcusable fault of his substitute or deputy, and is liable only for his own personal inexcusable fault would be a derogation too exorbitant of the principles applicable in such a matter as a modification of the disposition of art. 7352. The consequences of that interpretation would be very grave. It cannot be supposed the legislature intended the law should have such an effect as would be given to it. It would be necessary to edict a clear and formal disposition in this regard before we could put on one side the fundamental principles of our law in the matter of inexcusable fault.

The patrons, or employers, in the majority of instances to-day, are companies or corporations. These companies always act through the medium of a deputy or agent, and to decide that a patron is responsible for additional indemnity only in the case of his own personal inexcusable fault would have for effect the withdrawal in nearly every case of companies from responsibility for inexcusable fault. The victim would then be deprived of all recourse for additional indemnity, because Art. 7334 of the law of workmen's compensation takes from him the right to proceed against the duty of a patron. The latter is alone responsible. I conclude, therefore, that Art. 7325 means that the court may reduce the indemnity if the accident has been caused by the inexcusable fault of the workman, and may augment it if the accident happened through inexcusable fault on the side of the patron or employer.

(Having laid down this ruling, His Lordship turned to examine the case to ascertain if the accident in question was actually caused by inexcusable fault. He found that the collision that resulted in the death of Wilfrid Gagnon was caused through negligence on the part of the telegraph operator at South Durham station to deliver a telegram to the conductor of the eastbound train, telling him to halt his train at Lisgar station until the westbound train passed him.)

The telegraph operator stated that he placed the order on his desk among other papers. He stated further, that he was suffering from a violent headache that night and he forgot to communicate

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the instructions to the conductor of the train. The judge of the Superior Court decided that there was, in the circumstances, inexcusable fault on the part of the telegraph operator; and I am of opinion that this conclusion was well founded. The question whether there was inexcusable fault is one of fact, which is left to the appreciation of the court, which must be guided by the circumstances of each case. There can be no absolute rule in such a matter. When it is a question—as it was in this instance—of the life of persons being endangered; when forgetfulness or an omission may bring about the death of employers or passengers such fault is grave and inexcusable. An employee has no right to plead that distractions caused him to omit to fulfil formalities, the certain consequences of which omission would be to put the life of his fellows in danger, and the excuse cannot be accepted unless it is founded on such a case of sickness as would render the employee powerless to act—such as being stricken with sudden folly, apoplexy, or paralysis. Neuralgia, headache or other similar indisposition cannot be invoked as an excuse. In the present case it is proved that the telegraph operator did not take the precaution to keep the order he had received constantly within his sight. He placed it "among other papers" on his desk and "forgot to deliver it to the train conductor." I have no hesitation in saying that in the circumstances the fault of the telegraph operator was inexcusable. *Appeal dismissed.*

MINAKER v. HADDEN.

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District Court of Prince Albert, Saskatchewan, Doak, Dist. Ct.J. November 2, 1917.

HUSBAND AND WIFE (§ II D—70)—*Title to animals acquired by husband managing wife's property—Execution against husband—Married Women's Property Act, R.S.S. 1909, c. 45.*]—Interpleader issue to determine the ownership of 2 horses seized by the present defendant under an execution against one R. G. Minaker, and claimed by the present plaintiff, who is the wife of the execution debtor, as her property.

T. C. Davis, for plaintiff; *A. E. Cairns*, for defendant.

DOAK, Dist. Ct. J.:—The plaintiff's claim to the property now in question rests upon s. 4 of the Married Women's Property Act, R.S.S. 1909, c. 45, and under this section the property which a

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married woman may hold free from the disposition or debts of her husband is classified as follows: 1. Wages and personal earnings. 2. Proceeds or profits of business or trade carried on separately by her. 3. Profits from the exercise of literary or scientific skill. 4. Investments from the above three classes. 5. Real and personal property held and enjoyed by her of April, 3, 1917, or thereafter acquired.

It is evident that the plaintiff's claim must rest either upon the 2nd or the 5th of the above classifications and the other 3 may therefore be eliminated so far as the present case is concerned.

Prior to 1907, the plaintiff's rights as regards her personal property were governed by C.O. 1898, c. 47, and by this ordinance she had the same rights in respect thereto as if she were a *feme sole*.

If, therefore, the plaintiff, twelve years ago, invested money belonging to herself, in cattle, there is no reason to doubt that her rights are the same to-day as they were at the time of the investment, and that such property would come under the fifth classification referred to.

It is when we come to consider the disposition which was made of these cattle that the difficulty in this case arises. The evidence shews that they were placed on the farm of the execution debtor, fed from the crops grown on his farm, and looked after and cared for by him and his sons as part of the farming operations carried on by him. The offspring of the original stock were treated in the same way, and sales made of these animals from time to time and the proceeds invested in others, both horses and cattle, of which the 2 animals now in question formed part.

It seems to me that under these circumstances the property in question would come within the same class as the exceptions mentioned by Lamont, J., in *Lindsay* v. *Morrow*, 1 S.L.R. 516, and subsequently adhered to by him in *Moose Mountain* v. *Hunter*, 3 S.L.R. 89.

If the husband were a tenant his title would of course depend upon entirely different considerations, but if upon the fact that he was carrying on the farming operations as head of the family then I take it that the reason for excluding the wife in such a case is, that notwithstanding the fact that she is the owner of the land, the crops grown thereon are the proceeds or profits of a business not carried on by her separately from her husband. I am of the

opinion that the same reasoning would apply to the present case. The original investment may have been the plaintiff's, but the business of raising cattle, the selling off of the surplus stock, the purchasing of other animals, the use made of the animals so purchased upon the farm were all part of the farming operations carried on by the execution debtor as proprietor of the farm. The fact that on two separate occasions the execution debtor mortgaged some of the animals now claimed by the plaintiff, as she says with her consent, does not create an estoppel against her except as regards the mortgages (*Simpson* v. *Dom. Bank*, 13 W.L.R. 1). But it is evidence bearing upon the degree of control which the execution debtor exercised over the property. Wetmore, C.J., in *Karst* v. *Cook*, 3 S.L.R. 406, at 411, in commenting on the decision in *Moose Mtn.* v. *Hunter*, *supra*, says: "I do not wish to be understood as holding that if the husband carries on farming operations upon such land merely as his wife's manager it would deprive her of her right to her property or the proceeds of that property."

There is, however, a wide distinction between the case where the husband acts simply as the agent or manager of property in the reputed ownership of his wife, even although such acts extend to the doing of work upon it such as sowing and harvesting crops, and the case where the business is carried on by him not ostensibly as his wife's agent but in a manner totally inconsistent with its being her separate business: *Laporte* v. *Costick*, 31 L.T. 434, at 437, per Blackburn, J.

It may be doubted whether the last mentioned decision goes as far in protecting the married woman as the dictum of Wetmore, C.J., referred to, but I am satisfied from the evidence in this case that the execution debtor was not carrying on the farming operations as his wife's manager, but as proprietor, and that the plaintiff cannot, therefore, claim the animals in question as the proceeds or profits of a business carried on by her separately from her husband.

So far as the animals originally owned by her are concerned, I should be inclined to doubt whether, had they been sold and the proceeds invested in others, the plaintiff could claim the latter animals, because while the original animals as long as they remained in the possession of the plaintiff or her husband could rightfully be claimed as falling within the fifth class above enumer-

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ated, the proceeds from their sale might with equal force be said to be part of the proceeds or profits of a business not carried on separately by the plaintiff from her husband. Even if they could be so claimed the onus of proving that the animals in question in this action were paid for from the proceeds of the sale of this original stock would be upon the plaintiff and this onus has not been discharged by her.

So far as the animal purchased from J. M. Campbell is concerned, it might be contended by the plaintiff that since this was purchased for her use, even although paid for with money which could not be claimed as her separate property, it constituted a gift from the execution debtor to her.

This, however, is met by s. 7 of the Act, which invalidated any gift made by the husband which remains in the reputed ownership of the husband. This animal, moreover, is not entirely paid for, and at least 2 of the payments upon it have been made since the execution creditor obtained his judgment, with moneys which have not been shewn to belong to the plaintiff, and this constitutes a violation of the latter part of s. 7 which prohibited the investment of the husband's money in the name of his wife in fraud of his creditors.

I am of the opinion, for these reasons, that judgment must be for the execution creditor.

Judgment will therefore go maintaining the seizure. The plaintiff must pay the costs of these proceedings including the sheriff's costs thereon as the same shall be taxed.

Judgment for creditor.

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WILLOW HEIGHTS RURAL TELEPHONE Co. v. ROURKE.

Saskatchewan Supreme Court, McKay, J. October 13, 1917.

TRIAL (§ I A—1)—*Notice of trial—Time and place—Rules 237, 238—Prematurity of order.*]—Appeal by plaintiff from an order of a local master, ordering the plaintiff to set the action down for trial at the next sittings of the court. Order set aside.

P. H. Gordon, for appellant; *B. D. Hogarth*, for respondent.

MCKAY, J.:—The reply herein was delivered on April 10, 1917, and the first sittings of the court at Battleford after delivery of the reply commenced on April 17, 1917.

The plaintiff not having given notice of trial, the defendant

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on May 28, 1917, served a notice of motion on plaintiff's solicitor, under r. 237, for an order to dismiss the action for want of prosecution. The master on the return of the motion made an order, ordering the plaintiff to set this action down for trial at the next sittings of this Court at Battleford, and that notice of setting down be served on defendant's solicitors, costs of and incident to the application to be costs in the cause. From this order the plaintiff appeals, on the ground that the application was premature, as plaintiff was not yet entitled to give notice of trial, no court having yet been fixed by Order-in-Council for Battleford.

Rule 237 reads as follows:—

If the plaintiff does not within 6 weeks after the time when he first becomes entitled to give notice of trial, under the last preceding rule, or within such extended time as the court or a judge may allow, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the court or a judge to dismiss the action for want of prosecution; and on the hearing of such application, the court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the court or judge may seem just.

I think that r. 238 must be read with r. 236 in order to ascertain when plaintiff first became entitled to give notice of trial.

Rule 236 does not in any way say what the notice of trial shall be, whereas r. 238 specifically states what such notice shall contain, and gives a form for notice of trial, and, amongst other things, provides that the notice of trial shall state the place and day for which the cause is to be entered for trial.

Under these two rules, then, before plaintiff can give notice of trial complying with them, there must be a court fixed to be held at a named place and the date of same.

When these rules were originally made r. 691, as then in force, fixed the sittings of the court presided over by a single judge for each and every year at Battleford on the second Tuesdays in April and November. Consequently, a notice of trial could then be given with the reply as the place and date of holding the court were already fixed, and, at that time, I am of the opinion that the plaintiff would first become entitled to give notice of trial on the filing of his reply. But, owing to the increased number of places and times of holding courts since r. 691 was first promulgated, and the limited number of judges for holding these courts, this rule has had to be amended and was repealed in November, 1913, and it is now the established practice to pass a new rule twice a year

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fixing the places and dates of holding the courts. This is done by the judges at the conclusion of the June sittings of the court *en banc* for the fall sittings, and at the conclusion of the October sittings of the court *en banc* for the spring sittings of the following year, which rules are approved by Order-in-Council published in the "Saskatchewan Gazette," pursuant to s. 54 (2) of the Judicature Act. The sittings of the courts, therefore, are not now permanently fixed, as formerly, but are fixed twice a year as above stated. Consequently, when the plaintiff delivers a reply now he may not be in a position to give notice of trial so as to comply with r. 238, as the place and date of the court may not yet be fixed.

There is no doubt the intention of r. 237 was to limit the plaintiff to 6 weeks from delivery of reply within which to give notice of trial before defendant could move under it for dismissal of the action, and I do not think that it was the intention to extend this time by repealing r. 691 and changing the manner of fixing the place and dates of the courts, yet it is bound to have that effect in some cases, as I cannot come to the conclusion that r. 238 must be disregarded altogether. Having in view the present practice of fixing the courts, and the original intention of limiting the plaintiff to 6 weeks for giving notice of trial without interference by the defendant, and to give effect to r. 238, I think the proper construction to put on r. 237 is that the time when plaintiff first becomes entitled to give notice of trial is when he delivers his reply etc., as stated in r. 236, provided the time and place of holding the court where the case is to be tried has been fixed by Order-in-Council according to the present practice as above stated, and that, if such court has not been so fixed, then the 6 weeks shall not be deemed to have expired until within a reasonable time after such court is so fixed.

The sittings of the court at Battleford on April 17, 1917, had been fixed by Order-in-Council dated November 20, 1916. But plaintiff could not, on April 10, 1917, give notice of trial to that court when he delivered his reply on April 10, because he could not give 10 days' notice of trial before April 17, as required by r. 240; and it is not shewn by legal evidence that plaintiff, or plaintiff's solicitors, had defendant's consent to serve short notice of trial. True it is that plaintiff's solicitor received defendant's solicitor's letter of April 3, asking him to set this case down for

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trial for the court beginning on April 17, but plaintiff's solicitor did not take this to mean they would consent to short notice and it does not so state, and on April 5, he wrote to defendant's solicitors telling them he could not get the case down for trial as that was the last day for giving notice of trial. The defendant's solicitors again wrote and telegraphed to him on April 10, but there is no evidence that he received either this letter or telegram.

As, therefore, there is no legal evidence that he had the consent of defendant's solicitors to short notice of trial and it was too late, on April 10, to give the 10 days' notice of trial for April 17 court, I cannot come to the conclusion that plaintiff was entitled to give notice of trial for the court commencing on April 17.

Then, at the time of the application to the master on June 1, 1917, the rule fixing the time and place for holding the Battleford court had not been promulgated, as this was not done until July 14, 1917, and was approved by Order-in-Council dated and published in the *Saskatchewan Gazette* on July 27, 1917.

In my opinion, therefore, for the reasons above given, the defendant was premature in making his application and he should have waited until a few days after the Order-in-Council containing the new rule fixing the Battleford Court for November 27, 1917, was published in the "Saskatchewan Gazette," or, at any rate, until the said Order-in-Council was published, so as to give plaintiff an opportunity of complying with r. 238.

I think, therefore, the appeal should be allowed and the order of the master set aside, but, as this is a new question, I think, with costs in the cause to plaintiff in any event. The costs of the motion to the master will also be costs in the cause to plaintiff in any event. *Appeal allowed.*

BANK OF HAMILTON v. BLACK.

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C. A.

British Columbia Court of Appeal, Martin, Galliher and McPhillips, JJ.A. September 18, 1917.

GARNISHMENT (§ II A—35)—*Of funds in bank—Effect and validity of assignment thereof by judgment debtor—Trust.*]—Appeal by defendant from the judgment of Morrison, J. Reversed.

Livingstone, for appellant; *Taylor*, K.C., for respondent.

MCPHILLIPS, J.A.:—In my opinion the appeal must succeed. Upon the evidence it is clear that at the time of the service of the

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attaching order no moneys were owing by the Bank of British North America to Banfield, and that was the issue to be tried. All moneys owing or which would become due or owing by the bank were previously to the service of the attaching order duly assigned by Banfield to Black and the bank had notice thereof. The moneys in question are moneys—being a balance over and above what was due to the bank by Banfield—derived from an award whereby the City of Vancouver paid a sum of $73,100 in respect of property expropriated, the title thereto being held in trust for Banfield by Godfrey the manager of the Bank of B.N.A., the balance being $11,997.18. This latter sum was paid into court. Upon the trial of the issue, Morrison, J., found the said sum of $11,997.18 was due and owing to Banfield by the Bank of B.N.A., and that by reason of the attaching order the respondent was entitled to the moneys and the claim of Black thereto was dismissed.

With great respect to the judge I am entirely unable to accept that view. There is the clearest evidence that before the service of the attaching order an assignment was made to Black of all the moneys of which notice was duly given and admitted by the bank, that being the position of matters anterior to the service of the attaching order. There was plain error in law in the decision arrived at by the judge. The position of the attaching creditor could be no higher as against the bank than that of the judgment debtor Banfield, and at the time of the service of the attaching order by operation of law any moneys theretofore due and owing to Banfield had become due and owing to Black. Some attempt in argument was made to challenge the effect of the assignment and its validity, but no evidence was led upon which any argument could be founded, nor was it an issue in the court below. The assignment, if voluntary, is nevertheless perfectly valid (*Donohoe* v. *Hull*, 24 Can. S.C.R. 683, at 690, 692); and it certainly was an assignment made by Banfield in trust to Black in good faith and to ensure the payment of moneys held in trust. Further authorities that may usefully be referred to are *Greer* v. *Faulkner*, 40 Can. S.C.R. 399, at 404-408; *Minger* v. *Anderson*, 1 A.L.R. 400, at 404; *New Prance & Garrard* v. *Hunting*, [1897] 1 Q.B. 607.

MARTIN and GALLIHER, JJ., agreed that the appeal be allowed.

Appeal allowed.

ESQUIMALT & NANAIMO R. Co. v. McLELLAN.

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British Columbia Supreme Court, Morrison, J. November 2, 1917.

PUBLIC LANDS (§ II—20)—*Provincial grant for railway purposes—Settlement Act—Coal Mines Act—Lease—Determination of rights—Remedy—Petition of Right—Parties—Intervention of Attorney-General.*]—Action to have Crown lease declared void.

Davis, K.C., and *Robertson*, for plaintiff; *J. Martin*, K.C., and *A. H. Casey*, for defendant; *L. G. Abbott*, for Ellen Wenborn, proposed party defendant.

MORRISON, J.:—By an Act of the Legislature of British Columbia passed in the year 1883, intituled an Act Relating to the Island Railway, the Graving Dock, and Railway Lands of the Province, being 46 Vict. c. 14, and commonly called the Settlement Act, certain lands were granted to the Dominion Government for the purpose of construction and to aid in the construction of a railway between Esquimalt and Nanaimo (s. 3). The lands so granted were not to include any that were then held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor to include any Indian reserves or settlements, nor naval or military reserves—(s. 6). Coal was enumerated as one of the minerals included in the grant. The railway was constructed and the contract consummated.

In 1912 the provincial government purported to grant to the defendant a license pursuant to the Coal Mines Act, R.S.B.C., to prospect for coal, etc., in and under portions of the lands alleged to have been granted as above, and in the year 1913 they purported to renew this license. The defendant thereupon entered upon the lands covered by his license and proceeded to prospect for and to recover coal from the premises claimed under the grant by the plaintiffs.

In 1914 the government purported to grant to the defendant a lease for 5 years of the under surface rights under the land covered by these licenses. The plaintiff now seeks a declaration that the lease so issued by the Crown to the defendant is null and void and that the plaintiffs are entitled to the land covered by the said lease.

In limine the question was submitted by counsel on behalf of the defendant, although not raised on the pleadings, that the Court should be assisted by the attorney-general in the adjustment

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of this dispute between him and the plaintiff. That the proceedings be by petition of right. It is urged that as all the evidence upon which I must rely in determining the issue is in the possession of the government, the defendant is unable to properly defend the action, the attorney-general not being a party. Mr. Martin urges upon me the plea *ad misericordiam* that inasmuch as all the plaintiff need do is to prove a *primâ facie* case, the defendant will be helpless under the burden then shifted upon him. Be that as it may, it must be shown clearly that the action cannot be maintained at all without the intervention of the attorney-general. *Att'y-Gen'l* v. *Pontypridd Waterworks Co.*, [1908] 1 Ch. 388. The defendant has not satisfied me on that point. From what plaintiff's counsel stated in open court as to the matters in issue herein by the attorney-general, and which was not denied by the defendant's counsel, then also present, I assume that the attorney-general is advised to remain aloof. However that may be, and notwithstanding the strong argument of Mr. Abbott, I am bound by the decision of the full court in the case of *Esquimalt & Nanaimo Ry. Co.* v. *Fiddick*, 14 B.C.R. 412.

As to the merits of the case, I confess I have very little trouble in finding that the lands covered by the lease fall within the boundaries described in the statutory grant, and that they were neither alienated nor reserved previously.

In my opinion it follows that the government gave the defendant a lease of lands of which they were then not the owners.

There will be judgment for the plaintiff in the terms of the statement of claim. *Judgment for plaintiff.*

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COLLINGS v. CITY OF CALGARY.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. February 19, 1917.

MUNICIPAL CORPORATIONS (§ II G—210)—*Liability for act of officers—Receiving cheque in payment of taxes—Non-presentment.*] —Appeal by plaintiff from a judgment of the Alberta Supreme Court, 29 D.L.R. 697, 10 A.L.R. 102.

A. Hannah, for plaintiff, appellant; *C. J. Ford*, for defendant, respondent.

The court dismissed the appeal with costs.

TUCKWELL v. GUAY. MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. April 3, 1917.

LIENS (§ I—1)—*For improvements upon lands under mistake of title.*]—Appeal from the judgment of Metcalfe, J., in favour of the plaintiff, 34 D.L.R. 106. Affirmed.

W. Boston Towers, for defendant, appellant.

B. L. Deacon, for plaintiff, respondent.

Appeal dismissed.

SMART v. SPRAGUE.

Manitoba Court of Appeal, Perdue, Cameron and Haggart, JJ.A. March, 1917.

ELECTIONS (§ III—80)—*Nomination paper — Sufficiency — Elegibility—Residence.*]—Appeal from the judgment of Curran, J., 35 D.L.R. 657. Affirmed.

H. N. Baker, for appellant; *A. E. Hoskin*, K.C., for returning officer.

Appeal dismissed.

CANADIAN CREDIT MEN'S TRUST ASSOC. v. ANDERSON.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. October 15, 1917.

VENDOR AND PURCHASER (§ I B—5)—*Purchase price notes—Defences—Maker only trustee—Admissibility of extrinsic evidence to prove relationship—War Relief Act.*]—Appeal by defendant from a judgment in an action on promissory notes made defendant to plaintiff. Affirmed.

J. L. M. Thomson, for appellant; *H. P. Grundy* and *C. D. Bates*, for respondent.

The judgment of the court was delivered by

PERDUE, J.A.:—The plaintiffs are the assignees of a firm of Anderson Bros., for the benefit of the creditors of that firm. An agreement was entered into between the plaintiffs of the first part, the defendant, Mary Anderson, of the second part, and her husband and her 3 sons of the third part. The husband and the 3 sons were the members of the firm of Anderson Bros. By the agreement the plaintiffs agreed to sell the property of the firm to Mary Anderson for the total amount of the indebtedness of the firm, some $9,400, payable in instalments extending over a period

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of some 3 years. As collateral to this agreement the defendant Mary Anderson made the notes in question in favour of the plaintiffs, and these notes were indorsed by her husband and her 3 sons. The defence is that she was, to the knowledge of the plaintiffs, only a trustee for Anderson Bros., who were, as she alleges, the real purchasers; that her 3 sons had all enlisted and been mobilised as volunteers in the forces raised by the Government of Canada in aid of His Majesty in the present war, and that she is entitled to the benefit of the War Relief Act, 5 Geo. V. c. 88, and the amendment 6 Geo. V. c. 122.

None of the sons of the defendant, Mary Anderson, who were enlisted have been made parties to this suit. Extrinsic evidence is not admissible to shew that she signed the notes as a trustee only and was not to be personally liable for them; *Lindsay-Walker Ltd.* v. *Hilson*, 27 D.L.R. 233, 26 Man. L.R. 206; *Chapman* v. *Smethurst*, [1909] 1 K.B. 927, 930. It is from the note itself that the intention of the maker is to be gathered. The agreement also shews on its face that she was the purchaser of the property. There is nothing in the War Relief Act which affords protection to the defendant against her liability on the notes.

Appeal dismissed.

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SMITH v. PARSENAU.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., and Lamont and Brown, JJ. November 24, 1917.

ANIMALS (§ I C—25)—*Injuries by—Stray Animals Act—Distraint.*

G. N. Broatch, for appellant, *G. E. Taylor*, K.C., for respondent.

The facts of this case being the same as *Fogde* v. *Parsenau* (*ante* p. 758), except that defendant made no claim for damages to his grain; the court dismissed the appeal with costs.

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